



**Musyoki & another (Suing as the Administrators of the Estate of the Late
Morris Muteti Matheka) v Kenya Power & Lighting Co. Ltd (Civil Appeal
E1168 of 2023) [2025] KEHC 14204 (KLR) (Civ) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1168 OF 2023

LP KASSAN, J

SEPTEMBER 17, 2025

BETWEEN

MARIETAH SYOWIA MUSYOKI 1ST APPELLANT

JOEL MATHEKA MUTETI 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE MORRIS
MUTETI MATHEKA**

AND

KENYA POWER & LIGHTING CO. LTD RESPONDENT

*(Being an appeal against the Ruling of the Hon. L. Ambasi (CM) delivered
on 13th October, 2023 in Nairobi Milimani CMCC No. E5499 OF 2022)*

JUDGMENT

1. This appeal emanates from the ruling delivered on 13.10.2023 by the lower Court in Nairobi Milimani CMCC No. E5499 OF 2022 (hereafter the lower Court suit). The history leading to the instant appeal is that Marietah Syowia Musyoki & Joel Matheka Muteti (suing as the administrators of the estate of the late) Morris Muteti Matheka (deceased) (hereinafter the Appellants) the plaintiffs before the lower Court, initiated suit by way of plaint as against Kenya Power & Lighting Co. Ltd (hereinafter the Respondent), the defendant before the lower Court seeking damages under the Fatal Accident Act & [Law Reform Act](#); special damages; costs of the suit; and interest at the Court rates on awarded damages above in respect of an incident that occurred on 26.01.2021.
2. The gist of Appellants averment was that at all material times to the suit the Respondent is was the sole supplier of electricity, responsible for the installation and maintenance of power lines and cables all



over Kenya. That on the aforesaid date the deceased was installing CCTV cameras on ICD Business park along ICD road off Mombasa road when uninsulated live loose Kenya Power & Lighting Co. Ltd (KPLC) electric power cables which were too near the building electrocuted the Deceased whereof he sustained serious injuries and succumbed on 08.02.2021. It was further averred that by the reason of the deceased's demise, his dependents have been subjected to loss and suffering and have been deprived of their sole means of livelihood and the deceased has been denied his natural expectation of life.

3. The Respondent filed a defence denying the key averments in the plaint. Meanwhile averred that without prejudice to the averment in the statement of defence, if any electrocution occurred as alleged, the same was caused and or substantially contributed to by the negligence of the deceased as well as that of the landlord/owner of the premises where the deceased was installing the CCTV cameras. It was further averred that the suit is statute barred by virtue of Section 3(1) of the Public Authorities Limitation Act and that this Court lacks jurisdiction to hear the matter by virtue of Section 25 & 36 of the Energy Act.
4. Prior to hearing of the lower Court suit, the Respondent's preliminary objection was disposed of by way of written submissions. By way of a ruling delivered on 13.10.2023, the trial Court partially upheld the Respondent's preliminary objection by directing that the lower Court suit be stayed pending determination before the Energy Tribunal; and that the question of limitation be canvassed at the proper forum which is the Energy Tribunal given the lower Court's lack of jurisdiction.
5. Aggrieved with the outcome, the Appellants preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder :-
 - (a) That the learned trial magistrate erred in law and in fact in holding that Respondent had raised or filed any preliminary objection.
 - (b) That the learned trial magistrate erred in law and in fact in failing to treat the alleged P.O as issues for determination and thereby refusing to have the Appellants testify.
 - (c) That the learned trial magistrate erred in law and in fact holding that the Energy and Petroleum Tribunal was a specialized Court.
 - (d) That the learned trial magistrate erred in law and in fact in holding that the Court did not have jurisdiction to hear a tort of negligence claim.
 - (e) That the learned trial magistrate erred in law and in fact in failing to properly interpret section 36 of the Energy Act as read together with section 25 of the Act.
 - (f) That the learned trial magistrate erred in fact and in law in failing to give effect to the overriding objective.
 - (g) That the learned magistrate erred in law and in fact in purporting to transfer the suit to the Energy Tribunal.
 - (h) That the learned trial magistrate erred in law and in fact in staying her own proceedings.
 - (i) That the learned trial magistrate erred in law and in fact in failing to determine if the Respondent was a Government Authority.
 - (j) That the learned trial magistrate greatly inconvenienced the Plaintiffs in refusing to hear them and having all issues submitted upon in written submissions." (sic)
6. Directions were taken on disposal of the appeal by way of written submissions. The parties duly complied. That said, this Court has considered the rival submissions alongside the record of appeal.



7. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123 and *Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
8. As earlier captured in this judgment, the Respondent’s preliminary objection before the lower Court was two (2) pronged-; that this Court lacks jurisdiction to hear the matter by virtue of Section 25 & 36 of the [Energy Act](#); and that the suit is statute barred by dint of Section 3(1) of the [Public Authorities Limitation Act](#). The trial Court in upholding the Respondent’s preliminary objection itself part as follows-:

“ 10. Courts have consistently held that an aggrieved party must first exhaust all dispute resolution mechanisms provided under the law before proceeding to Court....

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12. The Court of Appeal has also variously cautioned Courts against expanding its jurisdiction to hear and determine matters over which it otherwise lacks jurisdiction. Litigants are also warned against drafting their pleadings with intend to bypass dispute resolution mechanisms provided under the statute.....

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15. The jurisdiction of the tribunal is provided under Section 36 of the [Energy Act](#). At sub-section 3 thereof, the Act provides that the Tribunal shall have original civil jurisdiction on any dispute between the licensee and a third party or between licensees. Subs section 5 provides that the Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

16. I beg to differ with the plaintiff’s submission that the preliminary objection ought to have been heard at the main hearing of the suit and I hold and find the same properly brought before the Court at the right time.

Disposition

17. The upshot of the following is that the preliminary objection is partially successful” (sic)

9. At the outset, one of the Appellant’s contestation concerning the impugned ruling is that the trial Court erred by holding that the Respondent had raised or filed a preliminary objection meanwhile the same ought to have been contemporaneously canvassed with the substratum of the suit. As to the nature of a preliminary objection, the same has since been settled within our jurisdiction. In the celebrated decision of *Mukisa Biscuits Manufacturing Company Ltd* it was stated that-:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary



point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

See:- Oraro v Mbaja [2005] KLR 141 and Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR)

10. In Mulemi v Angwenye & Another (Civil Appeal 170 of 2016) [2021] KECA 214 the Court of Appeal further distilled the definition of a preliminary objection as elucidated in Mukisa Biscuits (supra) by stating as follows-;

- “i) It must be a pure point of law;
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion”.

11. Therefore, applying my mind to the dicta in Mukisa Biscuits (supra) and Mulemi (supra), it is evident from the grain of the Respondent’s pleadings earlier captured in this judgment that the preliminary questions were pleaded therefore the Respondent needed not to separately file his objection for purposes of its determination. Further, it is settled that a preliminary questions have the ability to dispose of a suit in limine therefore the same can be canvassed in first instance and or contemporaneously with subject matter of the suit. Thus, the lower Court cannot be faulted for opting to dispose of the same in limine given that the question of the Court’s jurisdiction to entertain the suit arose by clear implication of the Respondent’s pleadings.

12. On whether the lower Court rightly concluded that it was ousted of jurisdiction to entertain the suit by dint of Section 25 & 36 of the *Energy Act*. Section 26 of the Act provides that-;

There is established the Energy and Petroleum Tribunal, hereinafter referred to as "the Tribunal", for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law.

13. Whereas, Section 36 of the Act states that-;

- (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
- (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
- (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.



- (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
 - (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
 - (6) The Tribunal shall hear and determine matters referred to it expeditiously.
14. The locus classicus on the question of jurisdiction is the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
15. Further, it was held in *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR), that a Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. A Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
16. Ex facie, by implication of the Appellants’ pleadings, the dispute between the parties herein is civil in nature. The Magistrates Court draws its jurisdiction to entertain civil disputes before it by dint of Section 2 & 5 of the *Civil Procedure Act* (CPA) and Section 7 of the Magistrates Court’s Act 2015. The Respondent’s objection and submissions before the lower Court on jurisdiction appear to advance the position that the Energy and Petroleum Tribunal is endowed with the requisite jurisdiction to entertain the suit and ought to have been the Appellant’s first port of call. As earlier captured in this judgment, the Appellant’s suit is founded on particularized negligence in respect of an incident that occurred on 26.01.2021 that resulted in the untimely demise of the deceased through electrocution, to wit, the deceased’s estate now seeks damages under the Fatal Accident Act & *Law Reform Act* and special damages. With the aforesaid in reserve, the gist of the Appellants complaint is easily discernable from their pleadings and requires no further examination.
17. To contextualize the Respondent’s contestation on jurisdiction, the Court draws reverence from the rendition of the Court of Appeal in *Engineers Boards of Kenya v Jesse Waweru Wahome & others & 5 others* [2015] KECA 1 (KLR) wherein it was pithily stated that“It is our view that there is also the need to give a statute a holistic reading and interpretation in order to ascertain the true legislative intent.” The scope of the *Energy Act* is captured as an act of Parliament to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.
18. While Section 36(3) of the Act provides that the tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees, by dint of the objective of the Act, this Court reasonably believes that claims founded on the tort of negligence though not exclusively ousted by the Act nevertheless do not encompass claims that are within the ambit of the



Tribunal's jurisdiction. It would seem that the lower Court selectively read the Act without digesting the legislative intent of the Act. While the Act empowers the Tribunal with original civil jurisdiction on any dispute between a licensee and a third party or between licensees meanwhile can grant damages, I believe it was not the legislative intent to endow the Tribunal with jurisdiction to determine tortious claims premised on negligence, given the object of the Act.

19. The doctrine of exhaustion has since been addressed in a long line of decision within our jurisdiction such as *Speaker of the National Assembly v Njenga Karume* [1992] 1 KLR 425, *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* [2015] KECA 469 (KLR) and *Mumba & 7 others v Munyao & 148 others* [2019] KESC 83 (KLR) towards the prescriptive requirement that the first opportunity has to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.
20. Here, the Appellants complaint as against the Respondent did not fall within the ambit to the Tribunal so as to ouster the lower Court of jurisdiction. The learned Magistrate misapplied herself in arriving at the determination she did and the same must be faulted. Before this Court the Respondent cited the Tribunal decision in *Mutui & another v Kenya Power and Lighting Company Ltd (Tribunal Case E004 of 2022)* [2022] KEET 839 (KLR) to agitate that the latter was best placed to hear and determine the suit, it must be respectfully stated by dint of the doctrine of stare decisis, this Court cannot reasonably be guided by the said decision.
21. Penultimately, the lower Court did not address itself in depth on the limb of Section 3(1) of the *Public Authorities Limitation Act*, to wit, it would be moot to address myself on the same given this Court's finding concerning the lower Court's jurisdiction pursuant to Section 25 & 36 of the *Energy Act*. In the end, the lower Court's decision, in respect of the Respondent's Preliminary Objection and the resulting ruling must be faulted and set aside. For avoidance of doubt the appeal herein is allowed by way of an order setting aside the ruling of the lower Court rendered on 13.10.2023 whereas the commending order would that suit be heard before any other Magistrate other than Hon. L. Ambasi. The Appellants are awarded the cost of the appeal in any event.
22. Orders Accordingly!

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2025

L. P. KASSAN

JUDGE

In the presence of:

No appearance for Appellant

Mwangi for Respondents

Court Assistant – Carol.

