



REPUBLIC OF KENYA



KENYA LAW
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**Atako v Kenya Power & Lighting Company Limited (Civil Case
231 of 2024) [2025] KEHC 14918 (KLR) (Civ) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14918 (KLR)

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

**CIVIL
CIVIL CASE 231 OF 2024**

**JN MULWA, J
OCTOBER 23, 2025**

BETWEEN

ISAAC MATATI ATAKO PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. The Applicant who is the Defendant in the suit by its Motion dated 19/03/2025 sought orders that the suit be dismissed and/or be struck out for being Res-Judicata with costs. It is based on provisions of Section 7 of the [Civil Procedure Act](#).
2. The Applicant's Legal Officer one Moses Barasa swore the supporting affidavit on 19/03/2025 to buttress its grounds of Opposition positing that there existed another suit filed between the parties and has since been determined in Milimani CMCC No. E9803/2021 - Isaac Matati Atako v. Kenya power & Lighting Company Limited filed on 21/07/2021 and by a ruling dated 13/10/2023 wherein the suit was struck out with costs. The ruling is annexed as "EXHB. 2".
3. In opposition to the motion, the Respondent/Plaintiff filed a Replying Affidavit on 10/04/2025 together with a Preliminary Objection purportedly filed and/or raised in the previous suit at the Chief Magistrates Court dated 18/04/2023 raising legal objection as the suit had been filed in court instead of the Energy & Petroleum Tribunal pursuant to Sections 36(1) as read with Section 166(2) and (3) of the Act upon which the suit was struck out by the trial magistrate by a ruling dated 13/10/2023.
4. For the foregoing, the Respondent has urged that the suit is defective, vexatious and ought to be dismissed.



5. Parties were directed to file submissions within 14 days on 16/06/2025. As at date of preparing this ruling, none of the parties had filed submissions which is way after the period granted by the court.

Analysis and Determination

6. The court has carefully considered the Chief Magistrate's Court ruling whereof the suit filed therein was struck out for lack of jurisdiction as raised in the Preliminary Objection filed by the Defendant stating that the suit ought to have been initiated in the Energy and Petroleum Tribunal by dint of Section 26(1) and Section 166(2) and (3) of the Act and therefore invoked the doctrine of exhaustion for its decision.
7. The court is acutely aware of the principle of exhaustion; to the extent that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, the said procedure ought to be strictly adhered to unless special circumstances are demonstrated to permit or persuade the court to depart therefrom as held by the Court of Appeal in the case of Speaker of National Assembly v. Karume [1992] KLR 21 and reiterated in the case of Kweri v. Beehive Media Limited; Capwel Industries Limited (Interested party)[2023]KEHC 2684 (KLR)
8. Jurisdiction for the Energy and Petroleum Tribunal flows from the *Energy Act* 2019, Section 36. It provides:-
 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.
9. Section 25 as read with Section 36 creates an exclusive jurisdiction on the disputes relating to Energy and Petroleum sector and gives the Tribunal original civil jurisdiction on any dispute between a licensee and a third party, or between licensees and has the power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance among others.
10. Under the broad jurisdiction of the Tribunal as stated above, the question that needs interrogation is whether the Energy and Petroleum Tribunal has jurisdiction to handle tortious disputes involving the tort of negligence in the manner of the Plaintiffs injuries for which he seeks compensation for the injuries he sustained.
11. The *Energy Act* 2019 as defined under the Act is an Act of Parliament to consolidate the laws relating to energy,, to provide for National and County Government functions relating to energy sector to provide for the establishment, powers and functions of the energy sector entities etc. it is a highly regulated sector.
12. The Energy and Petroleum Tribunal, on its party derives its jurisdiction under Section 36 of the Act as stated above. A dispute must be referred to it by a party and the dispute must relate to the Energy and Petroleum sector.
13. On the other hand, the High Court under Article 165 (3) (d) of the *Constitution* has unlimited original jurisdiction in both civil and criminal matters initiated by public institutions and individual matters under the tort of negligence, but between the parties stated, licensees and third party.
14. In the matter before the court, the tort of negligence was allegedly committed by Kenya Power & Lighting Company (Licensee) employees, to an individual, outside the Energy Sector.
15. In the court's considered view, this is not a dispute that can be handled by the Tribunal, but a court of relevant jurisdiction, the High Court being one of them by dint of Article 165(3)(d) of the *Constitution*.



16. It is also appropriate to go back to the leave to file suit out of time granted to the Plaintiff by the court by a ruling dated 3/10/2024 upon which this suit was filed.
17. The court is also aware that the ex-parte leave maybe challenged during the hearing of the suit, which is not the issue before the court.
18. It is trite that a suit filed out of time upon leave being granted ought to be filed in the court for which leave was granted. In the instant matter, leave was granted to the Plaintiff to file suit in the High Court, Civil Division. The draft copy of the plaint – exhibit IMA -1 was clearly stated as to be filed in this court.
19. It is not disputed that it is the same draft plaint, which was eventually filed – see the plaint herein dated 29/10/2024. It could not be filed in any other court or tribunal. It is therefore the courts finding that the suit is properly filed in the court envisaged in its ruling dated 3/10/2024.
20. Is the suit as filed res judicata? This is the main ground raised by the Applicant/Defendant.
Section 7 of the [civil Procedure Act](#) underpins the doctrine of res judicata. For a matter to be declared as res judicata, conditions stated at Section 7 must be complied with to the satisfaction of the court as seen below
21. There is no dispute that a similar case vide Milimani CMCC No. E9803/2021 was filed between the same parties, over the same cause of action. Was it adjudicated and finally decided by a court of competent jurisdiction?
22. In the ruling of the trial Magistrate delivered on 13/10/2023, (Hon. C. K. Cheptoo) the court found itself without jurisdiction to hear and determine the suit and accordingly struck out the suit with no orders as to costs. This ruling as stated earlier was prompted by a Preliminary Objection raised by the Defendant on jurisdiction of the court to entertain the suit. As well stated, the said court found itself without jurisdiction, therefore not a competent court to try the suit – explanation 1 under the Act.
23. Was the suit or any other subsequent suit ever tried, heard and finally decided by a court of competent jurisdiction to hear and try the same?
The answer is in the negative. The suit was never tried, heard and decided – explanation 2 under Section 7 of the Act.
The doctrine of res judicata prevents courts from re-litigating of a matter that has been decided and finally determined by a court of competent jurisdiction, as held in the case of Anita Wambui Munga V. Samuel Maina Ngunya & 3 Others [2024]eKLR that the court should look at the parameters or conditions that must be satisfied for a matter to be deemed as res judicata
24. The Plaintiff herein having filed this suit in this court, with leave to file out of time does not, in the courts view amount to filing the same suit that has been duly heard and determined by a court of competent jurisdiction, the first such case having been struck out by the trial court citing lack of jurisdiction.
25. This court in furtherance to the Chief Magistrates Court decision ruling that it had no jurisdiction cannot amount to the suit having been heard and determined as deponed to by the Defendant/ Respondent in the motion before the court.
26. A party whose case has been struck out on grounds on jurisdiction may file a fresh suit in a court with jurisdiction.



In the case of Ramji Gir & Others V. Elachideri Air 1974. The court decided that a rejection of a petition does not determine the rights of the parties since a rejected petition is like a struck out appeal as opposed to a petition dismissed after a full hearing likewise. The court in Uhuru Highway Development Ltd vs. Central bank of Kenya & 2 Others [1996] KECA 102 (KLR) (the court of Appeal full bench) made a finding that to rely on the defence of res judicata the matter at issue must have been decided by a court of competent jurisdiction in a former suit, and has been raised once again in a fresh suit, and that similar principles of re-judicata applies to interlocutory applications as well.

27. It is therefore this court's conviction that the Defendant cannot rely on the doctrine of res judicata to urge for striking out the Plaintiff's suit, for the reasons found in the body of this ruling.
28. For the going, the court finds no merit in the Defendants application dated 19/03/2025. It is dismissed with costs to the Plaintiff.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF OCTOBER, 2025.

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JANET MULWA.

JUDGE

