

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLA NO. E106 OF 2025

KENYA POWER & LIGHTING COMPANY PLC.....

APPELLANT

=VERSUS=

EDWARD KINUTHIA GATONYE1ST

RESPONDENT

ENERGY & PETROLEUM REGULATORY AUTHORITY..2ND

RESPONDENT

(Being an appeal from the judgment and decree of the Energy & Petroleum Tribunal (Hon. Kioko Kilukumi S.C (Chairperson) Hon. Doris Kinya Mwirigi, Hon. Buge Hatibu Wasioya & Hon. Feisal Shariff Ibrahim as members delivered on 15th May 2025 in EPA/E028/2024)

JUDGMENT

1. This Judgment is in respect to an appeal from the Judgment and Decree of the Energy & Petroleum Authority delivered on 15th May 2025 in respect to EPA/E028/2024 wherein the Tribunal issued the following orders:-

- (a) A declaration be and is hereby issued that the 1st Respondent trespassed on the Appellant's**

parcel of land known as L.R No. 209/12398 Nairobi without the Appellant's consent.

(b) A declaration be and is hereby issued directing the 1st Respondent to within (60) days from the date of this judgment, remove the power poles and electricity supply lines erected on L.R No. 209/12398 at its own cost.

(c) The Appellant is awarded general damages in the sum of Kenya Shillings 1,500,000/= for continuing trespass.

(d) The cost of this Appeal is awarded to the Appellant and shall be borne by the Respondents.

(e) Interest on (c) and (d) above shall accrue at court rates from the date of this judgment until payment in full.

2. The Appellant herein who was the 1st Respondent before the Tribunal being aggrieved by the said decision lodged the instant appeal vide a Memorandum of Appeal dated 11th June 2025. The Memorandum of Appeal raised the following grounds:-

(i) The Energy & Petroleum Tribunal erred in law and fact and misdirected itself by declaring

that the Appellant herein trespassed onto the 1st Respondent's property (Land Reference Number 209/12398, Nairobi hereinafter "the suit property") despite clear evidence to the contrary which the Tribunal failed to appreciate namely, confirmation from the Kenya Urban Roads Authority (KURA) that the Appellant's power lines are located on the road reserve and that the suit property had in fact encroached on the road reserve.

(ii) As a result of the foregoing, the Energy & Petroleum Tribunal erred in law and fact and misdirected itself by declaring that the Appellant trespassed on the 1st Respondent's property without the Appellant's consent and directing the Appellant to remove the energy infrastructure within sixty (60) days at its own cost.

(iii) The Energy & Petroleum Tribunal erred in law and fact by considering irrelevant considerations in awarding general damages Kshs. 1,500,000.00 for alleged continuing

trespass to the 1st Respondent, despite the Appellant demonstrating that it did not trespass onto the suit property and despite the Respondent failing to prove the prayer for general damages to the required standard.

(iv) The Energy & Petroleum Tribunal erred in law and fact and misdirected itself by exercising jurisdiction on and determining the issue of ownership of land and/or land boundary dispute which is the exclusive preserve of the Environment and Land Court (ELC) contrary to the provisions of article 162 of the Constitution as read with Section 13 of the Environment and land Court Act.

(v) The Energy & Petroleum Tribunal erred in law and fact and misdirected itself by awarding costs of the appeal before it and interest on the general damages and costs at court rates to the 1st Respondent.

3. The Appellant thus sought for the following reliefs:-

(i) THAT the Appeal be allowed and the Judgment and Decree of the Energy & Petroleum Tribunal

- Hon. Kioko Kilukumi SC, Hon. Doris Kinya Mwirigi, Hon. Buge Hatibu Wasioya & Hon. Feisal Shariff Ibrahim delivered 15th May 2025 be set aside in its entirety.

(ii) THAT the Appeal be allowed and the Judgment and Decree of the Energy & Petroleum Tribunal - Hon. Kioko Kilukumi SC. Hon. Doris Kinya Mwirigi, Hon. Buge Hatibu Wasioya & Hon. Feisal Shariff Ibrahim delivered on 15th May 2025 be set aside in its entirety and substituted with an order/declaration that the Appellant's electricity infrastructure is lawfully on the road reserve.

(iii) THAT the Energy & Petroleum Tribunal does not have jurisdiction to hear and determine the issue of ownership of land and/or land boundary dispute.

(iv) THAT the costs of the appeal and those of the proceedings before the Energy & Petroleum Tribunal be borne by the 1st Respondent.

(v) THAT the Honourable Court be pleased to grant any other orders as it may deem fit to further the ends of justice.

4. The Appeal was contested by the 1st Respondent and pursuant to the directions issued by this Court upon admission of the said appeal, parties were directed to canvass the same by way of written submissions. The Appellant filed written submissions dated 21st November 2025 while the 1st Respondent filed written submissions dated 16th February 2026. No written submissions had been filed by the 2nd Respondent as at the time this Court retired to write its judgment.
5. Curiously though the 1st Respondent also filed a 'Replying Affidavit' to the Memorandum of Appeal. In principle for appeals before this Court parties typically respond via written submissions and if any party desires to introduce any new evidence then there is a separate procedure to do so and as such this court will not consider the said document titled 'Replying Affidavit' as the same in not properly on record.

The Appellant's submissions

6. The Appellant submitted on the following issues:-

- (i) In respect to ground 4, whether the Energy and Petroleum Tribunal erred in law and fact and misdirected itself by exercising jurisdiction on and determining the issue of ownership of land and or land boundary dispute.**
- (ii) On grounds 1, 2 and 3, whether the Energy and Petroleum Tribunal erred in law and fact and misdirected itself by finding that the Appellant had trespassed onto the 1st Respondent's property and awarding general damages of Kshs. 1,500,000/= and directing the Appellant to relocate the energy infrastructure within (60) days at its own cost.**

(iii) Costs.

7. It was submitted that the issue of jurisdiction was raised by the 2nd Respondent but the Tribunal arrogated itself jurisdiction to determine whether the 1st Respondent herein was the rightful owner of the suit property Land Reference Number 209/12398.

8. It was contended that Article 162(2)(b) of the Constitution as read with Section 13 of the Environment and Land Act 2011 bestows jurisdiction to hear and determine

ownership dispute on the ELC. It was argued that the said property fell on a public road reserve and the Tribunal did not have jurisdiction to determine the said issue and as such on this ground alone the Appeal ought to succeed and the entire judgment of the Tribunal be set aside.

9. In respect to the general damages and Kshs. 1,500,000/= which was awarded, it was argued that the Tribunal erred in granting the same since as per the Affidavit of James Kibet Sacho and the Appellant's response the Appellant is not a trespasser.
10. The Court was urged to allow the Appeal with costs.

The 1st Respondent's submissions

11. The 1st Respondent submitted on the following issues:-
 - (a) Whether the Energy & Petroleum Tribunal had jurisdiction to hear and determine the dispute relating to the Appellant's energy infrastructure located on the Respondent's private property;**
 - (b) Whether the Energy & Petroleum Tribunal erred in fact and law in finding that the Appellant had trespassed onto the Respondent's property**

and directing removal of the energy infrastructure.

(c) Whether the award of general damages of Kshs. 1,500,000/- for continuing trespass was warranted; and

(d) Who should bear the costs of this appeal and the proceedings before the Tribunal.

12. On jurisdiction, it was argued that the Tribunal has competent jurisdiction to hear and determine disputes relating to wayleaves, easements and energy infrastructure on land including determining whether such infrastructure constitute trespass. The 1st Respondent's ownership of L.R No. 209/12398 was never in dispute before the Tribunal. Hence therefore the Appellant cannot assert and deny the issue of jurisdiction at different forums dealing with the same matter. Having conceded before the Tribunal that ownership was not in issue, it cannot now be raised at this stage.

13. It was submitted that the jurisdiction of the Energy & Petroleum Tribunal is conferred by statute. **Section 25 of the Energy Act**, establishes the Tribunal with jurisdiction to hear and determine appeals from decisions of EPRA.

Section 36 sets out the jurisdiction of the Tribunal. Further **Regulation 4(2) of the Energy (Complaints and Disputes Resolution) Regulation, 2012** expressly includes the disputes to which the Regulations apply and the same applies to wayleaves, easements or rights of way in relation to the generation, transmission, distribution, supply and use of electrical energy.

14. It was further submitted that the current dispute before the Tribunal was over wayleaves, easements and rights of way which fell under Regulation 4(2)(a). Reliance was placed to the cases of **Thomas Schering vs Nereah Michael Said & 3 Others (2019) eKLR** and **Kenya Power & Lighting & Lighting Co. Ltd vs A.G & 3 Others (2016) eKLR.**

15. On the issue of trespass, it was argued that the 1st Respondent adduced overwhelming evidence of ownership and encroachment. He produced; Letter of Allotment dated 25th November 1994, Grant of Lease dated 23rd May 1995, Deed Plan No. 192787, Beacon Certificate No. 192787, Confirmation from Director of Surveys dated 14th August 2020 that the deed plan is authentic and originated from that office, construction permit from

Nairobi City County Government dated 27th January 2020 and Jevanjee Estate Survey Report dated 9th November 2020 by a Land Surveyor. It was contended that the Appellant's reliance on KURA letters is misplaced and contradicting. KURA is not statutorily mandated to determine if suit property falls within a road reserve. The same is a preserve of the Ministry of Lands and Physical Planning, the Director of Surveys, the Registrar of Titles and National Land Commission.

16. It was argued that the Director of Surveys had confirmed in writing on 14th August 2020 that the 1st Respondent's deed plan is authentic and originated from that office. The same was never challenged nor controverted.

17. It was argued that the Appellant erected high voltage electricity poles and lines on the 1st Respondent's property without consent and compensation. Wayleaves are statutory easement that requires compensation to the land owner. Section 171 of the Energy Act, 2019 provides for compensation for wayleaves. No such compensation was ever offered.

18. In respect to the award of general damages, it was submitted that the same was neither excessive nor unreasonable and this Court should not interfere with the same.

19. The Court was urged to dismiss the appeal with costs.

Analysis and Determination

20. Having considered the entire record of appeal, written submissions filed and the existing legal framework, the main issues for determination are as follows:-

- (i) Whether the Tribunal had jurisdiction to hear and determine the dispute.**
- (ii) Whether the Tribunal erred in law and fact in arriving at its decision.**
- (iii) What are the appropriate reliefs to grant in respect to this appeal.**

Issue No. (i)

Whether the Tribunal had jurisdiction to hear and determine the dispute before it.

21. The issue of jurisdiction having been raised by a party should be determined at the earliest possible opportunity.

This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See **Owners of the Motor Vessel "Lillian SS" vs Caltex Oil Kenya Limited (1989) KLR 1**. A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in **The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011** discussed the issue of jurisdiction in the following manner:

" Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity.

22. The Energy and Petroleum Tribunal is a specialized Tribunal established under **Section 25 of the Energy Act**. It has jurisdiction to hear and determine appeals and disputes under the said Act or any other written law as prescribed.

23. **Section 36 of the Energy Act** sets out the jurisdiction of the Tribunal as follows:-

- (i) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum section arising under this Act or any other Act.**
- (ii) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.**
- (iii) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licenses.**
- (iv) 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.**

(v) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions.

(vi) The Tribunal shall hear and determine matters referred to it expeditiously.

24. In the instant case, the Appellant argued that Tribunal arrogated itself jurisdiction to determine the question of whether the 1st Respondent herein is the rightful owner of the suit property Land Reference Number 209/12398 despite the clear provisions of **Article 162(2)(b) of the Constitution as read with Section 13 of the Environment and Land Court Act 2013** and as such the question of ownership is a preserve of the ELC and the Tribunal had no jurisdiction on the same.

25. In responding to this issue, the 1st Respondent submitted that the Tribunal has competent jurisdiction to hear and determine disputes relating to wayleaves, easement and energy infrastructure on land including determining whether such infrastructure constitutes trespass. The Tribunal did not determine ownership of land. The 1st Respondent's ownership of L.R No. 209/12398 was never in dispute before the Tribunal.

26. From the record of the appeal, it was the 1st Respondent's case that he was the registered proprietor of Land Reference No. 209/12398 upon which the Appellant had forcibly entered the suit property and erected power lines without conducting due diligence. The 1st Respondent in arguing his case adduced evidence to the effect that he was issued with an allotment letter in 1994 and was subsequently granted a lease on 23rd May 1995 vide grant number 66010. He produced a letter of allotment, sale agreement, copy of the grant. He also called Priscilla N. Wago, an Assistant Director of Survey who testified as PW2 and confirmed that L.R No. 209/12398 was surveyed pursuant to FR No. 270/162 authenticated on 16th January 1995 and that Deed plan No. 192787 was subsequently issued. Stephen O. Ambani a licensed surveyor testified as PW3 and produced a report dated 27th October 2022 which affirmed that the grant survey had been approved by the Director of Surveys under FR No. 270/162.

27. The Appellant on the other hand argued that the power line was erected on a public road reserve, it relied on a letter from KURA which was not accompanied by any

documentary evidence establishing a direct correlation between FR No. 76/74 and L.R No. 209/12398.

28. In respect to the reliefs that were sought by the 1st Respondent before the Tribunal, none of the reliefs was to the effect that the 1st Respondent sought to be declared the owner of the suit parcel and neither did the Tribunal grant any order or reliefs or declaration awarding the ownership of the suit parcel to the 1st Respondent.

29. **Section 26 of the Land Registration Act, 2012** provides that a certificate of title is prima facie evidence of proprietorship and indefeasible except in cases of fraud or misrepresentation. The Tribunal did not exceed its jurisdiction merely because in determining whether the power lines had been erected on the 1st Respondent's land it had to examine survey plans, title documents or beacon certificates to determine whether the said infrastructure encroaches on private land. To hold otherwise would indeed render the Tribunal's mandate over wayleave disputes inoperative.

30. This position is fortified by the Court of Appeal in **Kenya Power & Lighting Co. Ltd v A.G & 3 Others [2016] eKLR,** which affirmed that the Energy Tribunal is the

specialized forum for disputes in the energy sector, including those relating to wayleaves and compensation. Similarly, in **Kenya Power & Lighting Ltd v Bhogal [2024] KECA 179 (KLR)**, the Court of Appeal upheld the Tribunal's role in wayleave-related trespass disputes. Recent ELC decisions have consistently recognized that while title disputes lie with the ELC, ancillary issues of wayleaves, consent, and trespass by licensed energy infrastructure fall squarely within the Tribunal's remit (see also **Waitiki v Kenya Power & Lighting Co. Limited [2022] KEELC 13795 (KLR) and Kenya Power & Lighting Company v Marwa [2025] KEELC 3569)**)

31. In view of the foregoing, it is the finding of the court that what was before the Tribunal was not a contest on ownership of the suit parcel, the Tribunal was not called upon to decide who between the parties was the lawful owner of the suit parcel No. L.R 209/12398 and the Tribunal never issued such orders in its final orders.
32. The Tribunal did not issue any declaration of ownership. It merely applied the undisputed evidence of title to determine trespass and the statutory requirements under **Sections 170, 171, and 173 of the Energy Act, 2019.**

These sections mandate that any person wishing to enter land for energy infrastructure development must seek prior written consent of the owner and enter into a compensation agreement. Failure to do so renders the entry and continued presence unlawful.

33. Accordingly, the Tribunal properly exercised its jurisdiction. The Appellant's contention lacks merit.

Issue No. (ii)

Whether the Tribunal erred in law and fact in arriving at its decision

34. The Appellant at ground 2 and 3 of the Memorandum of Appeal faulted the decision of the Tribunal in finding that the Appellant had trespassed on the 1st Respondent's property and ordering the Appellant to pay Kshs. 1,500,000/= for alleged continuing trespass to the 1st Respondent.

35. Section 3(1) of the Trespass Act, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

36. Trespass is an intrusion by a person into the land of another who is in possession and ownership. See also the case of **George Joseph Kang'ethe & Another v Kenya Power & Lighting Co. Limited [2018] eKLR.**
37. From the proceedings before the Tribunal, the 1st Respondent called PW2 and PW3 who indeed confirmed that the Appellant's infrastructure had been placed in the 1st Respondent's land. The same had equally been done without his consent and or any compensation.
38. The Tribunal in its judgment noted that the Appellant did not adduce any evidence demonstrating that it had obtained the 1st Respondent's consent before erecting the power line and further that the Appellant had overlooked the procedural law in the construction of power lines on the suit premises as required under Section 171 and 173 of the Energy Act, 2019.
39. The Appellant also faulted the Tribunal for awarding general damages of Kshs. 1,500,000 for trespass.
40. In respect to general damages granted, it is noteworthy that the principles under which an appellate court may award damages is outlined in the landmark case of **Butt vs Khan (1977) 1 KAR 1** as follows:

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

41. Similarly, in the case of **United India Insurance Co. Ltd V East African Underwriters (Kenya) Ltd (1985)** **E.A** a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case. This court sitting on Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or

fifthly, that the court's decision, albeit a discretionary one, is plainly wrong.

42. From a perusal of the judgment delivered by the Tribunal, it is clear that the Tribunal found that there was trespass and that the 1st Respondent's land was affected by the 1st Appellant's infrastructure. The Tribunal further took judicial notice of the prolonged infringement on the 1st Respondent's right to quiet possession and enjoyment as well as the protracted efforts to enforce those rights since 2020. The Tribunal also referred to the case of **Eunice Nkirote Ringera vs Kenya Power and Lighting Company [2020] eKLR** where a sum of **Ksh 2,000,000/-** had been awarded as general damages for trespass for continuous trespass and proceeded to award Ksh 1,500,000/-.

43. It is evident that the act of trespass as pleaded herein is an act of continuous trespass. Every continuous act of a trespass is a fresh trespass of which a new cause of action arises from day today as long as the trespass continues.

44. In applying similar set of facts, this court in the case of **Mwihaki v Safaricom PLC (Formerly Known as Safaricom Limited) (Environment & Land Case**

(30 August 2023) (Judgment) awarded a sum of Ksh 2,000,000/- against the Defendant after finding that there was continuous trespass by the Defendant on the Plaintiff's land.

45. After carefully considering the above, it is the finding of the court that on general damages awarded, the Tribunal applied the correct principles and the decision was legally sound. The Tribunal did not err in law and fact in arriving at its decision and this court cannot interfere with the same.

Issue No. (iii)

What are the appropriate reliefs sought

46. An appellate court's primary duty, once it is satisfied that the lower tribunal or court did not err in law or fact, is to affirm the decision appealed against so as to uphold the rule of law, protect vested property rights, and ensure finality in litigation. This principle is deeply rooted in Section 3A of the Civil Procedure Act (Cap 21) which grants this Court inherent jurisdiction to make such orders as are necessary for the ends of justice, and is reinforced by Article 159(2)(b) and (d) of the Constitution which

mandate that justice shall be administered without undue regard to procedural technicalities and that disputes shall be determined expeditiously.

47. In the instant matter, none of the five grounds in the Memorandum of Appeal has been substantiated. The Appellant has failed to demonstrate any jurisdictional overreach, any misapprehension of the evidence of title and survey, or any erroneous application of the law on trespass and wayleaves. To allow the appeal would be to countenance a continuing trespass in flagrant violation of the 1st Respondent's constitutionally protected right to property under Article 40(1) and (3) of the Constitution and the statutory safeguards in the Land Registration Act, 2012 and the Energy Act, 2019. Such an outcome would undermine public confidence in the specialized dispute resolution framework established by Parliament for the energy sector.

48. The Court of Appeal has consistently held that where a first instance decision is supported by credible evidence and correct legal principles, an appellate court ought not to interfere merely because it might have reached a different conclusion on the facts.

49. In **Selle v Associated Motor Boat Co. Ltd [1968] EA 123; Kenya Power & Lighting Co. Ltd v Bhogal [2024] KECA 179 (KLR)** and Similarly, **in Kenya Power & Lighting Company PLC v Marwa [2025] KEELC 3569**, the Courts affirmed that once trespass by energy infrastructure is established without consent or compensation, the appropriate relief is an order for removal at the utility's cost coupled with general damages for continuing trespass. The present case falls squarely within that jurisprudence.

50. Having determined that the Energy and Petroleum Tribunal properly exercised its jurisdiction and that its findings on trespass, the mandatory requirements of Sections 171 and 173 of the Energy Act, 2019, and the award of general damages were legally sound and factually unassailable, it follows inexorably that the Appellant's appeal is devoid of merit and must be dismissed in its entirety.

51. On the question of costs of this appeal, the settled principle is that costs follow the event unless there are compelling reasons to depart from it (**See Order 22 Rule 1 of the Civil Procedure Rules, 2010 and**

Section 27 of the Civil Procedure Act). The 1st Respondent has successfully defended the appeal. He is therefore entitled to his costs, which this Court assesses at Kshs. 140,000/= (all inclusive) to be borne by the Appellant.

Final Orders

52. In the premises, and for the reasons alluded to, the final orders that commend themselves to the court are as hereunder: -

- (i) The Appeal be and is hereby dismissed.**
- (ii) The judgment of the Energy and Petroleum Tribunal delivered on 15th May 2025 in respect to EPA/E028/2024 be and is hereby affirmed.**
- (iii) The costs of this appeal are awarded to the 1st Respondent assessed at Kshs. 140,000/= all inclusive.**

Dated, Signed and Delivered Virtually this 25th day of March 2026.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Owano for the Appellant.

Mr. Mugu for the 1st Respondent.

Mr. Bullut for the 2nd Respondent.

Court Assistant: Mary Ngoira and David Ngoosa.

ORIGINAL