



**Macaria v Kenya Power and Lighting Company (Petition E190 of 2023)  
[2024] KEHC 4009 (KLR) (Constitutional and Human Rights) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4009 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E190 OF 2023**

**LN MUGAMBI, J**

**APRIL 25, 2024**

**BETWEEN**

**DANIEL CYRUS MACARIA ..... PETITIONER**

**AND**

**KENYA POWER AND LIGHTING COMPANY ..... RESPONDENT**

**RULING**

**Introduction**

1. The ruling is in respect of the respondent’s Notice of preliminary objection dated 10<sup>th</sup> July 2023. The preliminary objection is that the Court lacks jurisdiction and is based on the following grounds:
  - i. Sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42; 159(3); 160(3) and 224(2)(e) of the *Energy Act*, 2019 together with,
  - ii. Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with,
  - iii. Article 159(2)(c) and 169(1)(d) and (2) of *the Constitution* and,
  - iv. Sections 9(2) and (3) of the Fair Administration Act, 2015.

**Respondent’s Submissions**

2. In support of its preliminary objection, the respondent through its Advocate, Joseph Muchai filed submissions dated 19<sup>th</sup> July 2023. He pointed out that the petition relates to billing and disconnection of electricity supply by the respondent.



3. The respondent's Advocate thus contended that this Court lacks jurisdiction to entertain the Petition based on the doctrine of exhaustion of remedies. He cited on *Albert Chaurembo Mumbo & 7 others vs. Maurice Munyao & 148 others*; SC Petition No 3 of 2016 (2019) eKLR where the Supreme Court observed:

“(118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of 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 relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the disputes as provided for in the relevant parent statute.”

4. Similarly, he relied on *Adero and Another vs. Ulinzi Sacco Society Limited* (2002)eKLR, *United Millers Ltd vs. Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 Others* [2021] eKLR, and *Republic vs. Magistrate Court, Mombasa; Absin Synergy Limited (Interested Party)* Judicial Review E033 of 2021) [2022] KEHC 10 (KLR).
5. He argued that a suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Further, without jurisdiction, the Court cannot confer jurisdiction upon itself as observed by the Court of Appeal in *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR.
6. Other cases cited included: *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR, *Joseph Njuguna Mwaura & 2 Others vs. Republic* [2013] eKLR, *Kenya Ports Authority v. Modern Holdings [E.A] Limited* [2017] eKLR and *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1.
7. It was contended on behalf of the Respondent that the jurisdiction of this Court is limited by the express provisions the *Energy Act*, 2019 which provide for the dispute resolution of this nature to be determined by the Energy & Petroleum Regulatory Authority or the Energy & Petroleum Tribunal. Counsel submitted that the dispute resolution mechanism through such bodies is explicitly recognized under Article 159 (1) and 169(1(d) of *the Constitution*.
8. The Respondent counsel submitted that under Section 3 of the *Energy Act* disputes on distribution, supply or use of electrical energy are adjudicated in the manner directed by the Act, a position he stated was affirmed by the Court in *Abidha Nicholus vs. Attorney General & 7 Others*; *National Environmental Complaints Committee (NECC) & 5 Others (Interested Parties)* (2021)eKLR where it was observed thus:

“The import of the above (section 3) is that the *Energy Act* 2019 prevails over any other Act of Parliament or law 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. If there was any such conflict, then *the Constitution* would prevail.”

9. Accordingly, Counsel stated that the Act Section 11(i) provides that the Energy & Petroleum Regulatory Authority has the power to investigate and determine complaints or disputes between parties over any matter relating to licenses and license conditions. It's authority over disputes that nature is further affirmed under Section 167(m) of the *Energy Act*, 2019 which grants the Cabinet Secretary power to make regulations for several purposes. Including prescribing the procedures for hearings, settlement of disputes and any proceedings before the Authority. These Regulations are the



- Energy (Complaints and Dispute Resolution) Regulations, 2012 (the Regulations) which provide for dispute resolution under 2, 4, 7, 9 and 21 in line with Sections 3, 9, 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42; 159(3); 160(3); 167; 168 and 224(2)(e) of the Act.
10. Furthermore, Counsel submitted that the Act under Section 25 establishes the Energy and Petroleum Tribunal. Its jurisdiction under Section 36 is to hear and determine all matters referred to it, relating to the energy and petroleum sector. And in the context of this case, original civil jurisdiction on any dispute between a licensee and a third party or between licensees. Additionally, the Tribunal has appellate jurisdiction over the decisions of the Authority and power to grant the requisite equitable reliefs to aggrieved parties.
  11. On this premise Counsel relied in *Speaker of National Assembly v. Njenga Karume* [1992] 1KLR 425 where the Court of Appeal held that:

“There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of parliament that procedure should have been strictly followed.”
  12. He also relied on the case of *Cyrus Komo Njoroge vs. Kiringa Njoroge Gachoka & 2 Others* (2015)eKLR.
  13. Counsel further pointed out the *Fair Administrative Action Act*, 2015 under Section 9(2) and (3), bars this Court from reviewing an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. For that reason, where the Court finds that such mechanism has not been exhausted, it is to direct a party to first exhaust such a remedy.
  14. Reliance was placed in *Abidha Nicholus* (supra) where the Court noted that:

“This court further finds that Section 9 (2) and 3 of the Fair Administration Act 2015 removes this kinds of disputes from this court and places jurisdiction to the Energy Authority. The upshot of the above is that the objection raised by the 8<sup>th</sup> respondent succeeds and the petition against the 8<sup>th</sup> respondent is struck out as there is alternative mechanism for resolving the dispute.”
  15. Also relied on was the case of *Night Rose Cosmetics (1972) Ltd v. Nairobi County Government & 2 Others* (2018)eKLR and *Mutanga Tea & Company Ltd v. Shikara Limited & Another* [2015] eKLR.
  16. The Respondent Counsel described this petition as an abuse of the court process because it was manifest that the petitioner did not exhaust the statutory dispute mechanisms prescribed under the *Energy Act*. As a consequence, Counsel asserted that the Court lacks jurisdiction to entertain the petition at this juncture. He cited *Thomas Schering vs. Nereah Michael Said & 3 Others* [2019] eKLR where it was held thus:

“From the provisions of the *Energy Act*, it is apparent that Parliament in its wisdom wanted such disputes to be taken away from the mainstream courts to be handled by a specialized body known as the Energy Regulatory Commission.”
  17. The Respondent’s Advocate further relied on *James Mwaura Ndung’u v. Kenya Power and Lighting Co. Ltd* [2016] eKLR, *Kenya Power and Lighting Co. Ltd v. Geoffrey Orina Oganga* [2020] eKLR, *Kenya Power & Lighting Co Limited v. Samuel Mandere Ogeto* [2018] eKLR, *Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013* [2017]eKLR, *Njoroge v. Kenya*



Power & Lighting Company (Constitutional Petition E533 of 2021) [2023] KEHC 1924 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling) and others.

18. Finally, The Respondent Advocate relied on Section 27 of the *Civil Procedure Act* and submitted that the petitioner ought to bear the costs of this suit for electing to file the instant suit against the respondent prematurely. He cited the Joseph Nzyoki Mwanthi vs Kenya Power & Lighting Co. Ltd (2017) eKLR in support of this submission in which the Court held as follows:

“I have on my part considered the sort of reliefs sought by the appellant in the plaint. It is apparent from the plaint that the dispute is over the charges and or supply of electricity. In my view, the dispute is a matter which is reserved by statute to be heard and determined by the Energy Regulatory Commission under Section 61(3) (a) of the *Energy Act*. The *Energy Act* also provides for any person who is dissatisfied with the decision of the Energy Regulatory Commission to file an appeal with the Energy Tribunal under Section 108 of the aforesaid Act. I am therefore convinced that the learned Senior Resident Magistrate properly dismissed the suit for want of jurisdiction. In the end, I find no merit in this appeal. It is dismissed in its entirety with costs to the respondent.”

### **Petitioner’s case**

19. In response the petitioner filed his response and submissions dated 26<sup>th</sup> July 2023. The petitioner’s opposed the preliminary of objection. He submitted on, jurisdiction and why the respondent’s preliminary objection is wanting for failing to meet the legal threshold.
20. According to the petitioner, the Respondent had misunderstood the essence of his petition. That contrary to the respondent’s allegation, the Petition revolves around the respondent’s actions in regard to the new power consumption rates that took effect on April 1, 2023.
21. The petitioner claims that the respondent deliberately and unlawfully changed the effective date of the new rates and in some cases backdated the effective date by more than three (3) months in violation of Article 46 (1)(a) of *the Constitution*. Accordingly, the petitioner stressed that the petition is primarily pegged on violation of consumer right by the respondent.
22. The petitioner rebutted the respondent’s allegation of failure to exhaust the alternative remedies and stated that he had reached out to the respondent with his complaint as evidenced by the various email correspondences outlined in this response. In view of this, he asserted that this Court has jurisdiction to entertain his petition. He relied on Allan E. Donovan vs Kenya Power and Lighting Company (2019)eKLR where the Court addressing a similar suit observed as follows:

“ 31. This matter as I consider it would have been referred to the tribunal for dispute resolution as per our Constitution, however the alternative dispute mechanism would not have exhausted the predominant issues related to violence of human rights. There is challenge of this matter not being determined timely and effectively as submitted by the petitioner. I find that the petitioner has persuaded the court, that in the circumstances of this case, the exhaustion requirement would not result in the values enshrined in *the constitution* or law to permit the suit to proceed before the Energy Regulatory Commission. I find in this matter there is exception to the exhaustion requirement...”



23. He also cited the case of James Kugocha vs Chief County Officer Department of Infrastructure (2018)eKLR.
24. The petitioner further contended that the respondent's preliminary objection is misplaced and totally disregards his grievance on violation of his consumer rights as protected under *the Constitution* which is the key issue for determination. For this reason, he argues that the respondent's preliminary objection is unmerited and so ought to be dismissed.

### **Analysis and Determination**

25. The only issue for determination is whether the preliminary objection founded on the doctrine of exhaustion of remedies is merited.
26. What constitutes a preliminary objection was set out in the case of Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA 696 and later emphasized by the Supreme Court in the Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others(2014)eKLR as follows:

“

“(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696: “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”.

27. Discussing its nature in Dismas Wambola v Cabinet Secretary, Treasury & 5 others (2017) eKLR, the Court noted as follows:

“A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence....”

28. Additionally, the observation in the Oraro vs. Mbaja [2005] 1 KLR offers significant insight where the Court observed that:

“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 facts



pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

29. A court’s jurisdiction is most essential requirement that must be ascertained before embarking on any determination. Jurisdiction refers to the authority or power given to the Court or legal body to hear and determine a Dispute by the law that constitutes it. Black’s Law Dictionary Tenth Edition describes jurisdiction to mean: “A court’s power to decide a case or issue a decree.”

30. The Supreme Court had the occasion to discuss the issue of jurisdiction in Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others (2012)eKLR and held thus:

“ A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

31. Likewise, in Benson Makori Makworo v Nairobi Metropolitan Services & 2 others (2022)eKLR, the court citing the Court of Appeal’s opine noted as follows:

“I will, however, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:



By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...”

32. The jurisdiction of the High Court is provided for in Article 165 (3) of *the Constitution* as follows:

- (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.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.\
- (5) The High Court shall not have jurisdiction in respect of matters—



- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
  - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Const2010 [Constitution of Kenya, 2010](#) 72
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

33. The question to be asked is, how does the principle of exhaustion of remedies come into play as a jurisdictional issue?

34. Under the doctrine of exhaustion of remedies, Courts do not take up disputes that are specifically required to be adjudicated before another an administrative forum or body.

Black’s Law Dictionary 10<sup>th</sup> Edition explains the doctrine of exhaustion of remedies as follows:

“The doctrine that if an administrative remedy is provided by a Statute, a claimant must seek relief first from the administrative body before judicial relief. The doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure courts will not be burdened by cases in which judicial relief is unnecessary.”

35. The Supreme Court in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (2019) eKLR held thus:

“... the Court must exercise restraint in exercising its jurisdiction under Article 165. Where there exist alternative methods of dispute resolution, the Court must exercise deference to the bodies statutorily mandated to deal with specific disputes in the first instance.... The foregoing verdict also finds support in an adage principle in administrative law of “Exhaustion of Administrative Remedies” and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by [the constitution](#) and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance ...In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of 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 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... Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the



statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”

36. Be that as it may, there may be instances where an exception to the application of this doctrine is justified. The Court of Appeal in *Fleur Investments Limited vs Commissioner of Domestic Taxes & another* [2018] eKLR stated as follows:

“

“22. For this proposition the appellant called in aid this Court’s finding in the case of *Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546* where the Court expressed itself in relevant part as follows: -

“...where there was an alternative remedy and especially where parliament has provided a statutory 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 was necessary for the court to look carefully to 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...”

23. ... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.”

37. The Court also in *Krystaline Salt Limited vs Kenya Revenue Authority (2019)eKLR* on this issue opined as follows:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

...this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”



38. In William Odhiambo Ramogi case (supra) the Court emphasized that certain circumstances deserved exceptions despite the existence of the alternative remedies. The Court stated:

“ 60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. 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.”

39. I must now turn to the Petition in order to ascertain if the nature of the dispute is one which the doctrine of exhaustion of remedies applies and thus ousting the jurisdiction of this Court.

40. For a preliminary objection to be raised, it must be based on the assumption that the facts as pleaded by the Petitioner are correct without contesting them.

41. The gist of the Petitioners grievance is that whereas the Energy and Petroleum Regulatory Authority (EPRA) announced revised electricity tariffs effective April 1, 2023, Kenya Power and Lighting Company violated his Consumer rights by billing him using the new tariffs for electricity he had consumed, prior hence violated his consumer rights under Article 46.

42. The Respondent argued that this dispute raised in this Petition could be remedied under provision of the *Energy Act*, 2019 hence the same should be struck out as the Court’s jurisdiction is ousted on the principle of exhaustion of remedies.

43. In paragraph 4 of the Petition, the Petitioner sets out the facts that allege the manner his right under Article 46 of *the Constitution* were violated under the heading “The Contentious Issues.” In the said paragraph 4 a to d, he alleges:

a. My electricity meter reading of March 31, 2023 shows 27283, while a photo of the meter taken on April 1, 2023 shows meter reading of 27426 (see appendix II page 20). The readings imply that March 31 and April 1,2023, I consumed 145kWh of power, and between April 1 and April 30, 2023, my power consumption was 66kWh! My conclusion is that my electricity meter



was ‘bumped up’ between the end of March and the beginning of April 2023 (i.e. between March 31, and April, 2023).”

b. In the month of May, 2023, I received two bills from KPLC as follows: ‘One bill dated 03/05/2023 of meter reading 26595 to 27434 (839kWh @20.97 kWh, while my meter reading on 31/03/2023 was 27283 (As attached photo that I took on March 31, 2023 shows in Appendix II, page 19). This means the power consumption between the meter readings 26595 and 27283 i.e. 688 0ccured before April, 2023’

Based on my monthly average power consumption of between 110 to 230 kWh a month, 688 kWh level of power would suggest a consumption period of about three to four months (3 to 4 months). Effectively, KPLC billed me at the new rate of Kshs. 20.97 for power consumed three to four months before the new rate took effect.”

A second bill dated 11/05/2023 shows meter readings of 27434 to 27500. While my meter reading on 12/05/2023 was 27493 (see the attached photo of the meter reading on 12/05/2023 in Appendix II page 22). The overbilling by 7 kWh (27500-27434) was unjustified. Furthermore, KPLC erred by labeling the meter readings of May 11, 2023 as ‘real’ while fully aware that these were estimated readings. A statement of account is attached (Appendix II pg 23).

c) Clearly, KPLC deliberately ‘bumped up’ my meter reading expecting not to be caught. When KPLC realized that the bumping had failed to escape notice, the power supplier avoided the meter reading number 27283 (April 1 meter reading) like a plague. Each time I alluded to the meter reading of April 1, 2023, KPLC would ask for a clear photo of the meter. The exchanges between KPLC and I (Appendix III pg 25) demonstrate that KPLC bumped up meter reading deliberately and knowingly...”

d) The electricity bills for the interested parties have similar billing errors. The documents shared by the interested parties point to serious infringement of fundamental Constitutional rights and freedom of electricity consumers (sic)in Kenya- freedoms that are protected under Article 46 of the Constitution of Kenya 2010.

44. Having set out the basis of the Petition and the manner those rights were violated, the petitioner sought the following prayers at paragraph 7 of the Petition:

- a. The Court finds KPLC culpable, and in violation of electricity consumers rights and freedoms as prescribed in Constitution of Kenya 2010
- b. The Court directs/orders KPLC to correct all the bills where the new rate of Kenya shillings 20.97 per kWh was applied to power consumed before the effective date of April 1, 2023 for affected category of consumers, the old rate of 12.60 Kenya Shilling per kWh should apply up to March 31, 2023.

For above to happen, KPLC be ordered to do one of the following two things:

- i. Either pass credit to all affected accounts with the overcharged amounts or alternatively,
- ii. Change the effective date for the new rates to start at a new later date. This will give Kenyan Consumers time to be prepared, and avoid unwarranted ‘ambush’ and a violation of their fundamental rights and freedoms to enjoy accurate billings as consumers of KPLC services, as prescribed in the Constitution of Kenya 2010, Article 46.



- c. Reconnect electricity for all customers, if the disconnection arose from KPLC's violation of their constitutionally guaranteed fundamental rights and freedoms as prescribed in Article 46 of *the Constitution* of Kenya 2010.
- d. The Court orders KPLC not to disconnect electricity for non-payment of Bills in dispute, until this case is heard and determined.

45. The issue therefore becomes whether the Petitioner's grievances can be adjudicated upon by this Court as a constitutional question or whether it ought to have been pursued under the relevant provisions of the *Energy Act*, 2019 and the Regulations thereunder thereby ousting this Court's jurisdiction under the doctrine of exhaustion of remedies.

46. The *Energy Act* 2019, among others makes provision for regulating the relationship between a licenced supplier of electricity and a consumer. Section 160(3) enumerates disputes that may be resolved by referring the matter to the Authority, under Section 2 of the Act 'Authority' means the 'Energy and Petroleum Regulatory Authority (EPRA) established under section 9 of the Act'. It states:

'If any dispute arises as to—

- (a) any charges;
- (b) the application of any deposit;
- (c) any illegal or improper use of electrical energy;
- (d) any alleged defects in any apparatus or protective devices; or
- (e) any unsuitable apparatus or protective devices, it shall be referred to the Authority.'

Further, part of the powers of the Authority under Section 11 (k) is to "issue orders or directions to ensure compliance with this Act"

47. Section 25 of the *Energy Act* on the other hand provides for the Establishment of the Energy and Petroleum Tribunal in the following terms:

Establishment of the Energy and Petroleum Tribunal

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.

Section 30 sets out the jurisdiction of the 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.

Under Section 37 (3) Appeals from the Tribunal are to be made to the High Court. It states:

“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.”

Under Section 40 the Tribunal is empowered to hear appeals from the Energy and Regulatory Authority or any licensing authority. The Section states:

Appeals from decisions of the Authority

‘40. Where under this Act the provision is made for appeals from the decisions of the Authority or any licensing authority, all such appeals shall be made to the Tribunal, in accordance with the provisions of this Act.’

- 48. Having regard to the above provisions and bearing in mind the nature of the dispute brought by the Petitioner via this Petition, whereby the Petitioner alleges that KPLC charged for the electricity consumed prior to 1/4/2023 using the new tariffs rates, yet the commencement date for the new tariffs was 1/4/2023; it is my considered opinion that such a complaint is complaint relating to charges in respect of electricity consumption and should have been pursued in accordance with provisions of Section 160 (3) of the *Energy Act* by having the matter first referred to the Energy and Petroleum Regulatory Authority (EPRA) for resolution. And, if dissatisfied with EPRA’s decision on the matter, it could be appealed to the Energy and Petroleum Tribunal by dint of Section 30(4) of the Act.
- 49. In any case, he could permissibly approach the Tribunal directly under section 30 (3) of the Act which provides that the ‘The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees,’
- 50. Further, an examination of the prayers in this Petition, confirms that they were all within the purview of the Tribunal to grant as under Section 30 (5) the Tribunal ‘has the power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance’.
- 51. In the light of these glaring provisions setting an elaborate dispute settlement machinery under the Act, I am satisfied that the institution of this Petition before this Court offends the doctrine of exhaustion of remedies as this matter could comfortably be settled on non-constitutional grounds.
- 52. I uphold the preliminary objection and order that that the Petition be struck with costs to the Respondents.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of April, 2024.

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L N MUGAMBI

JUDGE

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