REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. E004 OF 2020

BENARD NYAKUNDI OSUGO.....APPELLANT

VERSUS

KENYA POWER LIMITED.....RESPONDENT

{Being an appeal against the Ruling of Hon. W. C. Waswa (Mr.) - RM Nyamira

dated and delivered on the 9th day of October 2020 in the original Nyamira

Chief Magistrate's Court Misc. Civil Case No. E003 of 2020}

RULING

On 29th September 2020 the appellant herein filed a miscellaneous suit and a Notice of Motion dated 28th September 2020 in which he sought the following orders against the respondent: -

> **"1. THAT the application herein be certified as urgent service thereof be dispensed with the first instance and be heard ex-perte as such account of its agency (sic)."**
>
> **2. THAT there be connection of electricity to my business premises, disconnected by the respondent without notice while there was no any outstanding bill or arrears on 4th September 2020, pending the hearing and determination of the application herein and the civil suit to be filed within (30) days, the respondent has precipitated loss of business.**
>
> **3. THAT there be stay of any disconnection without notice.**
>
> **4. Costs of this application to be borne by the respondent."**

The respondent who was the defendant in the suit did not enter appearance and the trial court proceeded to hear the application ex-parte. On 9th October 2020 the trial court delivered a ruling in which it dismissed the application and made orders as follows: -

> **"1. THAT any outstanding bill if any be paid by the respective account holder.**
>
> **2. THAT once the bill has been cleared, power be reconnected at the earliest opportune moment.**
>
> **3. There shall be no order as to costs.**
>
> **4. Since this is a miscellaneous application, this file is closed."**

Being aggrieved the appellant preferred this appeal to challenge the ruling of the trial court. The appeal is premised on the Memorandum of Appeal dated 21st October 2020 in which he raises the following grounds: -

> **"1. THAT the trial Magistrate erred in law and fact in abdicating his mandate as an impartial and passive arbiter by giving out ex-perte Ruling in favour of the respondent who never respondent neither was present in court despite being duly served.**

2. THAT the trial Magistrate erred in law by not considering the lease agreement between the landlord and the applicant which states that the applicant was to apply and use his own electricity meter, while the same was done and the meter No. 37176651364 was issued on the same.

3. THAT the trial Magistrate erred in law and fact by giving direction that until the landlord has fully paid his arrears of Kshs. 76,431.88/= while the account in arrears belongs to the landlord meter No. 55401202 which was in operation before the applicant entered the premises.

4. THAT the trial Magistrate erred in law and fact by refusing to grant the applicant's prayers 2, 3 and 4 sought in the application even after considering the urgency of the issues raised."

By the appeal he proposes to ask this court to order that: -

"1. THAT the Ruling/decree of the Honourable court dated 9th day of October 2020 be set aside and the prayers sought be awarded.

2. THAT the cost of this appeal be borne by the respondent."

Upon being served with the record of appeal the respondent entered appearance through Emily Kirui Advocate. Thereafter on 19th January 2021 the respondent filed a Notice of Change of Advocates and instructed the firm of Kimitei, Nthenge & Co. Advocates who filed the preliminary objection which is the subject of this ruling. By that preliminary objection it is urged that: -

"(a) The Honourable Court lacks jurisdiction to hear and determine the matter by dint of Section 160 and 36 of the Energy Act No. 1 of 2019 as well as the Energy (Complaints and Disputes Resolution) Regulations, 2012 which vest jurisdiction on the Energy and Petroleum Regulatory Authority.

(b) The Appellant does not have locus standi to sue the Respondent as per the facts alleged in his pleadings."

The preliminary objection was canvassed by way of written submissions. I have carefully considered the rival submissions, the proceedings of the trial court and the law.

The dispute between the parties is one touching on disconnection of electricity ostensibly for non-payment of the bill(s). The respondent's preliminary objection is premised on **Section 160 (3) of the Energy Act, 2019** and **Regulation 4** of the **Energy (Complaints and Dispute Resolution) Regulations, 2012** which state: -

"Section 160 (3) 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;

(e) any unsuitable apparatus or protective devices, it shall be referred to the authority."

Regulation 4 of the Energy (Complaints and Dispute Resolution) Regulations, 2021: -

"These regulations shall apply to complaints and disputes in the following areas—

(a) billing, damages, disconnection, health and safety, electrical installation, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy;

(b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

(c) any other activity and/or matter regulated under the Act."

It is Counsel's contention that there being a mechanism for resolution of disputes falling under the **Energy Act** and the same having not been exhausted the trial court did not and this court does not have jurisdiction to determine the dispute between the parties. In support of this submission Counsel has cited several cases among them: -

(i) **Samson Chembe Vuko v Nelson Kilimo & 2 others [2016]** where the Court of Appeal observed that: -

> ***Where there is clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed."***

(ii) In the matter of Interim Independent Electoral Commission [2011] eKLR where Counsel cited the Supreme Court as stating: -

> ***"To allow the application now before us, would constitute an interference with due process and with the rights of parties to be heard before a court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which the court must protect the jurisdiction entrusted to the High Court."***

(iii) Royal Reserve Management Company Ltd v Kenya Power & Lighting Company Ltd [2017] eKLR where citing with approval the decision of the Court of Appeal in the case of the **Speaker of the National Assembly v Njenga Karume [2008] 1 KLR 425** where Njoki Mwangi J held: -

> ***"26. A perusal of the Energy (Complaints and Disputes Resolution) Regulations, 2012 reveals that the ERC has well laid out procedures in place for the hearing of cases such as the one before me. I therefore uphold the preliminary objection and refer the dispute herein to the Energy Regulatory Commission for hearing and final determination. The suit and notice of motion are hereby struck out. Costs are awarded to the defendant/applicant."***

(iv) **Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd [2015] eKLR** where it was held: -

> ***"It is clear from the above that the plaintiff's first port of call should be the Energy Regulatory Commission and not this court. Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the courts must respect and up-hold the law."***

Relying on the celebrated case of the **Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Limited [1989] KLR 1** Counsel for the respondent submitted that jurisdiction is everything and as jurisdiction in these type of disputes lies in the Authority established under the **Energy Act** this court must dismiss this appeal. Counsel also contended that the appellant has no *locus standi* as the contract giving rise to the dispute was between the respondent and his landlord but not himself. Counsel urged that the costs of the appeal be awarded to the respondent.

On his part the appellant contended that this court has jurisdiction to hear this dispute because **Section 61 (4) of the Energy Act No. 12 of 2006** states that: -

> **"(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."**

He contended that the respondent's failure to issue and/or file a notice of disconnection should go to the substance of this matter. He also contended that the issue of disconnection of electricity without notice on another person's account should not be referred to the **Energy and Petroleum Regulatory Authority.**

On the issue of *locus standi* the appellant submitted that it is the respondent that confused his Meter No. 371 766 516 4 with that of his landlord Jefther Oiro No. 55401202. He contended that his is fully paid and urged this court to dismiss the preliminary objection with costs.

As was held in the case of the **Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Limited [1989] KLR 1**, jurisdiction is everything and without it a court cannot move even one step. I have considered the rival submissions, the cases cited and the law and I am in agreement with Counsel for the respondent that this court has no jurisdiction to entertain this appeal and it must down its tools. I agree with the holding of the court in the case of **Adero Adero & another v Ulinzi Sacco Society Ltd [2002] eKLR** that**: -**

> **"……..It is trite law that jurisdiction cannot be conferred by consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal……."**

As a preliminary objection can be raised at any stage of the proceedings it is immaterial that this preliminary objection was raised after the court had directed parties to file written submissions. In any event this court was merely trying to hasten the time of hearing the appeal as the appellant's electricity remains disconnected.

In opposing the preliminary objection, the respondent relied on **Section 61 (4) of the Energy Act No. 12 of 2012** and hence argued that this

court has jurisdiction. The **Energy Act No. 12 of 2012** was however repealed and replaced with the **Energy Act No. 1 of 2019.** The date of commencement of the **Energy Act No. 1 of 2019** was 28th March 2019 and the appellant having filed his action on 29th September 2020 the law applicable is the **Energy Act No. 1 of 2019.** In the new Act **Section 61 (4)** provides for the establishment of the office of the Chief Executive Officer and has nothing to do with disputes. Those are now provided for under **Section 160 (3)** of the **Act** which clearly vests the hearing and determination of disputes in the Authority. **Section 2** of the **Act** defines **"Authority"** as "**the Energy and Petroleum Regulatory Authority established under Section 9"**. **Section 160 (3)** of the **Energy Act No. 1 of 2019** is couched in mandatory terms meaning that it is the Authority that is vested with jurisdiction to hear and determine disputes arising from the matters listed as **(a)** to **(e).** The nature of those disputes is more particularly set out in the **Energy (Complaints and Dispute Resolution) Regulations 2012** which were saved under **Section 224 (2) (e)** of the **Act** which states: -

> **"(e) any subsidiary legislation issued before the commencement of this Act shall, as long it is (sic) not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall for all purposes, be deemed to have been made under this act."**

Among the disputes listed to be dealt with by the Commission now the **Energy and Petroleum Regulatory Authority** are those relating to billing and disconnection**.** I have listed the cases which Counsel for the respondent cited to support the submission that this court cannot hear this appeal. I agree with those decisions in arriving at the conclusion that the appellant should have taken this dispute to the **Energy and Petroleum Regulatory Authority**. He must exhaust the dispute resolution mechanism set out in **Section 160 (3) of the Energy Act 2019 and the Energy (Complaints and Dispute Resolution) Regulations 2012** before coming to court. To that extent the preliminary objection shall be upheld and this appeal is struck out with costs to the respondent. I however leave the issue of *locus standi* to the Authority. Orders accordingly.

Ruling signed, dated and delivered at Nyamira electronically via Microsoft Teams this 17th day of March 2021.

E. N. MAINA

JUDGE