

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
MISC. CIVIL APPLICATION NO. E1172 OF 2025

JOSEPH MWANGI GITHAIGA & 21 OTHERS.....APPLICANTS
-VERSUS-
KENYA POWER & LIGHTING CO. LTD..... RESPONDENT

RULING

1. For determination is **motion dated 04/08/2025** filed by **Joseph Mwangi Githaiga & 21 Others** (*hereafter the Applicants*) as against **Kenya Power & Lighting Co. Ltd** (*hereafter the Respondent*) seeking *inter alia*;

a) *Spent*

b) *That the honorable Court be pleased to issue an order withdrawing the following matters from the Milimani Chief Magistrates Court;*

- i. *Milimani MCCC E5595 of 2024 – Tabitha Njeri v Kenya Power & Lighting Co. Ltd.*
- ii. *Milimani MCCC E5596 of 2024 – John Kamia v Kenya Power & Lighting Co. Ltd.*
- iii. *Milimani MCCC E5600 of 2024 – James Mwangi v Kenya Power & Lighting Co. Ltd.*
- iv. *Milimani MCCC E5602 of 2024 – Beatrice Waringo v Kenya Power & Lighting Co. Ltd.*
- v. *Milimani MCCC E5599 of 2024 – Jane Nyambura v Kenya Power & Lighting Co. Ltd.*

- vi. *Milimani MCCC E5604 of 2024 – William Ndugio v Kenya Power & Lighting Co. Ltd.*
- vii. *Milimani MCCC E5605 of 2024 – Joseph Gathaiga v Kenya Power & Lighting Co. Ltd.*
- viii. *Milimani MCCC E5601 of 2024 – Purity Waithira v Kenya Power & Lighting Co. Ltd.*
- ix. *Milimani MCCC E3587 of 2024 – Eunice Wangeci v Kenya Power & Lighting Co. Ltd.*
- x. *Milimani MCCC E3586 of 2024 – Dorcas Wanjiru v Kenya Power & Lighting Co. Ltd.*
- xi. *Milimani MCCC E3264 of 2024 – William Maina v Kenya Power & Lighting Co. Ltd.*
- xii. *Milimani MCCC E3262 of 2024 – Purity Waithira v Kenya Power & Lighting Co. Ltd.*
- xiii. *Milimani MCCC E3261 of 2024 – Eunice Wambui v Kenya Power & Lighting Co. Ltd.*
- xiv. *Milimani MCCC E3260 of 2024 – Damaris Njeri v Kenya Power & Lighting Co. Ltd.*
- xv. *Milimani MCCC E3259 of 2024 – Eunice Nduta v Kenya Power & Lighting Co. Ltd.*
- xvi. *Milimani MCCC E3258 of 2024 – Martin Ngugi v Kenya Power & Lighting Co. Ltd.*
- xvii. *Milimani MCCC E3257 of 2024 – Mary Muthoni v Kenya Power & Lighting Co. Ltd.*
- xviii. *Milimani MCCC E3256 of 2024 – Monica Mulinge v Kenya Power & Lighting Co. Ltd.*
- xix. *Milimani MCCC E3255 of 2024 – Peter Waithaka v Kenya Power & Lighting Co. Ltd.*

xx. *Milimani MCCC E3254 of 2024 – George Muiga v Kenya Power & Lighting Co. Ltd.*

xxi. *Milimani MCCC E3253 of 2024 – Amos Mwinga v Kenya Power & Lighting Co. Ltd.*

xxii. *Milimani MCCC E3252 of 2024 – James Mwangi v Kenya Power & Lighting Co. Ltd.*

c) *That upon grant of prayer (b) the honorable Court be pleased to issue an order transferring the listed suits from Milimani Chief Magistrate’s Court to the Energy and Petroleum Tribunal for expedient hearing and determination thereof.*

d) *Such further or consequential orders as the honorable Court may deem just.*

e) *Costs of the motion be provided for.*

2. The motion is brought pursuant to **Section 1A, 1B, 3A, 11 & 18** of the **Civil Procedure Act (CPA)** and on grounds on the face of the motion amplified in the supporting affidavit **of even date** deposed by **Joseph Mwangi Githaiga**, who cites being one of the Applicants thus competent to depose.

3. **Kenya Power & Lighting Co. Ltd** (*hereafter the Respondent*) opposes the Applicant’s motion by way of **Preliminary Objection (PO) dated 11/08/2025** on grounds that-;

a. **Want of Jurisdiction** - *This Honourable Court lacks jurisdiction to entertain the instant Miscellaneous Application whose substantive prayers seek to have matters pending before the Magistrates’ Court withdrawn and transferred to the Energy and Petroleum Tribunal. Jurisdiction over the subject matter — allegations of*

negligence arising from electricity supply, distribution, power surges, outages, and fluctuations — is expressly vested in the **Energy and Petroleum Regulatory Authority (EPRA)** under the **Energy Act, 2019**.

- b. **Doctrine of Exhaustion** - The Applicant has improperly bypassed the statutory dispute resolution mechanism. **The Energy Act, 2019** mandates that such disputes must first be lodged before EPRA for investigation and determination. Only thereafter may an aggrieved party appeal to the Energy and Petroleum Tribunal as provided under **Section 36(4)** and **Section 40** of the **Act**.
- c. **Premature Invocation of the Tribunal** – The Energy and Petroleum Tribunal only has jurisdiction to hear appeals from decisions of EPRA. In the absence of an initial determination by EPRA, there is no jurisdiction to approach the Tribunal, and by extension, this Court cannot lawfully order a transfer to it.
- d. **Improper Forum for Transfer** – The prayer to transfer matters from the Magistrates’ Court to the Energy and Petroleum Tribunal is untenable. **Section 18** of the **Civil Procedure Act** only permits transfer between courts subordinate to the High Court, not to statutory bodies. The Tribunal’s jurisdiction under **Sections 36(4)** and **40** of the **Energy Act, 2019** is appellate, only after EPRA’s determination. The proper course where a court lacks jurisdiction is to strike out the matter.
- e. **Binding Authority** – Courts in Kenya have consistently held that disputes involving electricity supply and damages caused thereby must be determined in the first

instance by EPRA in line with the **Energy Act, 2019** (see **Kenya Power & Lighting Co. Ltd v Albert Mbugua Ng'ang'a [2022] eKLR** and **John Githinji & Another v Kenya Power & Lighting Co. Ltd [2021] eKLR**).

4. Directions were taken on disposal of the Applicant's motion and Preliminary Objection (PO) by way of submissions. Both parties complied. Having considered the motion, objection and submissions, the Court's postulation that the issues for **determination concern-**:

- a) *Whether the Respondent's Preliminary Objection is merited?*
- b) *Whether the Applicant's motion is merited?*
- c) *Who ought to bear costs?*

Whether the Respondent's Preliminary Objection is merited?

5. In urging the instant motion, the Applicant has relied on **Section 3A** of the **CPA** which specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court"", to wit, this Court's inherent powers was judiciously addressed by the Court of Appeal in **Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR** and requires no restatement.
6. Patently, alongside the above provision, the Applicant has also cited **Section 18** of the **CPA** which provides that-;
- (1) *On the application of any of the parties and after notice to the parties and after hearing such of them as desire to*

be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter —

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

7. By his affidavit material, **Joseph Mwangi Githaiga** deposes that the Applicants are business people operating different shops at Kamkunji Trade Center and that on or about 11/04/2024 an electrical transformer belonging to the Respondent, within the premises of the Applicants businesses, exploded due to negligence and or breach of statutory duty on the part of the Respondent.
8. That as a result of the explosion, a fire broke out and spread thereby destroying the Applicants shops and stock. It was

further stated that the dispute falls within the jurisdiction of the **Energy and Petroleum Tribunal** pursuant to **Section 25** of the **Energy Act** whereas the suits were erroneously filed before the Chief Magistrate's Court. Therefore, it would be just to have the matter transferred, given that the Applicants have expended upwards of Kshs. 500,000/- on filing fees whereas it would be prejudicial to dismiss the matters.

9. On the part of the Respondent, what I garner to be the kernel of its objection, is this Court cannot transfer the suits in question, to the **Energy and Petroleum Tribunal** (*hereafter Tribunal*) in the absence of a prior determination of the suits before the **Energy and Petroleum Regulatory Authority** (*hereafter EPRA*); and that this Court lacks jurisdiction to transfer the suits from the **Chief Magistrate Court to either the Tribunal or EPRA**, for want of jurisdiction, in the first of filing, instance.
10. 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 held therein 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, on occasion, confuse the issues, and this improper practice should stop.”

11. Meanwhile, the Court of Appeal in **Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR)** cited with approval the decision of the Supreme Court in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)** where the latter Court emphasized that:-

*“[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See **Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR.**”*

12. That said, the Respondent’s has called upon this Court to determine whether it can exercise its powers to transfer the lower Court suits, of which, the Respondent views were at the outset, incompetently filed before a Court that lacked jurisdiction to entertain them in the first instance.
13. To the foregoing end, admittedly the Applicant deposes that the causes of action before the Chief Magistrate Court fall within the jurisdiction of the **Tribunal** by dint of **Section 25** of the

Energy Act. And as to jurisdiction, **Nyarangi, JA** (as he then was) distilled the position in the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where he famously stated:

“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.”

14. 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.

15. With above in reserve, **Section 25** of the **Energy 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.

16. The above provision must be read alongside **Section 36** of the **Act**, which 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.

17. *Ex facie*, by implication of the Applicant's deposition, it would appear that the dispute as filed before the Chief Magistrate Court are 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**. The Respondent's objection and submissions before this Court on jurisdiction appear to advance the position that the **EPRA** and or the **Tribunal** ought to have been the first port of call with respect to the Applicants dispute, on the premise of the **Energy Act** and doctrine of exhaustion, to wit, the suits are incompletely before the lower

Court and thus by extension this Court cannot exercise its powers pursuant to **Section 18** of the **CPA**, to transfer incompetent suits.

18. Thus, to contextualize the Respondent's contention 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."*

19. 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.

20. Section 224(2)(e) of the **Energy Act**, provides that-;

"any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act"

21. To the above end, **Section 2** of The **Energy (Complaints and Dispute Resolution) Regulations, 2012**, which has yet to be repealed, states that-;

These regulations shall apply to any person who has a complaint or a dispute regarding any license, permit, contract, code, conduct, practice or operation of any party of any matter regulated under the Act.

22. Whereas, **Section 4** of the above **Regulations** provides that -;

These regulations shall apply to complaints and disputes in the following areas –

(a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of services, quality of supply, tariffs, way leaves, easements or right-of-ways in relation to the generation, transmission, distribution, supply and use of electrical energy.

(b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

(c) any other activity and or matter regulated under the Act.

23. Juxtaposing **Section 36(3)** of the **Act** alongside **Section 2** and **4** of the **Regulations, 2012** this Court reasonably believes that the Applicants claims as filed before the lower Court were well within the purview of the **Energy and Petroleum Tribunal**, of

which, ought to have been the first port of call with respect to the Applicants dispute.

- 24.** As concerns the utilization of alternative dispute resolution mechanisms provided for in statute, commonly known as the doctrine of exhaustion, the latter 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. Consequently, by dint of the above doctrine and provisions, the Chief Magistrates Court was ousted of jurisdiction to entertain the claims as filed.
- 25.** In light of the above, can this Court exercise its powers to transfer the claims to the Tribunal, on the premise of Section 18 of the CPA? The Court of Appeal, as rightly cited by the **Respondent, in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] KECA 250 (KLR)** pithily addressed itself on latter as follows-;

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent

suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and *allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer. In Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another [2012] eKLR, it was held as follows:-*

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mold it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognized by law.”

Further, in the case of Macfoy v United Africa Co LTD [1961] 3 All ER, 1169, it was held thus:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”.

- 26.** The Applicant by his submissions misconstrues the doctrine of exhaustion and its application as may relate to the instant proceedings. Further, the decisions in **Republic vs NEMA ex parte Sound Equipment Ltd [2011] eKLR** and **United Millers Ltd v Kenya Bureau of Standards & Others [2021] eKLR** as relied on by the Applicant equally do not offer succor. Given that, what is at issue does not concern whether the disputes ought to be filed before **EPRA** or the **Tribunal**, to wit, this Court can exercise its power pursuant to **Section 18** of the **CPA**, to transfer the matters to the **Tribunal**. But rather, the issue concerns the fact that the suits as filed, are incompetent and non-transferable even on application of **Section 18** of the **CPA**, without invoking in the first instance the Energy and Petroleum Regulatory Authority.
- 27. Consequently, the Court believes that it has reasonably addressed itself to the Respondent’s objection, to wit, the**

same is upheld. The Applicant's motion is dismissed with costs.

Orders Accordingly.

Delivered Dated and Signed at Nairobi this 5th March, 2026.

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JANET MULWA.

JUDGE

ORIGINAL