



Kenya Power & Lighting Company Limited v Kamau (Environment and Land Appeal 20 of 2024) [2024] KEELC 5332 (KLR) (Environment and Land) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND**

ENVIRONMENT AND LAND APPEAL 20 OF 2024

MC OUNDO, J

JULY 18, 2024

(FORMERLY NAKURU ELC APPEAL NO. E18 OF 2023)

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

GEORGE MBUGUA KAMAU RESPONDENT

(Being an Appeal from the Ruling delivered by Hon. Harrison O. Barasa, on 6th February, 2023 in Engineer SPMC ELC No. 38 of 2021)

JUDGMENT

1. What is before me for determination on Appeal is a matter which was heard and determined by Hon. Harrison O. Barasa, Senior Principal Magistrate where the learned Magistrate, vide his Ruling dated 6th February, 2023 dismissed the Defendants/Appellant's Preliminary Objection dated 3rd January, 2022 challenging the Court's jurisdiction to hear and determine the matter before it wherein it had held that it had the jurisdiction.
2. The Appellant, being dissatisfied with the Ruling of the trial Magistrate has now filed the present Appeal based on the following grounds in its Memorandum of Appeal :
 - i. That the learned trial Magistrate erred in law by not considering that the subject matter is purely under the purview of the *Energy Act*, 2019.
 - ii. That the learned trial Magistrate erred in law in completely misapprehending the principles governing and/or what constitutes a Preliminary Objection thereby arriving at an erroneous decision with regard to the Preliminary Objection raised by the Appellant.



- iii. That the learned trial Magistrate erred in law in entertaining and/or delving into issues of facts while ignoring the Preliminary Objection raised by the Appellant.
 - iv. That the learned trial Magistrate erred in law in failing to appreciate the facts and overwhelming laws and statutory provisions tendered to prove that the trial court had no jurisdiction.
 - v. That the learned trial Magistrate erred both in law and facts when he ignored the fact that the crux of the matter against the Appellant in the suit and the application is about wayleaves as set out in the *Energy Act*, 2019.
 - vi. That the learned Trial Magistrate erred both in law and facts when he ignored the Appellant's Notice of Preliminary Objection dated 3rd January, 2022 and delved into the merits of the suit.
 - vii. That the learned trial Magistrate erred in law in failing to appreciate the statutory provisions on the jurisdiction of the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal.
 - viii. That the learned trial Magistrate erred in law by ignoring the submissions tendered by the Appellant but irregularly relied on the Court's own misdirection that it had jurisdiction.
 - ix. That the learned trial Magistrate erred in law and facts by ignoring the binding authorities of the superior courts adduced in the Appellant's submissions.
 - x. That the Learned trial Magistrate erred in law and in fact by taking into account irrelevant considerations.
3. The Appellant thus sought that the instant Appeal be allowed and the ruling delivered on 6th February, 2023 be set aside. It also sought that its Preliminary Objection dated 3rd January, 2022 be allowed and that the Respondent do bear the costs of the Appeal and the lower court.(sic)
4. The Appeal was admitted on 13th March, 2024 and directions issued for the same to be disposed of by way of written submissions.

Appellant's submission

5. The Appellant vide its written submissions dated 12th April, 2024, hinged its submission on the court of Appeal case *Abidha Nicholus v Attorney General & 7 others, National Environmental Complaints Committee (NEEC) & 5 others (Interested Parties)* (unreported) where the court had outlined and clarified the three-tier mechanism of handling disputes as against the Appellants in the matters provided for in the *Energy Act* as hereinunder;
- i. The first tier is to raise a complaint with the Energy and Petroleum Regulation Authority (EPRA).
 - ii. The second tier is the Energy and Petroleum Tribunal (EPT)
 - iii. The third tier is the High Court (only upon exhaustion of the appellate process before the Energy and Petroleum Tribunal).
6. The Appellant thus invoked the doctrine of exhaustion which imposes an obligation on parties to exhaust any alternative dispute resolution mechanism before embarking on the court process. Reliance was placed on the provisions of Article 159 (2) (c) and the decision in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR to urge the court to uphold the instant Appeal pursuant to the provisions of



the [Energy Act](#), Energy (Complaint and Dispute Resolution) Regulations, 2012, The Energy Tribunal Rules, 2008, Articles 159 and 169 of [the Constitution](#) and Section 9(2) and (3) of [Fair Administrative Action Act](#), 2015.

7. The Appellant then proceeded to submit on its grounds of Appeal. As to whether the trial court had erred in law by not considering that the subject matter was purely under the purview of the [Energy Act](#), 2019, the Appellant maintained that the Respondent's claim had purely been on the alleged trespass along the Appellant's wayleave trace and that in the impugned ruling, the trial court had relied on the repealed [Energy Act](#) of 2006 and a decision on a Petition that had been filed on 1st November, 2016, which decision had been rendered on 12th January, 2017 before the coming into force of the [Energy Act](#), 2019.
8. That the Respondent's Complaint herein having been filed in the year 2021, the applicable Act was the [Energy Act](#), 2019 hence the trial court had been, misguided by relying on the repealed [Energy Act](#), 2006. That subsequently, the jurisdiction to hear and determine the Respondent's suit lay with the Energy and petroleum Regulatory Authority (formerly Energy Regulatory Commission) or in the alternative, the Energy and Petroleum Tribunal hence the trial court had misdirected itself by ignoring section 11(f), (i) and (k).
9. He placed reliance on the provisions of Section 36 of the [Energy Act](#), 2019 and regulation 4 of the Energy (Complaint and Dispute Resolution) Regulations, 2012 to maintain that the Respondent's suit fell purely under the purview of the [Energy Act](#), 2019 and not the repealed [Energy Act](#), 2006 thus the trial court had erred in law in failing to so find for which the impugned ruling should be set aside and the instant Appeal be upheld with costs to the Appellant.
10. With regard to the trial court erring in law by completely misapprehending the principles governing and/or what constitutes a Preliminary Objection thereby arriving at an erroneous decision, reliance was placed on the provisions of Articles 159 and 169 of [the Constitution](#) that recognizes alternative dispute mechanism and establishes other court or local tribunal by an Act of Parliament, to submit that the Energy & Petroleum Regulatory Authority (the Authority) and the Energy & Petroleum Tribunal (the Tribunal) were such creatures of Parliament through the [Energy Act](#), 2019 and by the power donated by article 169 (1) (d). That the provisions of Sections 3, 9, 10, 11 (e), (f), (i), (k) and (l); 23, 24, 25, 36, 40, 42 and 224 (2) (e) of the [Energy Act](#), 2019, as read together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 were clear to the effect that the Authority had the jurisdiction to handle disputes similar to the one filed by the Respondent herein and thereafter grant equitable relief provided for therein.
11. As to whether the trial court had erred in law in failing to appreciate the statutory provisions on the jurisdiction of the energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal, reliance was placed on the provisions of Sections 25 and 36 of the [Energy Act](#), 2019 which established the Energy and Petroleum Tribunal to submit that the Tribunal had original civil jurisdiction on any dispute between the licensee and a third party.
12. The Appellant also placed reliance in the decided case of *Cyrus Komo Njoroge vs. Kiringa Njoroge Gachoka & 2 Others* (2015) eKLR to submit that the alternative judicial forum with jurisdiction in the instant suit was the Energy and Petroleum Tribunal.
13. With regard to whether the trial court had erred in law by entertaining and/or delving into issues of facts while making a determination on the Preliminary Objection that had been raised by the Appellant, reliance was placed on the ingredients of a Preliminary Objection as was elucidated in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 to submit that their Preliminary Objection had met the required threshold. That further the Appellant had pleaded



prior the issue of jurisdiction in its Pleadings wherein the Preliminary Objection had been argued as a pure point of law based on the facts that had been provided by the Respondent in his pleadings.

14. The Appellant placed reliance in the decision in the case of *Dbow House Limited v Kenya Power and Lighting Company (Constitutional Petition E058 of 2021)* [2022] KEHC 11840 (KLR) (19 August 2022) (Ruling) to submit that there existed a competent alternative dispute resolution mechanism available to the Respondent that was bestowed with the requisite capacity to grant the reliefs sought thus the court should find that the instant Appeal was merited.
15. The Appellant further submitted that the trial court had pegged its decision on the repealed *Energy Act* of 2006 in disregard to the existing statute and the binding precedents of the superior courts.
16. While relying on the provisions of Section 27(1) of the *Civil Procedure Act* as well the decisions in the case of *Kenya Sugar Board v Ndungu Gathini* [2013] eKLR, the Appellant sought that the court upholds its Appeal with costs.

Respondent's Submissions.

17. In response to the Appellant's Appeal and in opposition thereto, the Respondent vide his written submissions dated 30th April, 2024, gave brief history of the matter in question evidenced in the trial court before framing his issues for determination as follows: -
 - i. Whether the Magistrate's Court is clothed with jurisdiction to hear and determine the Respondent's claim.
 - ii. Whether the Magistrate Court rightfully dismissed the Appellant's Preliminary Objection in the Ruling delivered on 6th February 2023
18. On the first issue for determination, the Respondent placed reliance on the provisions of Article 162 (2) (b) of *the Constitution*, Section 13(1) of the *Environment and Land Court Act*, Section 9(a), (v) of the Magistrates' Court Act and Section 36 of the *Energy Act* to submit that neither the Energy and Petroleum Authority (Authority) nor the Energy and Petroleum Tribunal (Tribunal) had jurisdiction to entertain the Respondent's suit owing to the fact that the *Energy Act* did not make provision for claims based on trespass. That further, the Appellant had failed to comply with the mandatory provisions of Section 171 (1) (a) and (b) of the *Energy Act*, 2019.
19. That the Appellant had premised their entire submissions in the trial court on a misguided presumption that the Respondent's claim had been with regard to the 300 cypress trees that had been destroyed by the Appellants for purportedly being along the Appellant's wayleave trace. That conversely, there had been nowhere in the Plaint where it had been pleaded that the said trees had been on the alleged wayleave trace thus by the Appellant's so alleging, it had re-drafted the Respondent's pleadings and thereafter sought to prosecute its Preliminary Objection based on the said misguided view. That the fact that the Appellant had and continued to accuse the Respondent of failing to disclose that the trees had been along the Appellant's wayleave trace shows that the Respondent's pleadings in the lower court had not mentioned the same hence the jurisdiction of the Energy and Petroleum Tribunal or any other quasi-judicial body could not be invoked.
20. Regarding what constitutes a proper Preliminary Objection, reliance was placed in the Mukisa Biscuit case (supra) on the ingredients of a Preliminary Objection to submit that the contention by the Appellant both at the trial court and in the instant Appeal that the suit had been based on wayleaves which the Respondent had allegedly failed to disclose had clearly demonstrated that the same was never pleaded thus could not be the basis upon which a Preliminary Objection would be sustained.



- He reiterated that his claim in the present suit had been for compensation for trespass and damage to property.
21. His submission was that the mere fact that the Appellant might be a licensee under the [Energy Act, 2019](#) did not automatically mean that any complaint against it ought to be heard before the Authority or the Tribunal. That further, had the Appellant wanted to hold the aforementioned allegation, the proper action would have been to advance such allegation as its Defence and prove the same to the required standard and that the same could not be determined vide a Preliminary Objection. That also in the event that the said allegations had been true, the Appellant needed to first prove that it had complied with the provisions of Section 171 (1) (a) and (b) of the [Energy Act, 2019](#). That nevertheless, the Appellant had failed to issue the notice contemplated under the said provisions thus taking the dispute herein outside the purview of the Authority and Tribunal. That lastly, the Appellant could not purport to prosecute its Preliminary Objection by relying on the documents that had been filed by the Respondent in the lower court but were yet to be produced. Reliance was placed on the Court of Appeal's decision in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR.
 22. That the suit before the lower court had not even taken off as the Respondent was yet to get a chance to produce his documents as per his list and bundles of documents and explain their relevance for the court's consideration which then could not be the basis upon which the Appellant prosecuted its Preliminary Objection, which as rightly dismissed. He thus submitted that the learned trial Magistrate had clearly directed his mind and had correctly applied the provisions of the [Energy Act](#).
 23. On the [Energy Act, 2006](#) vis a vis the [Energy Act 2019](#), the Respondent admitted that it had relied on the decision in *Ayadem Company Limited v Kenya Power & Lighting Company Ltd* [2017] eKLR and *Rachael Nelima Wanyonyi v Kenya Power Co. Ltd* [2018] eKLR where the court had dismissed a Preliminary Objection challenging its jurisdiction for failure by Appellant to comply with the mandatory provisions of Sections 46, 47 and 48 of the [Energy Act](#). That the Appellant had attempted to wrongly fault the learned Magistrate for applying the provisions of the repealed [Energy Act, 2006](#) instead of the [Energy Act, 2019](#) which had in its view constituted an error on the part of the learned Magistrate.
 24. That save for the learned Magistrate having placed reliance on the aforementioned precedents' in striking out the Appellant's Preliminary Objection, the learned Magistrate did not cite any provisions of the repealed [Energy Act](#) as informing its decision. Further, that whereas the [Energy Act, 2006](#) had been repealed, the Sections of the said repealed Act that had been quoted in the decisions relied on by the Respondent and cited by the learned Magistrate, a case in point being Sections 171, 173 and 174 of the [Energy Act, 2019](#) on seeking permission/consent to enter upon the land, assent to the proposal and objection to such proposal, the exact replica of Sections 46, 47 and 48 of the repealed [Energy Act, 2006](#).
 25. That the principles and ratio decidendi that had informed the above-mentioned decisions for failure to comply with the then Sections 46, 47 and 48 of the [Energy Act, 2006](#) were still applicable in the instant case save that the statutory provisions were now under the provisions of Sections 171, 173 and 174 of the [Energy Act, 2019](#). That subsequently, the Appellant's failure to comply with the provisions of Section 171(1) (a) and (b) of the [Energy Act](#), both the Authority and the Tribunal had been divested of their jurisdiction to entertain the suit before the trial court.
 26. That the present case was purely based on trespass and the resultant damage that had been caused by the Appellant thus distinguishable from the Appellant's authority. That further, the Appellant, in the lower court and the instant Appeal had not stated that it had complied with the mandatory provisions of the [Energy Act](#) in respect of seeking prior consent of the Respondent thus the instant dispute could not be referred to the Authority or the Tribunal.



27. The Respondent confirmed that indeed the trial Magistrate had rightfully dismissed the Appellant's Preliminary Objection in its Ruling dated 6th February, 2023 and urged the court to so find and have the instant Appeal dismissed with costs since the same followed the event.

Determination

28. I have considered the record of Appeal, the Ruling by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against assess, it and make my own conclusions. See the case in *Selle vs. Associated Motor Boat Co. Ltd.* [1968] EA 123.
29. According to the proceedings herein, the Respondent instituted suit against the Appellant herein vide a Plaint dated 29th November 2021 seeking judgment against the Appellant for general and aggravated damages for trespass into and destruction of land parcel No. Nyandarua/Muruaki/9296, costs of the suit together with interest at the court rate, and any other relief that the court would deem fit and just to grant.
30. In response to the case filed against them, the Appellant in its defence dated 3rd January, 2022 denied the allegations set forth in the Respondent's Plaint wherein at paragraph 14 the Appellant had raised the issue touching on the court's jurisdiction stating that the issues raised in the Plaint were the preserve for determination by the Energy and Petroleum Regulatory Authority and or the Energy and Petroleum Tribunal.
31. Alongside the defense, the Appellant had filed their notice of Preliminary Objection of an equal date where they had raised the same issue in relation to the trial court's jurisdiction stating that it lacked jurisdiction to hear and determine the dispute before it pursuant to the provisions of Section 3 (1), 10, 11(e) (f) ((i), (k) & (l), 23, 24, 36, 40, 42, and 224(2) (e) of the *Energy Act* 2019 together with Regulations 2, 4, 7, and 9 of the and the Energy (Complaints and Dispute Resolution) Regulations, 2012 As read together with Article 159(2) (c) and 169 (1) (d) and (2) of *the Constitution* and section 9(2) and (3) of the Fair Administration Act 2015.
32. The notice of Preliminary Objection was disposed of by way of written submissions which then gave rise to the impugned ruling herein.
33. In essence therefore the Respondent herein had accused the Appellant for illegally trespassing onto his parcel of land No. Nyandarua/Muruaki/9296 and cutting down his Cyprus tress, damaging his fence and fodder crops. The Appellant objected to the claim through its Preliminary Notice of objection sating that the trial Court's jurisdiction had been prematurely invoked in light of the alternative dispute resolution mechanisms established under the *Energy Act*.
34. The learned trial Magistrate, vide his Ruling dated 6th February, 2023 had dismissed the Appellant's Preliminary Objection thereby holding that the court had jurisdiction to hear and determine the matter before it.
35. The Appellant, being aggrieved by the said Ruling of the trial Magistrate has now filed the present Appeal stating that the matter before the trial Magistrate fell within the purview of the *Energy Act*, 2019 and therefore the trial learned Magistrate had erred in dismissing their Preliminary objection.
36. In response and in objection to the Appeal herein filed, the Respondent argued that neither the Energy and Petroleum Authority (Authority) nor the Energy and Petroleum Tribunal (Tribunal) had jurisdiction to entertain the his suit owing to the fact that the *Energy Act* did not make provision for actions based on trespass wherein his claim therein had been for compensation for trespass and damage



to property. That further, the Appellant had failed to comply with the mandatory provisions of Section 171 (1) (a) and (b) of the *Energy Act*, 2019.

37. With the said background in mind, I find the issues arising for determination as follows;
- i. Whether the Preliminary Objection raised in the trial court should be sustained.
 - ii. Whether the trial court had jurisdiction to hear and determine the matter before it.
38. The all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696 was clear as to what comprised a Preliminary Objection when the court had held as follows;-

“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 may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

39. The purpose of a Preliminary Objection according to the decision by Supreme Court was elaborated in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR at Paragraph 21 as follows:

”... The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

40. An objection to the court’s jurisdiction may be raised as a Preliminary Objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from *the Constitution* or Statute. If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. See the case in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012 [2012] eKLR

41. In this case the Appellant herein has raised the Preliminary Objection in relation to the jurisdiction of the court to hear and determine the matter before it for reasons that it was within the preserve of the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal. As was held in the Mukisa Biscuit case supra, an example of a Preliminary Objection is an objection as to the jurisdiction of a court.

42. Regulation 4(a) of the Energy (Complaints and Disputes Resolution) Regulations 2012 (Regulations) provides as follows:

“These regulations shall apply to complaints and disputes in the following areas: billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.”



43. Regulation 7 of the Energy (Complaints and Disputes Resolution) Regulations 2012 (Regulations) provides as follows:
- “(I) In the event that any complaint is not resolved to the dispute and satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.
2. A party to a dispute may refer the dispute to the Commission in form Section S-2 as set out in the Second Schedule.
 3. Where a dispute has been referred to the Commission, the Commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.
 4. Where the dispute
 - (a) is resolved through mediation in accordance with paragraph 3, the parties shall file their settlement agreement with the Commission within five days, and the agreement shall be final and binding on both parties.
 - (b) is not resolved through mediation in accordance with paragraph 3, the procedures set out in regulations 8 to 16 shall apply.”
44. Section 24 of the *Energy Act* provides as follows:
- “(1) A person aggrieved by a decision of the Authority may appeal to the Tribunal within thirty days of receipt of the decision.
- (2) Notwithstanding subsection (1), the Tribunal may entertain an appeal after the expiry of the thirty-day period if it is satisfied that there was sufficient cause for not filing it within that period.”
45. Section 37 of the *Energy Act* states as follows:
- “(1) The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.
- (2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a court of law.
- (3) Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.
- (4) The law applicable to applications for review to the High Court in civil matters shall, with the necessary modifications or other adjustments as the Chief Justice may direct, apply to applications for review from the Tribunal to the High Court.”
46. It is thus clear that the broad spectrum of activities envisaged by the regulations cited above must be construed ejusdem generis and therefore I am satisfied that the matter under review relates to a matter regulated under the *Energy Act*, 2019, as it concerned a dispute between a licensee (Appellant) and a third party (the Respondent) on the Appellant’s alleged action of trespass over the suit property.
47. The court has noted that Part VII (Sections 170 to 186) of the said Act deals with rights of way leaves, and use of land for energy resources and infrastructure. It is evident that entry into private land for the



purpose of survey, inspection or installation of energy infrastructure is regulated under the Act. The court is thus of the opinion that the Appellant's alleged wrongful actions fell within the jurisdiction of the tribunal as set out in Section 36 of the Act which provides as follows;

- “(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.”

48. Section 177 of the *Energy Act* provides as follows;

“The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act or by the loss or damage or breaking of any energy infrastructure or by reason of any defect in such infrastructure.”

49. Clearly this provision of the law provides for the liability of the licensee to make compensation to the occupier of any land for damages including any irregularity or trespass. This gives anyone with a complaint on trespass against a licensee to raise the same through the mechanisms that have been provided under the Act.

50. It has been held that where a statutory mechanism exists for resolution of a dispute, such procedure ought to be followed and exhausted before the aggrieved party can consider moving to court. Indeed under the doctrine of exhaustion of administrative remedies, a party must first avail of all administrative processes available before seeking the courts' intervention; the administrative officer concerned must be given every opportunity to decide on the matter within his or her jurisdiction; failing to exhaust administrative remedies affects the party's cause of action as these remedies refer to a precedent condition which must be complied with prior to filing a case in court.

51. Section 90 of the *Fair Administrative Action Act* provides for the Doctrine of Exhaustion thus –

- “(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.



- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 - (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”
52. The doctrine was aptly captured by the Court of Appeal in *Republic v National Environmental Management Authority* [2011] eKLR where the Court of Appeal observed: -
- “... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”
53. 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 the intent to bypass dispute resolution mechanisms provided under the Statute.
54. In the case *United Millers Limited v Kenya Bureau of Standards & 5 others* [2021] eKLR the Court of Appeal held;
- “In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had 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”.
55. The upshot of the foregoing is that the court finds merit in the Appellant’s appeal and the same is allowed with cost. Further orders are that:
- i. The ruling and orders of the trial court dated 6th February, 2023 in Engineer SPMC ELC No. 38 of 2021 is set aside for lack of jurisdiction.
 - ii. The Respondent’s suit before the trial court is hereby struck out with costs to the Appellant.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 18TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

