



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kenya Power & Lighting Company Limited v Mutunga (Environment and Land Appeal 6 of 2023) [2025] KEELC 2895 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2895 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 6 OF 2023**

**NA MATHEKA, J  
MARCH 26, 2025**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT**

**AND**

**DANCAN M. MUTUNGA ..... RESPONDENT**

**JUDGMENT**

1. Kenya Power & Lighting Company PLC the Appellant herein, being aggrieved by and dissatisfied with the Ruling and Order delivered by the learned Principal Magistrate at Machakos on the 10<sup>th</sup> March 2022 in Machakos ELC E374 of 2021 Dancan Mutunga vs Kenya Power & Lighting Company Limited appealed to this Honourable Court against the said Ruling and Order on the following main grounds amongst other grounds to be adduced and canvassed at the hearing hereof, namely:
  1. That the learned Magistrate erred in law and in fact by finding that the Preliminary Objection dated 12<sup>th</sup> August 2021 is not meritorious hence dismissing the same in the circumstances.
  2. That the learned erred in law and in fact by finding that it had the jurisdiction to deal with this case despite the express provisions of the *Energy Act* No. 1 of 2019.
  3. That the learned Magistrate erred in law and fact by finding that there were sufficient grounds to dismiss the Preliminary Objection dated 12<sup>th</sup> August 2021
  4. That the learned trial Magistrate erred in law and in fact in totally disregarding the evidence and submissions tendered by the Appellant, failing to properly and exhaustively evaluate the Submissions and authorities on record and as a result, arriving at an erroneous decision.
  5. That the learned trial Magistrate erred in law and in fact by wrongly evaluating the evidence on record and misdirected herself by arriving at conclusions and a determination that is unsupported by enough evidence and/or based on no evidence at all.



6. That the learned Magistrate erred in law and in fact by exercising her discretion arbitrarily and in disregard of the applicable legal principles thereby dismissing the Preliminary Objection and consequently, the decision of the learned Magistrate was plainly wrong;
  7. That the learned trial Magistrate erred in law and in fact in arriving at a decision that was against the weight of submissions on record and weight of law and as a result arriving at an erroneous decision;
  8. That the learned trial Magistrate took into consideration matters that it ought not to have taken into consideration and failed to take into consideration matters it ought to have taken into consideration and thus the Honourable Magistrate misdirected herself totally on the Law and on the facts and failed to appreciate the totality of submissions and authorities presented thereby arriving at an erroneous decision.
2. The Appellant prays that this Honourable Court be pleased to issue orders that;
1. This Appeal be allowed with costs.
  2. The Honourable Magistrate’s Ruling and Order delivered on 10<sup>th</sup> March 2022 in Machakos ELC E374 of 2021 Dancan Mutunga vs Kenya Power & Lighting Company Ltd be set aside in its entirety and be substituted with an Order of the findings of the Appellate Court.
  3. That the Costs of this Appeal be awarded to the Appellant.
3. The respondent submitted that they instituted this claim in the lower court vide an amended plaint. It is their claim that in the year 2018 the appellant trespassed into his property Machakos/Kiandani/5712 and passed an overhead wire without the respondent’s consent and prevented the respondent from entry or further development to his property. No way leaves agreement was entered into between the parties in blatant disregard of the laws as to consent by a land owner. Consequently, the respondent sought through the plaint orders that a declaration to issue that the appellant has trespassed on the suit property without the respondent’s consent and caused permanent and irreparable damage thereto. Costs of the suit and interests at court rates.
4. The appellant raised a preliminary objection on the jurisdiction of the court to hear and determine the suit stating that the matters raised were a preserve for the jurisdiction of the energy Regulatory Authority. Their objection was dismissed hence this appeal.
5. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;
- "I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."
6. A notice of preliminary objection was discussed by the Supreme Court in Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others cited the leading decision on Preliminary Objections, Mukisa



Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

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... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

7. Similarly, the Supreme Court in Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR made the following observation as relates to Preliminary Objections:

“... 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.”

8. The point of law the appellant argues is that this court does not have jurisdiction to entertain the suit as per the express provisions of the [Energy Act](#) No. 1 of 2019. In the case of Samuel Kamau Wachira vs KCB & 2 Others, Civil Application No. 2 of 2012 (eKLR) the court held that jurisdiction flows from [the constitution](#) or legislation or both. In the case of Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited (1989) KLR 1 the court held that without jurisdiction it has to down its tools.

9. I have carefully considered the preliminary objection. The instant preliminary objection was brought dated 12<sup>th</sup> August 2021 and argued through written submissions. The court reserved ruling on the preliminary objection for 10<sup>th</sup> March 2022. At the time of arguing the preliminary objection, Parliament had processed a legal framework to among other objectives, consolidate the laws relating to energy and to establish an energy and petroleum tribunal vested with jurisdiction to hear and determine disputes and appeals relating to the energy and petroleum sectors. That legal framework is the current [Energy Act, Act No 1 of 2019](#). The said Act received presidential assent on 12<sup>th</sup> March 2019 and became operational on 28<sup>th</sup> March 2019.

10. Section 25 of the [Energy Act, Act No 1 of 2019](#), establishes the Energy and Petroleum Tribunal. Section 25 of the [Energy Act](#), No. 1 of 2019 provides as follows;

25. There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law.”

11. Section 36 of the Act prescribes the jurisdiction of the Tribunal in the following terms:

”36

- 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.”
12. It is not in dispute that the dispute between the appellant and the respondent revolves around the development of energy infrastructure namely electricity overhead wires on the respondent’s land which is private land. The respondent is aggrieved by the acts of the appellant. 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 upon the Tribunal. The dispute herein therefore falls within the jurisdiction of the Energy and Petroleum Tribunal.
  13. Had the trial court taken its time to consider these important provisions of the law that were highlighted in the Preliminary Objection, it would have found that the respondent had no option but to refer the dispute to the Tribunal as the appropriate forum with jurisdiction to grant the orders sought by the Respondent.
  14. 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.
  15. Section 9 of the Fair Administrative Actions Act provides that :
    9.
      - (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 sub-section (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.”
  16. I concur with the appellant’s submissions. I find that had the trial Magistrate looked at their submissions and the Preliminary Objection especially on the above provisions of the law, she would have discovered that appellant’s act of constructing the overhead lines in the respondent’s land was a decision that affected the rights of the plaintiff and therefore is an administrative action. Section 2 of the Fair Administrative Actions Act defines administrative action as follows:



2. In this Act, unless the context otherwise requires- "administrative action" includes-(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates; means a person who takes an or who makes an administrative ..... 'decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be; "empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken; "failure", in relation to the taking of a decision, includes a refusal to take the decision;" state organ" has the meaning assigned to it under Article 260 of the Constitution; and "tribunal" means a tribunal established under any written law."
17. In light of the above provisions of the law it is clear that this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Energy Act the trial Magistrate erred in law and fact by finding that the court had jurisdiction to hear disputes arising from the Energy Act contrary to sections 25 and 36 of the Energy Act, 2019.
18. In case of *Elijah Mutahi & 10 others vs Kenya Power and Lighting Company Ltd* 2020 eKLR where the Court held that;
- "Since the Energy Act of 2019 under Section 25 as read together with Section 36 creates an exclusive jurisdiction on the disputes relating to energy and gives the Tribunal original civil jurisdiction on any dispute between a licensee and a third party or between licensees and has power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance, I hereby refer this dispute to the Energy and Petroleum Tribunal established under Section 25 of the Energy Act, Act No. 1 of 2019, to hear and determine the dispute within the framework of section 36 of the Energy Act, No. 1 of 2019."
19. I find that the trial court has no jurisdiction, I find that the appeal is merited. Accordingly, I allow the appeal by setting aside the ruling of the learned trial Magistrate dated March 10, 2022 and substituting it with an order upholding the preliminary objection and striking out the respondent's claim in the lower court with costs to the appellant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF MARCH 2025.**

**N.A. MATHEKA**

**JUDGE**

