Kenya Power & Lighting Company Limited v Kenafric Diaries Manufacturers Limited (Civil Appeal E192 of 2025) [2026] KEHC 1379 (KLR) (Civ) (13 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1379 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E192 OF 2025

AC MRIMA, J

FEBRUARY 13, 2026

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT

AND

KENAFRIC DIARIES MANUFACTURERS LIMITED ..... RESPONDENT

(Being an appeal from the ruling and order of the Energy & Petroleum Tribunal delivered on the 13th February 2025 in Tribunal Misc. Application No. E016 of 2023)

JUDGMENT

Background:

1. Kenafric Diaries Manufacturers Limited, the Respondent herein, filed an application dated 24th July 2023 before the Energy and Petroleum Tribunal (hereinafter referred to as "the Tribunal"). It sought leave to file a claim against Kenya Power & Lighting Company Limited, the Appellant herein, out of the statutory limitation period.

2. Subsequently, the Respondent's said application was dismissed by the Tribunal for want of prosecution. Subsequently, the Respondent filed an application dated 18th December 2024 seeking to set aside the dismissal order and to reinstate the earlier application dated 24th July 2023 for hearing on merit. The reinstatement application was listed for mention on 13th February 2025 for purposes of taking directions. On the said date, the Tribunal proceeded to deliver a ruling allowing the application dated 18th December 2024, thereby reinstating the Respondent's application.

3. Aggrieved, the Appellant preferred the instant appeal which was heard by way of written submissions.

The Appeal:

4. Through a Memorandum of Appeal dated 17th February 2025, the Appellant urged the following grounds of appeal: -

    1. That the Tribunal erred in fact and in law by finding that the Application dated 18th December 2024 sought for the reinstatement of the Respondent's suit that was struck out, whereas it sought to reinstate the Plaintiff's initial Application dated 24th July 2023.

    2. That the Tribunal erred in fact and in law in making a final substantive determination of the Respondent's Application dated 18th December 2024 when the same was coming up for directions on its disposal.

    3. That the Tribunal erred in fact and in law in determining the Application dated 18th December 2024 without according the Appellant its right to be heard on the same against the rules of natural justice.

    4. That the Tribunal fell into error of principle by failing to follow and be bound by the relevant statutory procedures and case laws.

    5. That the Tribunal erred in fact and in law in reinstating a suit that had not been filed in the first place.

The Submissions:

5. In its written submissions dated 4th April 2025, the Appellant contended that on 13th February 2025, the matter before the Tribunal was specifically slated for mention for directions. It was its case that as a well-established principle of law, a Court cannot make substantive orders during a mention date unless both parties consent to such a course of action. The Appellant argued that the Tribunal proceeded to issue a Ruling determining the application without affording it an opportunity to canvass its opposition. To buttress this argument, it relied on the case of *Paul Odhiambo Ogunde -vs- Maersk Kenya Limited* [2016] eKLR, where the Court held that substantive orders are not to be granted on the date a matter comes up for mention as it denies parties the opportunity to make substantive submissions.

6. Further reliance was placed on *Anthony Milimu Lubulellah Advocates v Patrick Mukiri Kabundu & 3 others* [2019] eKLR, where the Court referred to the Court of Appeal decision on *Rahab Wanjiku -vs- Esso Kenya Limited* (1995-1998) KAR where the Learned Judges faulted the High Court for determining substantive issues on a mention date, terming such procedure repugnant to the administration of justice.

7. The Appellant further submitted that the Tribunal's action violated Article 50(1) of the *Constitution* regarding the right to a fair hearing and the rules of natural justice. Support was drawn from the case of *Msagha -vs- Chief Justice & 7 others* [2006] eKLR, to assert that a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision.

The Respondent's case:

8. The Respondent opposed the appeal through amended submissions dated 18th June 2025. It was its position that the application dated 18th December 2024 was effectively unopposed as the Appellant had not filed a response despite service. It asserted that on the material date, 13th February 2025, respective

Counsel for both parties made oral responses and submissions before the Tribunal, which formed the basis of the impugned order.

9. The Respondent contended that the Tribunal, being an administrative body, is not strictly bound by technical procedural rigidities applicable to regular Courts and has the flexibility to adopt procedures that ensure the delivery of substantive justice pursuant to Article 159 of the *Constitution*. Reference to that end was made to the Supreme Court decision in *SGS Kenya Limited -vs- Energy Regulatory Commission & 2 others* [2020] KESC 64 (KLR), which held that administrative tribunals should have significant flexibility in responding to changes affecting the subject matter before them and should not be strictly bound by standard rules of procedure if such adherence negates the fundamental policy object.

10. The Respondent submitted that the Appellant, having participated in the proceedings of 13th February 2025, could not turn around and claim a violation of the right to be heard. They urged that the appeal was frivolous and intended to delay the hearing of the substantive dispute.

11. On costs, the Respondent relied on *Jasbir Singh Rai & others -vs- Tarlochan Singh Rai and 4 others* [2014] eKLR to argue that costs should follow the event.

Analysis:

12. From the grounds in the memorandum of appeal and the rival submissions, the main issue for determination is the validity of the Orders of the Tribunal made on 13th February 2025. The jurisdiction of this Court is donated by Section 37 of the *Energy Act* where any person who is aggrieved by a decision of the Tribunal may within thirty days from the date of the decision or order appeal to the High Court. As such, this Court is properly seized of this matter and, hence, proceeds to look into the main issue.

13. There is no dispute that the matter before the Tribunal on 13th February 2025 was listed for mention for directions regarding the disposal of the application dated 18th December 2024. For a voidance of doubt, this Court will reproduce the record as hereunder: -

    February 13, 2025

    Coram

    Hon. Doris Mwirigi (Vice Chairperson)

    Hon. Feisal Sharif (Member)

    Hon. Buge Wasioya (Member)

    Court Assistant: Zakariya Maalim

    Court Assistant: Matters coming up for mention E0016/23 kenafric manufacturers dairies vs kplc

14. After the matter was called out, the following followed: -

    Wambua: your honour I am not sure if the council is arguing the application because we have not been served with the response to that application and we have indicated to the tribunal we wish to file submissions, so I would like the court to just rein in their position.

    Mr Otieno: your honor for clarity I am not arguing the application to abandon prayer number 2

    Wambua: you are arguing the application and in fairness and in good order, it is within the prerogative of the applicant to decide which prayers they are bringing to court because it is their matter. The applicant has opted to abandon the prayer 2 which they had initially brought to the court or the

tribunal, so your honor if the application is an opposed should inform the court in such whether or not he intends to file a response or not because we have served the application your honor on 11th February 2024 immediately we got the directions updated in the CTS. So, the application as stand is unopposed, so that is much fundamental principle, so that then if we had not come today to hear the application it was a mention, we did that to have prepared for that eventuality if the council is going to argue the application we are disadvantage.

Hon. Doris Mwirigi (Vice Chairperson): Engineer are you able to project the rules from your side? So, we will place the matter aside give us 10 minutes we will be back on that.

Hon. Doris Mwirigi (Vice Chairperson): So the tribunal makes the following orders; the matter is hereby reinstated and will be heard on its own merits, the applicant to file and serve all pleadings within 7 days, the respondent to file and serve its response within 14 days after service by the applicant, the matter to be mentioned on 13th March 2025 to confirm compliance.

15. At the heart of the appeal herein is the Appellant's contention that they were ambushed by the foregoing ruling. The Respondent on its part argued that oral submissions were made and the application was unopposed. The proceedings before the Tribunal is self-explanatory. While the Respondent argued that the Appellant had not filed a formal response to the application, this did not strip the Appellant of its right to be heard. On a mention date for directions, the Appellant was entitled to appear and request for time to file a response. To proceed to a substantive determination on that very day, without a clear record of consent from the Appellant to dispense with filing a response and proceed to hearing, constituted a procedural impropriety.

16. The Court of Appeal in *Wanjiku v Esso Kenya Ltd* (1995-1998) 1 EA 332 CAK, observed as follows: -

> "…. Where a matter is fixed for mention, the court has no business determining the substantive issues therein on that date, and it can only do so, if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. There must be good reasons for adopting contrary procedure repugnant to the administration of justice."

17. In *Paul Odhiambo Ogunde v Maersk Kenya Limited* [2016] KEELRC 1148 (KLR), a decision relied upon by the Appellant where it was observed thus: -

> "… A related issue is whether it is in order to enter default judgment on a mention date. It is settled in law that substantive orders are not to be granted on the date a matter comes up for mention ((see *Rahab Wanjiru Evans v Esso Kenya Limited* (Civil Appeal No. 13 of 1999) and *Kenya Commercial Bank Limited v Naphtaly J.B. Hawala* (Civil Application No. 240 of 1997)). In light of this jurisprudence, it seems to me that it is not open for the Court to make substantive orders on a mention date. This is mainly because parties do not have an opportunity to make substantive submissions on a mention date and orders thus made could well occasion an injustice."

18. The sanctity of the purpose for which a matter is listed must be protected in order to breathe life to the fair hearing rights, a constitutional imperative. While this Court agrees with the Supreme Court in *SGS Kenya Limited -vs- Energy Regulatory Commission & 2 others case* [supra] that Tribunals are generally afforded more procedural latitude than strict Courts of record to facilitate efficiency, this flexibility is not a license to override the tenets of natural justice. Article 50(1) of the *Constitution* guarantees the right to a fair hearing. The rule of audi alteram partem, that no one shall be condemned unheard, is absolute. The efficiency of a Tribunal cannot supersede the constitutional right of a party to present

its case. In addition to the foregoing, Section 38(3) of the *Energy Act* provides, in mandatory terms, the procedure before the Tribunal thus:

> 38. Procedure of the Tribunal
>
> (3) The Tribunal shall conduct its proceedings without procedural formality but shall observe the rules of natural justice and rules of evidence of a similar nature. (Emphasis added)

19. In *M/s Master Power Systems Limited v Public Procurement Administrative Review Board & 2 others* [2021] eKLR, the Court pronounced itself as follows: -

> "…. With respect, I am persuaded by the appellant's argument that no substantive orders should be made during a mention. In this case the parties appeared before this court and proceeded to make submissions on whether or not the appeal should be dismissed. The record shows that the parties had not consented to allow the court make substantive orders during a mention. It would appear that this court was made to believe that the parties had given their consents to enable this court make substantive orders. It is apparent that no such consent was given. I am convinced that there being no consent order is an error apparent on the face of record. In the circumstances this court is obliged to set aside such an order."

20. Whereas the Appellant was present on the date fixed for directions, the Tribunal proceeded to deliver a ruling that effectively concluded the application without allowing the Appellant to put in a reply or make substantive submissions on merit. Accordingly, and respectfully so, the Tribunal fell into error by substantively determining the application without according the Appellant the opportunity to participate in the application or for failure to make a decision as to why the Appellant ought not be heard in the application. To that end, the appeal is merited.

Disposition:

21. Deriving from the foregoing, the ruling delivered on 13th February 2025 ought to be impugned. Justice demands that there be due process which takes care of the rules of natural justice.

22. In the end, the following final orders hereby issue: -

> (a) The Appeal is allowed and the Ruling and Orders of the Energy and Petroleum Tribunal delivered on 13th February 2025 in Miscellaneous Application No. E016 of 2023 are hereby set aside.
>
> (b) The Respondent's Application dated 18th December 2024 is remitted back to the Tribunal for hearing and determination.
>
> (c) The Respondent shall bear the costs of the appeal.
>
> Orders Accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY,2026.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for the Appellant.

Mr. Ndung'u, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.