



**Kenya Power and Lighting Company v Nduti (Civil Appeal E007 of 2023)  
[2024] KEELC 13966 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13966 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
CIVIL APPEAL E007 OF 2023  
LN GACHERU, J  
DECEMBER 19, 2024**

**BETWEEN**

**KENYA POWER AND LIGHTING COMPANY ..... APPELLANT**

**AND**

**TERESIAH WANGUI NDUTI ..... RESPONDENT**

*(Being an appeal against the Ruling and Orders of Hon. S. Mwangi Senior Resident Magistrate delivered on 9th August 2023 in at MURANG'A CMECLC Civil Case No. E102 of 2022)*

**JUDGMENT**

1. This is an Appeal against the Ruling of the trial court which was delivered on 9<sup>th</sup> August 2023, by Hon. S. Mwangi (SRM), dismissing the Appellant's Preliminary Objection dated 27<sup>th</sup> March 2023, wherein the Appellant as the Defendant in Muranga CMELC NO. E012 OF 2022, had sought for striking out of the said suit, on the ground that the said trial court lacked jurisdiction.
2. The suit before the trial Court was commenced by the Plaintiff (Respondent herein) vide Original Plaint dated 20<sup>th</sup> December 2022, and amended on 3<sup>rd</sup> February 2023, wherein, the Plaintiff sought for among other prayers, a declaration that the Defendant(Appellant) trespassed and encroached onto her land parcels Nos LOC.19/GACHARAGE-INI/683 and LOC.19 GACHARAGE-INI/3108 (the suit properties by erecting electricity posts thereon.
3. The Plaintiff (Respondent herein) had further sought for compensation as against the Defendant(Appellant), for trespass and encroachment in the tune of Kshs.270,000/=, per annum plus interest at 10% from 2016 until the removal of the offending electricity posts from the suit properties. In the alternative, the Plaintiff(Respondent) had prayed for a mandatory injunction directing the Defendant(Appellant) to uproot the electricity posts and dismantle the power lines erected on the suit properties.



4. The Defendant (Appellant) opposed the said suit through above referred Notice of Preliminary Objection dated 27<sup>th</sup> March 2023, and its Statement of Defence dated 28<sup>th</sup> March 2023, wherein it denied having erected electricity posts and power lines on the suit land.
5. In its Notice of Preliminary Objection, the Appellant averred that the trial Court lacked jurisdiction to entertain the Plaintiff's (Respondent) suit pursuant to the provisions of Sections 3(1), 10, 11 (e), (f), (k), (l); 23, 24, 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, as read together with Article 159 (2) (c) and 169 (1) (d) and (2) of the Constitution of Kenya and Sections 9 (2) and (3) of the Fair Administration Act, 2015.
6. Vide the referred Ruling, the trial Court dismissed the Appellant's Notice of Preliminary Objection, and determined that the matter before it was an issue of trespass, and that the trial Court's jurisdiction to entertain issues related to trespass to land was not ousted by the provisions of the Energy Act.
7. The Appellant herein was aggrieved by the said Ruling, and vide a Memorandum of Appeal dated 14<sup>th</sup> August 2023, challenged the said decision of the trial Court dated 9<sup>th</sup> August, 2023, in MURANG'A CMECLC Civil Case No. E102 of 2022. The Appellant has sought for these orders:
  - i. This Appeal be and is hereby allowed.
  - ii. The Honourable Court may declare as per incuriam and struck off Ruling delivered on 9<sup>th</sup> August, 2023 by the trial Court.
  - iii. That the Ruling dated 9<sup>th</sup> August, 2023 be substituted with a Ruling upholding the Appellant's Notice of Preliminary Objection dated 27<sup>th</sup> March, 2023.
  - iv. That the costs of this Appeal be met by the Respondent.2."
8. The instant Appeal is anchored on the following grounds;
  1. That the trial Court erred in law by failing to consider and to find out that subject matter is purely under the purview of the Energy Act No. 1 of 2019.
  2. That the trial Court ruling was per incuriam as it entertained and delved into issues of fact on the substance of the main suit before the Court.
  3. That the trial Court misapprehended the principles governing and/or constituting a Preliminary Objection thereby arriving at an erroneous decision with regard to the Preliminary Objection raised by the Appellant.
  4. That the trial Court erred in law in failing to appreciate the overwhelming constitutional and statutory provisions tendered to demonstrate that the trial Court lacked jurisdiction.
  5. That the trial Court erred in law, fact and principle by disregarding the fact that the crux of the matter against the Appellant in the suit is about electricity wayleaves as set out in the Energy Act No.1 of 2019.
  6. That the trial Court erred in law and in fact by holding that the dispute resolution tribunals under the Energy Act are not vested with powers to grant injunctive and compensatory Orders for the alleged trespass and thus failed to appreciate the jurisdiction of the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal as clearly set out in law.



7. That the trial Court erred in law and principle by ignoring the binding authorities of the Superior Courts adduced in the Appellant's submissions.
8. That the manner in which the trial Court conducted proceedings with regard to the Preliminary Objection in the matter and arrived at the decision was erroneous in law and in principle and against constitutional, statutory and case law in Kenya."
9. After the Appeal was admitted under the provisions of Section 79B of the *Civil Procedure Act*, the court directed that the same be canvassed by way of written submissions, which directions were fully adhered to.

### **The Appellant's Submissions**

10. The Appellant filed its written submissions dated 14<sup>th</sup> December 2023, through the Law Firm of Maanzo-dennis & Co. Advocates, and set out the following issues for determination;
  - (a) Whether the Plaintiff's suit is with respect to matters under the *Energy Act*.
  - (b) Whether the jurisdiction to tackle the suit before Court is vested in the Energy and Petroleum Regulatory Authority and/or Energy and Petroleum Tribunal.
  - (c) Whether the trial Court's Ruling was per incuriam.
  - (d) What Orders best suit the situation.
11. The Appellant submitted that the suit before the trial Court related to wayleaves as set out under Rule 4(a) of the Energy (Complaints and Disputes Resolution) Regulations 2012, as read together with the *Energy Act*, No.1 of 2019. It relied on the provisions of Section 171 and Part VII of the *Energy Act* No. 1 of 2019, to support the proposition that the suit before the trial Court did not fall within the jurisdiction of the trial Court.
12. Further reliance was sought in the provisions of Section 3 of the *Energy Act* to buttress the proposition that in the event of a conflict between the *Energy Act*, No.1 of 2019, and any other piece of legislation, the *Energy Act* shall prevail. Further reliance was sought in the reasoning of the Court in the case of *Abidha Nicholus vs Attorney-General & 7 others; National Environmental Complaints Committee (NECC) & 5 Others (Interested Parties)* [2021] eKLR.
13. The Appellant argued that while the trial Court cited Rule 4 of the Energy (Complaints and Disputes Resolution) Regulations 2012, in the impugned ruling, it failed to give effect to the above mentioned provision of the law. That the essence of the claim before the trial Court as evidenced by paragraph 4 of the Respondent's Amended Complaint dated 3<sup>rd</sup> February 2023, is that the Appellant illegally erected electricity posts and power lines, on the suit properties, and such matter are subject to the provisions of Part VII of the *Energy Act* No.1 of 2019, and Regulations flowing from thereof by virtue of section 224(2) (c) of the *Energy Act* No.1 of 2019, as read together with Part VII of the same Act.
14. On the question of jurisdiction, reliance was sought in the provisions of Article 169 (1) (d) of *the Constitution* to underpin the proposition that the tribunal established pursuant to the *Energy Act* No.1 of 2019 is invested with the jurisdiction to determine disputes related to wayleaves, such as the suit wrongly filed before the trial Court. For this, the Appellant relied on the case of *Law Society of Kenya vs Centre for Human Rights and Democracy and 13 Others* [2013] eKLR.
15. The Appellant also relied on Sections 2, 9, 25, and 36 (3) of the *Energy Act* No.1 of 2019, and in the case *Cyrus Komo Njoroge vs Kiringa Njoroge Gachoka & 2 others* [2015] eKLR, to support



the submissions that the Energy and Petroleum Tribunal, is vested with the original jurisdiction to entertain disputes concerning wayleaves.

16. Further, that the decision of the trial Court was per incuriam as it delved into issues of fact touching on issues of fact forming the substance of the main suit before the Court. Furthermore, that the issues identified by the trial Court were not pleaded in the Respondent's Amended Pleint.
17. For this submission, the Appellant relied in the Judgment of the Court in the case of Republic vs Magistrate Court, Mombasa; Absin Synergy Limited (Interested Party) Judicial Review E033 of 2021 [2022] KEHC 10 (KLR), in support of the contention that jurisdiction is determined on the basis of the pleadings as opposed to the substantive merits of the case.
18. Further, that the trial Court relied on repealed sections of the law, and therefore its decision was per incuriam. For this, the appellant relied on various cases, among them the case of National Social Security Fund Board Trustees & Others vs Central Organization of Trade Unions (K) [2015] eKLR.
19. Further, that the trial Court disregarded the precedent established by the Supreme Court of Kenya in the case of Albert Chaurembo Mumbo & 7 Others V Maurice Munyao & 148 Others; SC Petition no. 3 of 2016, [2019] eKLR, by not allowing the tribunal established under the *Energy Act* No. 1 of 2019, to hear and determine the dispute before it in the first instance.
20. The Appellant argued that the trial Court also disregarded the doctrine of exhaustion of local remedies as stipulated under Section 9(2) and (3) of the *Fair Administrative Action Act*. Reliance was placed in the decision of the Court in the case of Night Rose Cosmetics (1972) LTD Vs Nairobi County Government & 2 Others [2018] eKLR, to buttress the position that the term "shall" as deployed in Section 9(2), and (3) of the *Fair Administrative Action Act* connotes mandatory as distinguished from permissive conduct.
21. Further, it was submitted that as pertains to the energy sector, there exist alternative fora for the settlement of energy-related disputes. Reliance was sought in the holding of the Court in the case of Mutanga Tea Company ltd vs Shikara Limited & Another [2015] eKLR ,to anchor the proposition that where an alternative dispute resolution mechanism is established by statute, it is necessary that such a mechanism be adhered to.
22. The Appellant further submitted that *Energy Act* No.1, 2019 establishes a tribunal and vests the said tribunal with the original and exclusive jurisdiction to handle disputes such as the one presented before the trial Court. Reliance was sought in the holding of the Court in the case of Elijah Mutahi & 10 Others vs Kenya Power & Lighting Company Limited [2020] eKLR.
23. On the question of the doctrine of exhaustion of available remedies, reliance was placed in the Judgment of the Court in the cases of Geoffrey Muthinja vs Samuel Muguna Henry & 1756 Others [2015] eKLR; Justin Karionji Nyaga vs Attorney-General & 2 Others [2021] eKLR and, Thomas Schering vs Nereah Michael Said & 3 Others [2019] eKLR.
24. It was further submitted that where the law provides for a specific procedure with regard to the resolution of disputes, such procedure should be strictly followed. The appellant relied on the holding of the Court in the case of Peter Muturi Njuguna V Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017] eKLR, to buttress the foregoing submission.



25. The Appellant also relied on the reasoning of the Court in the case of Vitalis Ouma Osano vs Kenya Power & Lighting Company Ltd [2021] eKLR, where the court held;

“I do find that this dispute revolves on development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff’s land which is private land. The Plaintiff is aggrieved with the act of the defendant.

Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal. The Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.

Indeed Article 159(2) c of *the Constitution* of Kenya 2010 provides that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration.”

26. It was argued that the trial Court overlooked judicial precedent by not affording a statutory body the opportunity to exercise its lawful jurisdiction. Reliance was sought in the provisions of Article 159(2) (a) of *the Constitution* as well as the Judgment of the Court in KISUMU Court of Appeal No.173 of 2020: Philip Okoth (Suing as next friend of A.A, I.I, B.A, F.A, G.O., S.N., I.O, W.T., & P.S.) & Law Society of Kenya vs Board of Management of St. Annes Primary School Ahero & others.
27. It was also submitted that the Ruling of the trial Court was delivered in circumstances where the Court lacked jurisdiction, thereby rendering the said decision a nullity. For this position, the Appellant relied on the case of MACFOY V UNITED AFRICA CO. LTD [1961] 3 ALL ER 1169 at 1172.
- Ultimately, this Court was urged to allow the Appeal with costs, and proceed to declare the Ruling of the trial Court dated 9<sup>th</sup> August, 2023, as per incuriam and strike it off.
28. The Respondent filed her written submissions dated 12<sup>th</sup> September, 2024 through the Law Firm of C.W. WAITITU & CO. ADVOCATES, who came on record for the Respondent through a Notice of Appointment of Advocate in place of the Law Firm of MWANIKI WARIMA & CO. ADVOCATES, and submitted that the claim before the trial Court concerned the illegal encroachment by the Appellant onto the suit properties.
29. Citing Section 171 of the *Energy Act*, she submitted that the Appellant is required to obtain the consent of the proprietor of a parcel of land prior to accessing the said land to conduct any activities thereon. The Respondent argued that the trial Court possessed the necessary jurisdiction to determine the suit before it, which was founded on trespass; That the Appellant did not serve the Respondent with any notice as stipulated under Section 171 of the *Energy Act*, and the Respondent denied ever receiving such notice.
30. Reliance was placed in the Judgment of the Court in the case of KPLC vs Fleet Wood Enterprises Ltd (2017) eKLR, to undergird the proposition that trespass is an actionable tort, and proof of damage is necessary on the part of the Claimant. The Respondent controverted the Appellant’s submission that the claim before the trial Court concerned wayleaves and submitted that wayleaves necessarily involves the consent of the owner of the parcel of land in question, and in the dispute between the parties herein, no consent was sought or obtained from the Respondent.
31. Citing the holding of the Court in the case of Rachel Wanyonyi vs KPLC (2018) eKLR, the Respondent further submitted that the trial Court could not decline jurisdiction with regard to the



suit before it on the ground that the Appellant had not complied with the requirements set out under Sections 46 and 47 of the Energy Act.

32. Further, that the Appellant has been in “continuous trespass” of the suit land since year 2016, as defined in Clerk on the Law of Torts, 16<sup>th</sup> Edition para 23-01. Further reliance was placed in the decision of the Court in the case of Nyabochwa Obiero vs Kenya Power & Lighting Company Ltd (2021) eKLR, to anchor the argument that once trespass is proven, the owner of the parcel of land in question is automatically entitled to compensation by way of general and/or special damages.
33. The above being the grounds for and against this Appeal, this court has carefully considered the Memo and Record of Appeal filed, the rival written submissions, cited authorities and the relevant provisions of law, and finds the issues for determination are; -
  - I. Whether the appeal is merited?
  - II. Who shall bear the costs of the appeal?

#### **i. Whether the Appeal is merited?**

34. Basically, the bone of contention herein is that the trial court does not have jurisdiction to hear and determine the suit before it. However, the said trial court dismissed the Appellant’s Preliminary Objection, that it lacked jurisdiction as the dispute ought to have been dealt with through the Alternative disputes mechanism, provided by the Energy Act of 2019.
35. The Appellant argued and submitted that the Respondent’s suit was wrongly filed before the trial Court, and that the same ought to have been filed before the Tribunal established under the Energy Act, 2019, as it concerns a wayleave in respect of the suit properties. The Respondent, on her part contended and submitted that the matter before the trial Court was founded on trespass rather than wayleave, hence, it fell within the jurisdiction of the trial Court.
36. As correctly held by the trial court, Jurisdiction is everything, and without it, the court has no option, but to down its tools. See the case of Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR, where the Court held that: -

“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 its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”

37. Further, in the case of Phoenix of E.A Assurance Co Ltd vs SM Thiga t/a Newspaper Services (2019) eKLR, the court of Appeal held;

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

38. Further, there is no doubt that Article 159(2)(c) of the constitution recognizes the place of Alternatives Disputes Resolution. It provides as follows;
  - (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—



- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional disputes resolution mechanisms shall be promoted, subject to clause (3):”

39. In recognition of the said forums for alternatives disputes resolution, Article 169(1)(d) of *the Constitution* also recognizes existence of Tribunals, which play a part in alternative disputes resolution, as follows;

“(1) The subordinate courts are—

- (d) any other court or local tribunals as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).”

40. Courts in Kenya have given life to the above Articles of *the Constitution* by holding that where there are clear procedure for redress of a particular grievance prescribed by *the Constitution* or an Act of Parliament, the procedure should be strictly followed. See the case of Speaker of National Assembly - Versus- Karume (1992) KLR 21, where the court held: -

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

41. Further, in the case of Cyrus Komo Njoroge vs Kiringa Njoroge Gachoka & 2 Others(2015)eKLR, the court held that;

“The principle that where *the Constitution* and or statute has provided a disputes resolution procedure, then that procedure must be strictly followed is well established.” Court further held: “The Plaintiff must therefore exhaust the remedy stipulated by the *Land Registration Act*. The upshot of the foregoing is that the suit herein is dismissed.” (Emphasis ours)

42. Therefore, in determining this Appeal, the court will first consider whether the dispute herein falls under the *Energy Act* No1 of 2019, and the Regulations thereon, and whether this dispute herein ought to have been referred for the Alternative Disputes Mechanism provided in the said Act, thus ousting the trial court’s jurisdiction to hear and determine the dispute before it.

43. The parties have cited the law as provided in the *Energy Act*, 2019, and the various decided cases, which this court will not reproduce herein, as it has cited them while paraphrasing the parties submissions.

44. This court has considered the Amended Complaint as filed by the Respondent, and it is clear in Paras 4 and 5, the Respondent had lamented that the Appellant entered onto her named parcels of land and without consent illegally erected electricity posts and power lines, without the Respondent’s consents or compensation. Further, that the Appellant had been verbally promising to compensate her for the said wayleave, without success.

45. From the above pleadings, it is clear that the Respondent complaint was the creation of wayleaves on her parcels of land, from 2016, by the Appellant, without compensation. Apart from claiming for a declaration that the Appellant’s act, was illegal, the Respondent had also sought for damages.

46. In the Respondent’s submissions filed in opposition to this Appeal, it is clear that she admitted that the Appellant, went against the provisions of section 171 of the *Energy Act* 2019, as it did not send a



notice to her, and did not obtain her consent. If the Appellant's went against the provisions of section 171, of the Energy Act 2019, then the dispute before the trial court, was governed by the Energy Act, and the parties were bound by the provisions of that Act.

47. Section 3(1) of the said Energy Act, 2019 provides;

- “(1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters—
- (a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy;
  - (b) the exploration, production, transportation, distribution, and supply of any other form of energy; and
  - (c) all works and apparatus for any or all of these purposes.”

48. In the case of *Abidha Nicholus vs Attorney General & 7 others; National Environmental Complaints Committee(NECC) & 5 others (Interested Parties)* [2021] eKLR, the Court of Appeal held that;

“The import of the above (Section 3) is that the Energy Act 2019 prevails over any other Act of Parliament or law but definitely not over the Constitution of Kenya 2010.

However, there is no indication that the Act is in conflict with the Constitution of Kenya 2010.

49. Given that the disputes between the Appellant and the Respondent was governed by the Energy Act, 2019 then Energy (Complaints and Disputes Resolution) Regulations 2012, is applicable herein.

50. In the above Energy (Complaints and Disputes Resolution) Regulations, Regulation 2 provides;

“The Regulations shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party of any matter regulated under the Act.”

51. Therefore, it is clear that complaints or disputes under the Energy Act 2019, can be resolved as provided by the above referred regulations.

52. Regulation 4 of the above referred Regulations, provides the nature of the disputes that can be heard and determined by the Energy & Petroleum Authority set up to hear disputes through the said Regulations. The said Regulation provides as follows;

- a. 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.
- 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 product; and
- c. Any other activity and/or matter regulated under the Act.

53. From the above Regulation 4, it is evident that disputes relating to wayleaves, easements or rights of way in relation to the generation, transmission and supply of electricity energy are some of the disputes



that can be dealt with by the Authority. Therefore, the said Authority, has jurisdiction to hear and deal with matters relating to wayleave, or easement, such as the complaint filed by the Respondent before the trial court.

54. Again Section 25 of the [Energy Act](#), 2019, establishes the Energy and Petroleum Tribunal, for purposes of hearing disputes and Appeals. Further, section 36 of the said Act, set out the Jurisdiction of the said Tribunal as follows;

“Jurisdiction of the Tribunal

- (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.”

55. As submitted by the Appellant, section 36(3) of the [Energy Act](#) gives the Tribunal original/ Civil jurisdiction to hear any dispute between the licensee and third party. The Respondent complaint is that the Appellant had promised on several times to compensate her for the erection of electricity poles and posts on her parcels of land, or wayleaves, but has not done so.

56. It was the Respondent’s allegation that the said act of the Appellant of erecting the electricity poles began in 2016, and the suit before the trial court was filed in 2022. If the Respondent had severally written to the Appellant complaining about the said illegal erection of electricity poles, and seeking compensation, then it is clear that the Respondent was attempting an alternative disputes resolution, and with the failure of the Appellant to act, then she should have used the provisions of the [Energy Act](#), 2019, Regulations on alternatives disputes mechanism.

57. Supreme Court in the case of *United Millers ltd vs Kenya bureau of Standards Directorate of Criminal Investigations & 5 others* (2021) eKLR held as follows;

“..... the emphasized that where there exists an alternative method of dispute resolution established by legislation, the Court must exercise restraint on exercising their jurisdiction conferred by [the Constitution](#) and must give deference to the dispute resolution bodies established by status with the mandate to deal with such specific disputes in the first instance.”

58. Having found that the dispute herein is regulated by the [Energy Act](#), 2019, then it follows that the Energy & Petroleum Regulation Authority and the Energy& Petroleum Tribunal had jurisdiction to



deal with this issues raised at the suit before the trial court. See the case of Sombo & 2 others vs Ketraco & 3 others (Environment & Land Case E021 of 2022) [2023] KEELC 21061 (KLR) (25 October 2023), where the court held:

“Arising from the above it is therefore clear that the substratum of the Plaintiffs suit is the digging of the holes for purposes of laying electricity transmission poles. The trespass by its very nature arises from these acts without which there would be no trespass. The actions cannot be delinked from issues relating to wayleaves. The power lines that are allegedly intended to be set up within the suit land fall within the regulation of the Authority as transmission is a preserve of the Authority as regulated under the Act. This to me brings the dispute under the jurisdiction of the Energy Act 2019.”

59. The court is further persuaded by the findings of courts of concurrent jurisdiction in the following cases;

i. Kerugoya Environment & Land Court Case No E003 of 2022, Dr.Florence Mukii v The Kenya Power & Lighting Company Limited(unreported) (E.C. Cheron, J) (Delivered on 22.7.22)the court held that;

From the totality of my analysis and the applicable law, I find that the claim against the defendant in this case is in respect of wayleaves in relation to the distribution and supply of Electrical energy. The plaintiff in the plaint averred that on 26/11/2021, the defendant trespassed into her property and without any notice and or consent, cut down thirty-six (36) trees which were maintained below the defendant’s power cables erected on the plaintiff’s property. If the plaintiff was dissatisfied with the defendant’s actions, she should have referred the complaint to the Energy Authority.

In view of the matters aforesaid, I find that this Honourable Court lacks jurisdiction to handle disputes in respect of wayleaves in relation to the distribution and supply of electrical energy and places the jurisdiction to the Energy Authority.

The upshot of my finding is that the Notice of Preliminary Objection dated 18/02/2022 succeeds and the same is hereby upheld. Consequently, this suit commenced by way of a plaint dated 21/01/2022 is struck out with costs to the defendant.” (Emphasis ours).

ii. The Environment and Land Court in Thika in the case of Thika Environment &Land Court Case NO. E077 of 2022, George Kimani Ng’ang’a, Peter Masai, Jecinta Mumbi, Veronicah Mutua, Mary Wangari Mugwanja, Januaries Mutua & Joseph Mburu Maina Vs. Kenya Power and Lighting Company(unreported) (J.G. Kemei,J) Delivered on 13.2.23) the court held that;

“The plaintiff’s case is that the defendant has entered into the suit land and erected poles and high voltage electric wires over their parcels without their consent and that the said erection is limiting their utilization of the land including development. Is this the kind of dispute contemplated to be referred to the tribunal as set out in the act? My reading of section 36 of the act read together with regulation 4 of shows that any dispute relating to way leaves easements or rights of way in relation to transmission distribution supply and use of electrical energy is one of the disputes contemplated by the Act.

I find that the plaintiffs dispute is such dispute that falls for determination under the act and going with the principle of judicial restraint or abstention the court shall



down its tools. This is to give effect to the principle of law that where parliament has decreed an agency of government to carry out an act, that agency must be allowed to do so without led or hinderance to allow exhaustion of dispute resolution mechanisms.....

In the upshot I find the preliminary objection has merit. it is allowed with the consequence that the suit is struck out.....(Empasis ours)

60. Having analyzed the issues as above, there is no doubt that by the various provisions of the *Energy Act* 2019, especially section 36, there are established alternative disputes resolution mechanisms, which the Respondent should have exhausted before filing the suit before the chief Magistrates court. The trial court was bound by the various decisions of the Superior Court on the issue of Jurisdiction on matters relating to erection of electricity poles on a proprietors parcel of land without his/her consent.
61. For the above findings, this court is bound by the decision the Court of Appeal in the case of Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 others (2015) eKLR, cited by the Appellant, where it was held:
- “...the exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts.”
62. It is trite that where procedures exist for resolution of disputes, such processes must be exhausted first, before a party can approach the Court. In the case of Peter Muturi Njuguna Vs Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 (2017) eKLR, the Court held as follows:
- “ [It] is abundantly clear to us that where there is a specific procedure as to the redress of grievances, the same ought to be strictly followed”. I find that the learned magistrate erred in dismissing the Preliminary Objection. The subordinate court had no jurisdiction to hear the matter. I allow the appeal and uphold the Preliminary Objection. Consequently, the suit is struck out” .
63. The Supreme Court of Kenya in the case of Albert Chaurembo Mumbo & 7 others vs Maurice Munyao & 148 Others SC Petition No.3 of 2016(2019) eklr, held as follows:
- “.....the first opportunity had to be given to 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.”
64. In the *Fair Administrative Action Act*, 2015, section 9(2) provides as follows;
- “(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.”
65. This section 9 of the Fair Administrative Actions Act is couched in mandatory terms, and where alternative disputes resolutions mechanisms exist, courts are stripped of Jurisdiction, as parties need to first exhaust the Alternative Disputes Resolutions Mechanisms before moving to court.



66. It is trite that Alternative Disputes Resolutions Mechanisms have their own advantages, as ordinarily disputes are determined by experts. See the case of *Mutanga Tea and Coffee Company Ltd Vs Shikara Ltd & Another* [2015]e KLR, the Court of Appeal declared as follows:
- “.....such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; the dispute is resolved much more expeditiously and in a more cost effective manner.”
67. This court having analyzed and found that the dispute herein being one involving erection of electricity poles on the Respondent parcels of land, and which falls under the purview of Section 171 of the *Energy Act* 2019, then the said *Energy Act* 2019, has provisions for resorting to Alternative Disputes Resolution Mechanisms, and the Respondent should have exhausted them before moving to court. The Respondent failed to exhaust the available Alternative Disputes Resolutions Mechanisms, and thus the trial court is stripped off jurisdiction.
68. The trial court dismissed the Appellant Preliminary Objection on the ground that the Respondent suit was based on trespass. However, it is not in doubt that section 36 of the *Energy Act*, 2019, gives the tribunal original civil jurisdiction on any dispute between a licensee and third party, and the tribunal too has power to grant equitable reliefs including but not limited to injunction, penalties, damages, specific performance. See the case of *George Kimani Nganga & Others Vs Kenya Power and Lighting Company* (Supra).
69. Having carefully considered the Memo of Appeal and the evidence available before the trial court as contained in the Record of Appeal, this court in its Appellate Jurisdiction finds and holds that indeed the trial court erred in law and in fact in failure to find and holds that the subject matter fell under the purview of the *Energy Act*, 2019, since the crux of the matter against the Appellate was about the electricity wayleaves as set out in the *Energy Act*, No1 of 2019.
70. The trial court ignored the constitutional provisions on Alternative Disputes Resolutions Mechanisms, the various provisions of law on exhaustion of existing Alternative Disputes Resolutions Mechanisms, and the cited authorities of the Superior Courts on the said issue, and therefore arrived at an erroneous decision.
71. Consequently, this court finds and holds that the Appeal herein is unmerited, and the court proceeds to upset the trial court’s Ruling of 9<sup>th</sup> August 2023, by allowing the Appellant’s prayers as set out in in the Memo of Appeal in terms of prayers Nos i, ii, and iii, thereon.

## **ii. who should pay costs of this Appeal?**

72. The court will be guided by the provisions of Section 27 of the *Civil Procedure Act*, which provides that costs are granted at the discretion of the court. However, costs follow the event, and are awarded to the successful litigant, unless there are circumstances existing to warrant departure from that norm.
73. The Appeal has been allowed, but given that the Respondent was represented by a counsel, who might not have guided her accordingly, this court finds that each party should bear its own costs, of this Appeal, and the lower court’s suit.
74. In a nutshell, the Appellant’s Appeal as contained in the Memo of Appeal dated 14<sup>th</sup> August 2023, is allowed accordingly in terms of prayers Nos i, ii, and iii thereon, with an order that each party to bear its own costs.

Appeal is allowed accordingly



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**L. GACHERU**

**JUDGE.**

**19/12/2024**

Delivered online in the presence of;

Mr Maanzo for the Appellant

M/s Waititu for the Respondent

Joel Njonjo - Court Assistant.

**L. GACHERU**

**JUDGE.**

**19/12/2024**

