



Kenya Power & Lighting Company Limited v Lalji Makan Limited & 2 others (Civil Appeal 581 of 2018) [2023] KEHC 25992 (KLR) (Civ) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 581 OF 2018

DAS MAJANJA, J

NOVEMBER 30, 2023

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

LALJI MAKAN LIMITED 1ST RESPONDENT

MPAKA HOLDINGS LIMITED 2ND RESPONDENT

KIRAGU & MWANGI LIMITED 3RD RESPONDENT

(Being an appeal from the Ruling and Order of Hon. K. I. Orenge, SRM dated 26th November 2018 at Nairobi Magistrates Court at Milimani CMCC No. 5827 of 2018)

JUDGMENT

1. The 1st Respondent filed suit in the Subordinate Court seeking the following reliefs set out in the Plaintiff:
 - a. An injunction order compelling the 1st Respondent to reconnect electricity supply to the Plaintiff's premises through meter number 537068;
 - b. Cancellation of the electricity bill amounting to KShs. 224,747.93 demanded from the Plaintiff by the 1st Defendant;
 - c. Recalculation of electricity consumption accruing only to the Plaintiff's premises meter number 537068;
 - d. Compensation for loss of business from 24/05/2018 till reconnection of electricity at KShs. 100,000/- per day;



- e. General Damages;
 - f. Costs of the suit;
 - g. Any other just and equitable relief as this Honourable may deem appropriate.
2. The Appellant raised a preliminary objection dated 10.07.2018 questioning the jurisdiction of the Magistrates Court on the ground that sections 59 and 61(3) of the Energy Act, 2006 required such disputes to be referred to the Energy Regulatory Commission. The 1st Respondent filed Grounds of Opposition dated 06.08.2018 stating that the provision of alternative dispute resolution mechanisms under the Energy Act, 2006 did not oust the jurisdiction of the Magistrates Court and that the Energy Act, 2006 did not provide adequate mechanisms favourable to the Plaintiff.
 3. After considering the parties' submissions, the trial magistrate rendered a ruling on 26.11.2018 asserting the court's jurisdiction. The court observed that among the reliefs sought by the Plaintiff was an injunction against the Defendant and an order for compensation for loss of business. Taking judicial notice of the fact that the board could not issue injunctive orders and order for compensation for loss of business, the trial court held that it had jurisdiction to entertain the matter.
 4. The Appellant is dissatisfied by the ruling of the trial court and thus preferred the present appeal. The main issue for determination is whether the trial court erred in holding that it had jurisdiction to entertain the matter. The parties have filed written submissions in support of their respective positions.
 5. At the material time, the Energy Act, 2006 was still in force. Sections 59 dealt with disputes concerning defective meters. The relevant part stated as follows:

59(3) If any dispute arises under this section as to recalculation of electrical energy supplied to a consumer or as to interference with any meter, such dispute shall be referred to the Commission for determination.
 6. Section 61 of the Energy Act, 2006 sets out circumstances under which a licensee such as the Appellant may discontinue or refuse the supply of electrical energy to any consumer. If a dispute arises out of those matters, section 61(3) provides as follows:

61(3) If any dispute arises as to—

 - (a) any charges; or
 - (b) the application of any deposit; or
 - (c) any illegal or improper use of electrical energy; or
 - (d) any alleged defects in any apparatus or protective devices; or
 - (e) any unsuitable apparatus or protective devices, it shall be referred to the Commission.
 7. The Commission referred to under the Energy Act, 2006 is the Energy Regulatory Commission which was empowered under section 6, to inter alia, investigate complaints or disputes between parties with grievances over any matter required to be regulated under the Act. Under section 107 of the Energy Act, 2006, appeals from the decisions of the Commissioner were appealable to the Energy Tribunal established under section 108 whose jurisdiction was to hear and determine appeals in accordance with section 107.



8. The *Energy Act*, 2006 was repealed by the *Energy Act*, 2019. The Energy and Petroleum Tribunal was established under section 25 of the latter Act, “for the purpose of hearing and determining disputes and appeals in accordance with this Act and any other written law.” Section 36 provides for the jurisdiction of the Tribunal which include, “original civil jurisdiction on any dispute between a licensee and a third party or between licensees.” In addition, the Tribunal has power to, “grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.”
9. The Appellant quoted the case of *Royal Reserve Management Company Ltd v Kenya Power & Lighting Company Ltd* [2017]eKLR and *Joseph Nzyoki Mwathi v. Kenya Power & Lighting Company Ltd* [2017]eKLR to persuade the court to strike out the case for want of jurisdiction. In the former case, the court observed that the gist of the dispute revolved around the amount of money that the Respondent was being billed which fell squarely under the jurisdiction of the Energy Regulatory Commission. In the latter case, the court upheld the trial court’s decision that it had lacked jurisdiction.
10. In *Elijah Mutahi and 10 Others v Kenya Power and Lighting Company Ltd* [2020] eKLR, the court held that the *Energy Act*, 2006 did not provide for compensation for damages suffered as a result of illegal connections hence the trial magistrate was wrong to strike out the suit as the Commission did not have power to grant such relief. I agree that although the *Energy Act*, 2006 provided for an appellate process from the Commission to the Energy Tribunal, the Commission was not empowered to provide for a range of specific remedies including equitable orders or compensation for loss. The Energy Tribunal would only hear appeals from the Commission.
11. I therefore hold that the trial magistrate was right not to dismiss the suit. This finding though is not the end of the matter, as the *Energy Act*, 2019 now has original jurisdiction to entertain and grant sufficient remedies in disputes between licensees and third parties. It is in the interest of justice that the matter be transferred to the proper forum for resolution.
12. I therefore dismiss the appeal but order that the dispute between the Appellant and Respondents be and is hereby referred to the Energy and Petroleum Tribunal for hearing and determination.
13. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023.

D. S. MAJANJA

JUDGE

Ms Kinoti instructed by Njuguna and Partners Advocates for the Appellant

Ms Gikonyo instructed by Kaniaru and Kaniaru Advocates for the 1st Respondent

