



**Rubia v Kenya Powere & Lighting Company & 2 others; County Government of Nairobi & another (Interested Parties) (Petition E006 of 2025) [2025] KEHC 9414 (KLR) (27 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
PETITION E006 OF 2025  
J NGAAH, J  
JUNE 27, 2025**

**BETWEEN**

**CHARLES WAITHAKA RUBIA ..... PETITIONER**

**AND**

**KENYA POWERE & LIGHTING COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF ENERGY & PETROLEUM .... 2<sup>ND</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY**

**COUNCIL OF GOVERNORS ..... INTERESTED PARTY**

**RULING**

1. By a petition dated 28 February 2025, the petitioner has petitioned this Honourable Court for:
  - a. An order quashing the action by the 1<sup>st</sup> respondent to cut off power supply to the 1<sup>st</sup> interested party.
  - b. An order to the 1<sup>st</sup> respondent to restore the cut power to the offices and essential services of the 1<sup>st</sup> respondent pending determination of the dispute with the 1<sup>st</sup> interested party under the [Intergovernmental Relations Act](#).
  - c. A declaration terming the act of arbitrary cutting of power supply by the 1<sup>st</sup> respondent without exhausting the dispute mechanisms provided under the [Intergovernmental Relations Act](#), to be unconstitutional.



- d. A declaration that cutting of power supply by the 1<sup>st</sup> respondent without exhausting the dispute mechanisms provided under the *Intergovernmental Relations Act*, is unconstitutional and breaches Kenyans rights to the highest standards of healthcare under Article 43 of *the Constitution*.
  - e. A declaration that cutting off power to essential services of the 1<sup>st</sup> interested party such as street lighting, without exhausting the dispute resolution measures in the *Intergovernmental Relations Act* is unconstitutional for endangering Kenyans right to protection of their safety in the public streets, and economic interests from businesses dependent on electric power supply.
  - f. An order directing the 1<sup>st</sup> respondent to forward their alleged payment of bills dispute with the 1<sup>st</sup> interested party to the quasi-judicial dispute resolution mechanisms provided under the *Intergovernmental Relations Act*.
  - g. Any other order this Honourable Court deems fit to grant.”
2. The factual background of the petitioner’s petition is that on 14 February 2025, the 1<sup>st</sup> respondent disconnected electricity from several of the 1<sup>st</sup> interested party’s offices over unpaid electricity bills. The disconnection was one, among other several past incidents, where the 1<sup>st</sup> respondent has disconnected power to county Governments. For instance, in 2014, Kisumu District Hospital lost power, putting patients at risk and in March 2023, Mombasa General Hospital faced a similar crisis. Homa Bay’s water supply was disrupted when power to its intake facility was cut off. And eight years ago, the 1<sup>st</sup> respondent also disconnected power from Busia Referral Hospital over unpaid bill of Kshs. 500,000/=.
  3. To demonstrate the danger to which the public has been exposed as a result of disconnection of power, the petitioner states that in Busia County Government’s case, for instance, services in the theatre and other crucial departments like the nursery in the County Government’s hospital were severely affected. The power disruption could have caused massive losses of lives. Indeed, a section of Busia residents came face-to-face with the crisis at the referral facility and were forced to rush victims of a road traffic accident to Matayos for treatment. The patients were later forced to be transferred to Tanaka Nursing Home, a private health institution.
  4. Other counties such as Mombasa, Kisumu, Homa Bay, and Migori have faced indiscriminate power disconnections, including at referral hospitals, such as the Coast General Teaching and Referral Hospital. It is contended that while the 1<sup>st</sup> respondent swiftly disconnects power to counties over unpaid bills, the 1<sup>st</sup> respondent itself owes to the County Governments “billions in unpaid land rates, wayleave charges, and water bills”.
  5. According to the petitioner, the structured dispute resolution mechanisms are necessary to prevent arbitrary power disconnections that compromise public services. Further, *the Constitution* foresaw such disputes occurring and that is why article 189 (3) of *the Constitution* provides that in any dispute between governments (and their organs), the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.
  6. The *Intergovernmental Relations Act* cap. 5G, is such a national legislation which, according to section 31 thereof, obligates State organs of both levels of government to first, resolve disputes amicably; and second, apply and exhaust the mechanisms for alternative dispute resolution provided under that Act or any other legislation before resorting to judicial proceedings as contemplated by article 189(3) and (4) of *the Constitution*. Section 33(1), in particular, states that parties shall undertake all necessary



measures to amicably resolve issues in controversy through consultation, conciliation or negotiation, before a dispute is formally declared.

7. The 1<sup>st</sup> respondent, it is contended, has failed to follow the laid-out procedures under both *the Constitution* and the *Intergovernmental Relations Act* before taking the actions of disconnecting power to critical sectors of the 1<sup>st</sup> interested party.
8. If the 1<sup>st</sup> respondent had a dispute with the 1 interested party, they were required by law to attempt mediation, arbitration and any of the other mechanisms set in place. If the attempts failed, then the 1<sup>st</sup> respondent would then declare a formal dispute with the 1<sup>st</sup> interested party, and the matter would be forwarded for intervention by the Summit set up under the Act. To this end, section 34 provides:

Within twenty-one days of the formal declaration of a dispute, the Summit, the Council or any other intergovernmental structure established under this Act shall convene a meeting inviting the parties or their designated representatives—

  - (a) to determine the nature of the dispute, including—
    - (i) the precise issues in dispute; and
    - (ii) any material issues which are not in dispute.
9. The exhaustive doctrine, a key tenet of judicial and quasi-judicial determination bound the 1<sup>st</sup> respondent under section 34 (2) of the same Act to exhaust the legislated dispute resolution mechanisms before resorting to the punitive actions of cutting power to a fellow State organ. The provision dictates that where a mechanism or procedure is specifically provided for in legislation or in an agreement between the parties, the parties shall make every reasonable effort to resolve the dispute in terms of that mechanism or procedure.
10. The disconnection of power to essential services is not an option on the table because of the prejudice occasioned to the public interest, especially to a fellow government organ which provides essential services just like the 1<sup>st</sup> respondent.
11. Accordingly, it is pleaded, that as a result of the 1<sup>st</sup> respondent's illegal, unconstitutional, and unreasonable actions, the Constitutional rights of Kenyans have been compromised. The 1<sup>st</sup> respondent's acts are alleged to be arbitrary and draconian and also unconstitutional.
12. In particular, the disconnection of power to hospitals and other County referral hospitals and health facilities because of alleged debts in utility bills compromises Kenyan's right to healthcare under Article 43 of *the Constitution*. The disconnection of street lighting compromises Kenyans right to safety and security especially at night.
13. Street lighting is a social amenity and is a key indicator of the relative socio-economic development status of our county. Street lighting also plays a pivotal role in enhancing security by lighting large areas both in urban and rural areas and also improving tremendously the business environment especially at night.
14. The 1<sup>st</sup> respondent owns and operates most of the electricity transmission and distribution system in the country and sells electricity to the citizens. It remains the implementation agent for street lighting. The act of cutting off power to a critical service provider, especially a County government, without exhausting the dispute resolution mechanisms codified is unconstitutional and, to be precise, it is in breach of article 189 (3) & (4) of *the Constitution*.



15. Alongside the petition, the petitioner filed a motion for interim and conservatory orders against the 1<sup>st</sup> respondent. In particular, the petitioner has prayed:

- “ 3. That pending the hearing and determination of this Petition, this Honorable Court be pleased to issue the following an Interim order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their agents, employees, or any other persons acting on their behalf from disconnecting electricity supply to the County Government of Nairobi essential facilities, County Government of Mombasa and all other forty five counties including but not limited to hospitals, water pumping stations, and street lightning.
4. That pending the inter partes hearing and determination of this petition, this Honourable court be pleased to issue conservatory orders restraining the Respondents from taking any adverse action against the 1<sup>st</sup> Interest Party and vice versa in relation to the ongoing electricity dispute.
5. That this Honourable court be pleased to issue a declaration that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent constitutes violate the principles of devolution, intergovernmental cooperation, and public service under *the constitution*.”

16. In response, the 1<sup>st</sup> respondent filed grounds of objection and a preliminary objection. In the preliminary objection, the applicant 1<sup>st</sup> respondent has pleaded as follows:

- “ 1. This Honourable Court lacks jurisdiction to hear and determine this dispute and therefore, the Petition and Notice of Motion both dated 28<sup>th</sup> February 2025 as against the 1<sup>st</sup> Respondent and together with all consequential orders sought by the Petitioner ought to be struck out with costs because the same offend the provisions of sections 3, 10, 11 (e), (f), (i), (k) & (l), 23, 24; 36; 40; 42; 160, and 224(2)(e) of the *Energy Act*, 2019 as read with Regulations 2, 4, 7, 9 and 21 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 and the Energy Tribunal Rules, 2008.
2. This Honourable Court lacks jurisdiction to hear and determine this dispute and therefore, the Petition and Notice of Motion both dated 28<sup>th</sup> February 2025 as against the 1<sup>st</sup> Respondent and together with all consequential orders sought by the Petitioner ought to be struck out with costs because the same offend the provisions of Article 159(2)(c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010 as read with sections 9(2) and (3) of the Fair Administration Action Act, 2015.
3. This Honourable Court lacks original jurisdiction to hear and determine this matter, and as such it ought to be struck out with costs, by dint of the appellate jurisdiction vested in the High Court vide section 37(3) & (4) of the *Energy Act*, 2019 and Regulations 21 of the Energy (Complaints and Disputes Resolution) Regulations, 2012.”

17. At the very outset, it must be appreciated that there is no dispute between the petitioner, in his personal capacity, and the 1<sup>st</sup> respondent on connection or disconnection of electrical energy. He has described himself in the petition as “a resident of Mombasa County, and a person acting in the public interest as well as his own interest as a resident of Kenya’s 47 counties.”



18. Based on whom the petitioner has described himself to be, I understand the petitioner to be a public spirited litigant who, like every other Kenyan of goodwill, respects the Constitution and is out to, uphold and defend it in terms of article 3 thereof. This article provides:

3.

(1) Every person has an obligation to respect, uphold and defend this Constitution.

19. Even in the absence of this provision of the law, it has long been held that such litigants as the petitioner have the locus or standing to petition the court in matters of public interest. In Halsbury's Law of England, Judicial Review Vol. 61 (2010) 5<sup>th</sup> Edition at paragraph 656, they have been entertained as persons with "sufficient interest" which concept has itself been explained in the following terms:

"Sufficient interest' is not defined, but it is in practice a broad, flexible concept. What is a 'sufficient interest' is a mixed question of fact and law. The determination of any issue as to whether the claimant has a sufficient interest to bring the challenge in question will depend on consideration of the relationship between the claimant and the matter to which the claim relates, having regard to all the circumstances of the case. In appropriate cases, the court may also have regard to broader concerns, including the merits of the challenge, the importance of enforcing the law, the importance of the issue raised, the presence or absence of any other person with sufficient interest, the nature of the unlawful conduct alleged and the role of the claimant in relation to the issues under consideration. In recent years, the rules on standing in judicial review claims have been considerably relaxed. Individuals have been recognised as having standing not only where their rights or interests are affected but in a broad range of situations where in some way they are affected by a decision. A public spirited citizen raising a serious issue of public importance may be recognised as possessing standing. The courts have increasingly recognised that a wide range of pressure groups have standing to bring challenges in matter which concern their areas of interest or expertise. (Emphasis added).

20. No doubt, the petitioner falls into the category of 'a public spirited citizen raising a serious issue of public importance' or an issue of public interest.

21. Turning back to the Energy Act, 2019 and the inbuilt appellate mechanisms for resolution of disputes, the starting point for purposes of determination of the 1<sup>st</sup> respondent's preliminary objection is section 160 (1) of the Act which sets out the circumstances under which electrical energy may be refused or discontinued. These circumstances include cases where the consumer has failed to pay charges for consumption of electrical energy (see section 160(1)(a)). Section 160 (3) is to the effect where a dispute arises as to any charges, including charges for consumption of electrical energy, the dispute is to be referred to the Energy and Regulatory Authority which has been established section 9 of the Act.

22. According to section 24 (1), a person aggrieved by a decision of the Authority may appeal to Energy and Petroleum Tribunal established under section 25 of the Act. And under section 37(3) of the Act, any person aggrieved by the decision of the Tribunal may appeal to this Honourable Court.

23. In a nutshell, the 1<sup>st</sup> respondent's preliminary objection is that, to the extent that the petitioner has sidestepped what, in the 1<sup>st</sup> respondent's view, are the mandatory procedures prescribed by the Act for the resolution of disputes associated with connection and consumption of electrical energy, this suit is contrary to article 159 of the Constitution and section 9 (2) and (3) of the Fair Administrative Action Act, cap. 7L. Article 159(2) (2) of the Constitution provides that in exercise of judicial authority, courts must promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.



24. Section 9 (2) of the *Fair Administrative Action Act*, on the other hand, provides that the High Court or a subordinate court shall not review an administrative action or decision under the Act unless the mechanisms, including internal mechanisms for appeal or review and all remedies available under any other written law, have first been exhausted.
25. The question that then arises is, assuming the petitioner has a dispute with the 1<sup>st</sup> respondent, whether the petition is bad in law for the reason that, it is contrary to article 159 (2)(c) of *the Constitution* and section 9(2) of the *Fair Administrative Action Act* and, in the same breath, whether this Honourable Court is deprived of jurisdiction to entertain it.
26. This question has arisen before and the Supreme Court addressed it squarely in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment). The *Energy Act* was one of the two Acts of Parliament that were at the centre of the question before court and, for this reason, I need only reproduce here what the Supreme Court said in its judgment:

“ii. Whether the appellant was required to exhaust the alternative dispute resolution mechanisms under EMCA and the *Energy Act* before filing his constitutional petition at the Environment and Land Court...

91. On our part, in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (*NGOs Co-ordination Board*) we outlined the doctrine of exhaustion of administrative remedies and adopted our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR* where we held that:

“... even where superior courts had jurisdiction to determine profound questions of law, 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.”

92. In the above decision, we furthermore emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by *the Constitution* and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.
100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant’s claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of



the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows:

“What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* [CA No 2 of 2008](#). Perhaps that is why the legislature at section 9(4) of the [Fair Administrative Action Act](#) stipulates that:

“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. Our reading of the above provision reveals that contrary to the appellant’s contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.”

101. Reference to the High Court above must be read *mutatis mutandis* with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the [Fair Administrative Action Act](#), we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why section 9(4) of the [Fair Administrative Action Act](#) creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.
102. In the above context, what was in issue in the appellant’s petition? The appellant claims as regards the environmental question that, NEMA issued a stop order that was favourable to him but that NEMA failed to enforce the stop order. Despite the existence of the stop order, the 2nd and 3rd respondents continued their mining activities. The issue therefore that arose in the petition was whether the acts of the 2nd and 3rd respondents, by failing to adhere to the stop order, violated the appellant’s rights under articles 40 and 42 of [the Constitution](#).
103. The other claim by the appellant is that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so.



104. Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:

“In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.” [Emphasis ours].

105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

27. Taking cue from this decision, there would be nothing wrong with the petition to the extent that the petitioner is seeking this Honourable Court to interrogate the constitutionality of the 1<sup>st</sup> respondent’s unilateral and rather arbitrary acts of disconnection of electricity to county Governments’ offices and other facilities run by the County Governments, such as hospitals, because of pending electricity bills or because of disputes as to whether such bills are pending in the first place.

28. This Honourable Court’s mandate in this regard is rooted in article 165(3) of *the Constitution* which states:

(3) Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;



- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
  - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
  - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
  - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
  - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation. (Emphasis added).

29. Article 165(3)(d) of *the Constitution* would be of particular interest as far as the *Energy Act* from which 1<sup>st</sup> respondent draws its powers is concerned. Section 3 of that Act, which the 1<sup>st</sup> respondent largely relied upon in its preliminary objection states that the Act overrides any other Act; it reads as follows:

3. Act to prevail

- (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.
- (2) Save where this Act expressly provides otherwise, any licence granted or anything done under this Act shall not affect the right, privilege, obligation or liability acquired by any licensee or other person in any contract or under any written law prior to the commencement of this Act.

30. While the *Energy Act* may prevail in the event of conflict with any other law, it certainly cannot prevail over *the Constitution* and, in particular, the provisions in *the Constitution* authorising this Honourable Court to interrogate the constitutionality of any action by the 1<sup>st</sup> respondent purportedly undertaken on the strength of the *Energy Act* or even *the Constitution* itself.

31. One other provision in the *Energy Act* that has caught my attention is section 161 thereof which places the Government, the County Governments and Government agencies in a somewhat special category of electrical energy consumers. According to this provision, whenever any of these entities has pending power bill, it is incumbent upon the 1<sup>st</sup> respondent to report the debt to the Cabinet Secretary for the National Treasury. It reads as follows:



161. Where Government or its agencies default in paying electricity bills Without prejudice to any other remedies available a licensee which has outstanding uncollected billings attributable to the National Government, County Government or any Government agency shall report such billings to the Cabinet Secretary for the National Treasury who shall, in turn, report the same to Parliament for necessary appropriation.
32. In the wake of this provision of the law, this Honourable Court is entitled to interrogate the constitutionality of the 1<sup>st</sup> respondent's actions of disconnecting power from County Governments' facilities ostensibly because the County Governments' electricity bills have not been settled.
33. For the foregoing reasons, I am satisfied that the instant petition is properly before this Honourable Court. The preliminary objection is overruled. Costs will abide the outcome of the petition. It is so ordered.

**SIGNED, DATED AND DELIVERED ON 27 JUNE 2025**

**NGAAH JAIRUS**

**JUDGE**

