



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL CASE NO. 75 OF 2016

ASSOCIATED WAREHOUSING CO. LTD.....APPELLANT

-VERSUS-

KENYA POWER & LIGHTING CO. LIMITED....DEFENDANT

(Being an Appeal against the Judgment delivered on 3<sup>rd</sup> June 2016, by Hon. Ruguru I. N., Senior Resident Magistrate in the Chief Magistrate's Court Case No.633 of 2016)

JUDGMENT

1. The Appellant, **Associated Warehousing Co. Ltd** filed a suit against the Respondent, **Kenya Power & Lighting Co.** on **31<sup>st</sup> March 2016**, and amended on **11<sup>th</sup> April 2016**, seeking for Judgment in the following terms:-

- c. **An order directing the Defendant through its customer service engineer to reconnect the electricity power to the Plaintiff.**
- d. **Costs and interest of this suit.**
- e. **General damage for loss of business since 24<sup>th</sup> March 2016 till the date of reconnection.**

2. Briefly, the Respondent, being the sole Company that is charged with supply of electric power to the people of Kenya, had been supplying the Appellant with the same through meter serial **No.20347979** and account **No.044376-013**. The Appellant pleaded that it had been paying for the said electricity supply timeously, punctually and without fail every time the Respondent sent its monthly bill to it. The Appellant went on to state that on **24<sup>th</sup> March** at about 4.00pm, the Respondent's employees proceeded to its premises and disconnected the electricity supply to its premises from the pole on the claim that there was an outstanding amount of **Kshs.4,230,416/=** which remained unpaid. The Appellant disputed this claim.

3. The Defendant/Respondent on the other hand, filed a response vide its written statement of defence on **19<sup>th</sup> April, 2016**. According to the Respondent, the Appellant was in arrears of **Kshs.3,844,461.58** being charges of the electricity power that had been consumed at its premises from **July 1997** to the time of filing this suit. The Respondent explained how the amount being claimed from the Appellant had arisen at paragraph 4,5,6,7,8 and 9 of the defence. The Respondent further pleaded that the Appellant had filed a previous suit being **MOMBASA HCCC NO.19 OF 2001, ASSOCIATED WAREHOUSING COMPANY T/A BAMBURI BEACH RESORT...VS...KPLC LTD.** It urged that the suit be dismissed.

4. The case proceeded for hearing whereby both sides adduced evidence and in the Judgment, the learned trial Magistrate stated as follows:-

**“Before the Plaintiff's issues are determined, the issue of jurisdiction of the court has to be resolved. Section 61(3) of the Energy Act of 2016 states (verbatim):-**

**(3) If any dispute arises as to:-**

- a. **Any charges, or (b) the application of any deposit or,**
- b. **Any improper or use of electric energy or,**
- c. **Any alleged defects in the apparatus or protective devices,**

d. Any unsuitable apparatus or protective devices, it shall be referred to the commission”.

5. Upon analyzing the facts that were presented before her by the parties, the learned trial Magistrate concluded that they fall under **Section 61(3)** of the **Energy Act** and held that:-

**“For the above reasons, this court has no jurisdiction to hear or determine this matter. Then this suit is therefore struck out for lack of jurisdiction and I hereby advise the parties to seek redress from the bodies established under the Energy Act”**

6. This is what triggered this Appeal and the Appellant vide its **Memorandum of Appeal** dated **17<sup>th</sup> June, 2016**, raised ten (10) grounds namely:-

- 1. That the learned Magistrate erred in law and in fact and misdirected her mind by striking out the Plaintiffs’ suit.**
- 2. That the learned Magistrate erred in law and in fact and misdirected her mind in holding that the court did not have jurisdiction in the matter.**
- 3. That the learned Magistrate erred in law and in fact in holding that the Energy Act did not expressly exclude the courts’ jurisdiction and yet went and wrongly, unlawfully and unfairly excluded itself in the matter.**
- 4. That the learned Magistrate erred in law and fact in excluding herself from determining the matter yet the Plaintiff and the Defendant had testified.**
- 5. That the learned Magistrate erred in law and fact and misdirected her mind when directing the Plaintiff to lodge its complaint with the Energy Regulatory Commission.**
- 6. That the learned Magistrate erred in law and fact and misdirected her mind in failing to appreciate the fact that most of the monies claimed by the Respondent were beyond the statutory time limit of six(6) years and therefore statutorily time barred.**
- 7. That the learned Magistrate erred in law and fact in failing to hold that if such monies would be statutorily time barred then the Energy Regulatory Commission would not have the capacity or authority to make that decision.**
- 8. That the learned Judge erred in law and fact misdirected her mind in failing to appreciate and consider that the appellant’s business was incurring heavy losses owing to the illegal and unlawful disconnection of electricity by the Respondent.**
- 9. That the learned Magistrate erred in law and fact and misdirected her mind in failing to appreciate and consider that the Respondent is the single sole supplier of electrical energy in Kenya and by virtue of its position has unfairly and unlawfully demanded for nonexistent bills.**
- 10. That the learned Magistrate erred in law and fact in failing to consider that the Respondent herein has acted as judge and jury in demanding and disconnecting off electricity to the Appellant yet the monies demanded would conflict with the laws of limitation of action.**

7. The record of Appeal was filed on **23<sup>rd</sup> September, 2016** and on **24<sup>th</sup> November, 2016**, the Appeal was admitted for hearing and parties directed to canvass the same by way of written submissions. The Appellant filed its written submissions on **5<sup>th</sup> April, 2017** while the Respondent filed theirs on **4<sup>th</sup> April, 2017**.

#### **Determination**

8. As expected of this Court as the first appellate court, I have read through the evidence that was presented before the trial court together with the Judgment that was rendered by the trial Magistrate and re-evaluated the same so as to come up with my own independent decision on the facts. And in doing so, I am well minded that I did not hear, nor see the witnesses as they testified(see the **Selle Case**).

9. A reading of the grounds of Appeal raised by the appellant indicate that they can be grouped and argued together. I find the hotly contested issues relate to jurisdiction, which aspect has been raised in grounds 1,2,3,4 and 5. Loss and damage to business as raise in grounds 6,7, and 8 and the aspect of violation of rules and principles of our justice system in grounds 9 and 10.

10. Having read through the proceedings and Judgment of the trial court, the grounds of appeal, written submissions of both parties together with cited statutes and case law, I find that while the pleadings reveal that jurisdiction of the court was admitted, the trial Magistrate in her Judgment found that the court had no jurisdiction to hear and determine the matter, hence proceeded to strike out the same for want of jurisdiction.

11. It is trite law that jurisdiction of a court or tribunal is what gives it power to hear and determine disputes that come before it. In the often cited case of **MV LILIAN...VS...CALTEX OIL KENYA LTD (1989) KLR 1, NYARANGI J.A** stated:-

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there**

would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of a matter before it, the moment it holds the opinion that it is without jurisdiction”.

12. This position was followed in the recent case of the Court of Appeal which cited with approval the decision of the Supreme Court on the same subject. The case of Joshua **SEMBE MUTUA...VS...ATTORNEY GENERAL & 2 OTHERS (2019) eKLR**, applied both decisions in the **SAMWEL MACHARIA** case were the Supreme Court stated thus:-

**“A court’s jurisdiction flows from either the Constitution or legislature 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”.**

13. With regard to the matter that was before the trial court, the legislation is with the Energy Act, 2006. This Act has created institutions to deal with specific disputes. The reason for this is because specialized personnel is appointed to preside over those disputes. Where such tribunals exists, the courts must be reluctant to interfere with their functions as this will be seen as an attempt to usurp their powers.

14. The disputes covered by **Section 61(3)** of the **Energy Act, 2006** are summarized as follows:-

**(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 if any in apparatus or protective devices, or**
- e. Any unsuitable apparatus or protective devices, it shall be referred to the commission”.**

15. From the pleadings and prayers sought for in the Plaint, it is clear they relate to billing, which are part of the matters covered by the provision of **Section 61(3)** of the **Energy Act, 2016**. Therefore, once it is established that a cause of action falls under any of the listed matters under this Section, then an aggrieved party should accordingly invoke the intervention of the Commission which under **Section 2** of the **Energy Act** means, ‘**The Energy Regulatory Commission** established under Section 4 of the same Act’.

16. According to the Appellant, the matters complained of fall under **Section 61(4) of the Energy Act**. This Section states as follows:-

**(4)“Where any dispute referred to in subsection (3) has been referred to the Commission, or has otherwise been taken to court before a notice of disconnection has been given by the licensee, the licensee shall not exercise any of the powers conferred by this section until final determination of the dispute;**

**Provided that the prohibition contained in this subsection shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Commission, in addition and without prejudice to any other deposit the licensee is entitled to require, or the amount of the charge or other sum in dispute, and the consumer has failed to comply with the request within forty-eight hours of the request having been made”.**

17. The statute here confers jurisdiction to a court where the act complained of where a licensee goes to court before the licensor (Kenya Power & Lighting Co. Ltd) takes action without giving notice.

18. I have read through the record and established that the Appellant filed the original **Plaint** dated **31<sup>st</sup> March 2016**. This was amended by consent on **8<sup>th</sup> April, 2016** and filed on **11<sup>th</sup> April, 2016**. It appears from the record that the alleged disconnection took place on **24<sup>th</sup> March, 2016**. Therefore, in the circumstances, the suit was a reaction to the action of disconnection.

19. From the provisions of **Section 61(4)** of the **Energy Act, 2006**, the matters that fall under it are those where a suit was already pending before the Respondent Company takes action. Where a suit is filed and is pending before a court, a Respondent will not raise objection to the jurisdiction of the court. In this Appeal, the suit was filed after the Respondent had taken action by disconnecting power supply. Hence, the jurisdiction of the court was ousted by that action.

20. In the circumstances, I find and hold that reliance on **Section 61(4)** of the **Energy Act, 2006** cannot aid the Appellant. For the reasons advanced herein, it is my conclusion that the Honourable learned trial Magistrate was right in her decision and uphold the Judgment rendered therein on **3<sup>rd</sup> June 2016**.

21. I proceed to dismiss this Appeal with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2021**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.