



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E002 OF 2021

BETWEEN

GREEN VALLEY MARKET LIMITED.....APPLICANT

VERSUS

ENERGY & PETROLEUM REGULATORY AUTHORITY.....1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED.....2ND RESPONDENT

RULING

1. Green Valley Market Limited, the Applicant herein, states that it is a limited liability company currently operating a supermarket within Nairobi County. The said Applicant claims that 2nd Respondent herein has unlawfully, unjustly and unprocedurally disconnected the Applicant's electricity on the 17th December 2020, on the premises of a disputed demand for payment of Kshs 6, 957,780/=.

2. The Applicant has accordingly moved this Court in an application brought by way of a Notice of Motion dated 6th January 2021, in which it is seeking the following orders:

1. The application be certified as urgent and heard ex parte in the first instance due to its urgency and service thereof be dispensed with.

2. This Court be pleased to grant leave for the application to be heard during the High Court Vacation.

3. This Court be pleased to issue an order directing the 2nd Respondent to forthwith restore the electricity power supply to the Applicant or account number 45625308 at Green Valley Market: situated on the ground floor of the building erected on L.R. No. 209 /16885 pending the hearing and determination of this Application.

4. This Court be pleased to issue an order of temporary injunction directed at the 2nd Respondent barring it either by itself, employees, agents, disclosed and undisclosed principals, officers, contractors or any other persons acting in its name or behalf from disconnecting, tampering with or otherwise denying the Applicant access to and utility of electricity power supply for account number 45625308 at Green Valley Market situated on the ground floor of the building erected on L.R. No. 209 /16885 pending the hearing and determination of this Application and subject to the Applicant continuing to pay the monthly electricity bills.

5. This Court be pleased to exempt the Applicant herein from the requirement to settle the matter using the internal mechanisms provided for under the Energy Act 2019.

6. This Court be pleased to issue an order of Certiorari for the purposes of quashing the decision of the 2nd Respondent demanding for the sum of Kshs 6,957,780.57/= as communicated through the letter dated 10th November 2020 and signed by Peter K. Wambua, the 2nd Respondent's Manager, Commerce Cycle.

7. This Court be pleased to issue an order of Prohibition, prohibiting the Respondents herein and more so the 2nd Respondent either by themselves, employees, agents, disclosed and undisclosed principals, officers, contractors or any other persons acting in their names from harassing the Applicant's Directors, Shareholders, Employees, Agents, Contractors or any other person acting on its behalf either by arbitrarily arresting them, demanding for payments, incessantly calling them or in any other ways and further from disconnecting the Applicant's electricity power supply without compliance with the provisions of the Energy Act 2019.

8. This Court be pleased to issue an order of Mandamus directed at the 1st Respondent to respond to and address the Applicant and all other Consumers Complaints with regards to the actions of the 2nd Respondent timorously and in any event within a period of 7 days.

9. The Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

10. The Respondents to pay the costs of this Application.

3. The said application is supported an affidavit sworn on 27th October 2020 by Abdullahi Sheikh Mohamed, a Director of the Applicant. The main ground for the application is that the disconnection of the electricity power was done arbitrarily without any notice being issued to the Applicant, or compliance with the other mandatory provisions of the Energy Act 2019. The Applicant states that it has attempted to exhaust all the existing statutory remedies by first referring the complaint to the 1st Respondent and subsequently to the Energy and Petroleum Tribunal through Tribunal Case Number 04 of 2020, but that it has been unable to obtain any remedies as the 2nd Respondent has failed and or neglected to respond to its complaints, and that the Energy & Petroleum Tribunal is not properly constituted.

4. In addition, the Applicant detailed the disputes it has had with the 2nd Respondent over its electricity bills, and disclosed that there have been other suits on the same subject matter in Nairobi Chief Magistrate Court Civil Case Number 9334 of 2018, Nairobi Chief Magistrate Court Civil Case Number 1214 of 2020, and that there is pending criminal prosecution in Milimani Chief Magistrate's Court Criminal Division criminal case numbers E 3019 of 2020 and E 3032 of 2020.

5. HMS Advocates, the advocates representing the Applicant filed skeletal submissions dated 26th January 2021, wherein it was urged that the instant application meets the threshold for granting of the mandatory injunction, as there is a need to dispense with the case at once. Reliance was placed on the decision in **Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma (2020) eKLR** for this position.

6. Further, that the Applicant has disclosed all circumstances surrounding the case and the Respondents shall thus suffer no harm, as the Applicant isn't seeking to be excluded from meeting its responsibilities. The Applicant relied on the decision in **Robai Kadili Agufa & Another v Kenya Power & Lighting Co Ltd [2015] eKLR** wherein it was held that the 2nd Respondent's disconnection of the Appellant's electricity without giving reasons or following due process entitled the Appellants to interim mandatory orders.

7. On the exhaustion of statutory remedies, the Applicant submitted that the that the Energy and Petroleum Tribunal is yet to be fully constituted as it lacks a chairperson and thus the matters filed therein are not proceeding for hearing, and that section 11 (4) (*sic*) of the Fair Administrative Action Act empowers this Court to entertain, and determine judicial review proceedings devoid of exhaustion of other statutory remedies in exceptional circumstances.

8. Lastly, the Applicant cited various provisions of the Energy Act to demonstrate that the requirements of billing and disconnection of electricity by the Respondent are cast in steel per the law, and submitted that the 2nd Respondent was at all times under an obligation to charge electricity based on the consumption of the Applicant herein. Further, that the law provides that the 2nd Respondent could only disconnect the Applicant's meters and power supply only under two circumstances, namely subject to issuance of a 48 hours' notice and secondly with the consent of the Applicant. Therefore, it follows that the demand for payment of Kshs 6,957,780/= is unlawful and the process of disconnection of electricity was also not followed and is thus ultra vires. The decision in **Republic vs. Firearms Licensing Board & another ex parte Boniface Mwaura [2019] eKLR** was cited in support of this submission.

The Response

9. Kenya Power and Lighting Company Limited, the 2nd Respondent herein, filed Grounds of Opposition dated 4th February 2021 and submissions of even date in response to the application, in which it contended that the application amounts to forum shopping and is an abuse of court process as it violates the doctrine of *res judicata* under section 7 of the Civil Procedure Act. The 2nd Respondent stated that the challenge made against it has been heard and finally decided in **Nairobi Chief Magistrate Court Civil Case Number 9334 of 2018**; and **Nairobi Chief Magistrate Court Civil Case Number 1214 of 2020**, where in the Courts in their rulings upheld the 2nd Respondent's Preliminary Objections on 2nd April, 2019 and 23rd October, 2020 respectively that the Courts lacked jurisdiction and that the matter was *res judicata*, and referred the Applicant herein to the correct forum in which to prosecute its case.

10. Further, that this Court lacks the requisite jurisdiction to adjudicate over this dispute by virtue of the provisions of Section 36, 159 (3) and 160 (3) of the Energy Act, 2019 as this Court revisiting the decisions in the said rulings would amount to sitting on appeal against the decision of the Chief Magistrate Courts, yet the present Application is not an appeal. Lastly, that the application is premature for the reason that the *ex parte* applicant has not used the internal dispute resolution mechanisms as required under sections 36, 159 (3) and 160 (3) of the Energy Act, 2019.

11. The 2nd Respondent submitted that the law envisages finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court, and reliance was placed on the decision by the Court of Appeal in **The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 (2017) e KLR** on the elements of *res judicata*.

12. On this Court's Jurisdiction, the 2nd Respondent submitted that the nature of the dispute before the Court is one relating to supply of electricity and billing, meter readings and non-payment by the Applicant for consumed electricity supply despite demands to do so. Further, that this Court does not have the requisite jurisdiction to hear and determine the matter, as the Applicant has filed another application before the Energy and Petroleum Tribunal vide Tribunal Case No. 04 of 2020, and the Court pronounced itself in the ruling delivered on 23rd October 2020 in CMCC 1214 of 2020 that the Tribunal has since been properly constituted. Therefore, that the Applicant's acts amount to

abuse of court process, as it is unjustifiably running away from the proper forum and is forum shopping.

13. Reliance was placed on the provisions in sections 36 (1) and (3), 159 (3) and 160 (3) of the Energy Act on the jurisdiction of the Energy and Petroleum Tribunal, and on the holding in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, (2012) e KLR, James Mwaura Ndung'u vs. Kenya Power & Lighting Company Ltd Nairobi, HCCA No. 228 of 2011 and Republic vs Registrar of Political Parties & 6 others Ex parte Edward Kings Onyancha Maina & 7 others [2017] eKLR** for the position that the Applicant having invoked the jurisdiction of the Tribunal and Chief Magistrates Court, it can only challenge the decision that will emanate therefrom before this Court sitting as an appeal court and not in judicial review.

The Determination

2. I have considered the Notice of Motion dated 6th January 2021 and the arguments thereon by the parties, and note that the application is brought pursuant to the provisions of the Fair Administrative Action Act. Section 7 of the said Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to *inter alia* a court. The procedure and applicable conditions for one to apply for such review are set by section 9 of the Act, which provides as follows:

(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 subsection (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.

14. It therefore follows that the case must in the first place be one that is amenable to or appropriate for judicial review, and this is for the reason that in judicial review, the Court is being asked to review the lawfulness of an enactment, decision, action or failure to act in the exercise of a public function. Therefore, judicial review concerns the exercise of public duties and not private duties. Other grounds that may influence the exercise of the Court's discretion in this regard are the availability of an adequate alternative remedy, prematurity of a claim, delay, and where the claim would cause great prejudice and hardship to third parties or the public interest. Lastly, the extent and limits of this Court's judicial review jurisdiction as set out in Article 165(6) of the Constitution must also be borne in mind.

15. In the present application, the parties do not dispute that there is an alternative dispute resolution mechanism, and the Applicant conceded that it has already filed a case on the same dispute herein before the Energy and Petroleum Tribunal, which is pending determination. Section 9(2) of the Fair Administrative Action Act specifically provides as follows in this regard:

“The High Court or a subordinate court under subsection (1) shall not review and administrative action or decision under the Act unless the mechanisms including internal mechanism for appeal or review and all remedies available under any other law are first exhausted.

16. Section 25 of the Energy Act establishes the Energy and Petroleum Tribunal, and under section 36 (1) and (3) the Tribunal shall have jurisdiction to hear and determine all matters referred to it, relation to the energy and Petroleum sector arising under this Act or any other Act and the Tribunal shall have original civil jurisdiction on any dispute on any dispute between a licensee and a third party or between licensees. Section 36 (5) provides that the Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance. It is not disputed that the 2nd Respondent herein is a licensee under the Act.

17. While the availability of an alternative statutory remedy does not divest this Court's judicial review jurisdiction, it is a material consideration in the exercise of the Court's discretion to grant remedies sought, since judicial review is a remedy of last resort and Courts require other avenues of redress to be first utilised. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

18. The Court is however granted discretion to exempt an applicant from such mechanisms in exceptional circumstance under section 9(4)

of the Fair Administrative Action Act. The exceptional circumstances arise where the alternative mechanisms would not serve the values enshrined in the Constitution or law, particularly, where the dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons.

19. In the present application, the parties have disputed the fact whether the Tribunal properly constituted. However, this fact was the subject of the decisions in **Nairobi Chief Magistrate Court Civil Case Number 9334 of 2018**; and **Nairobi Chief Magistrate Court Civil Case Number 1214 of 2020**, copies of which rulings were annexed by the 2nd Respondent. This fact, and the fact that the Applicant was directed in the said rulings to first utilize this alternative dispute resolution method were not disputed by the Applicant. The Applicant has also not shown any exceptional circumstances as to why it should be exempted from the alternative dispute resolution.

20. Therefore, this application is essentially a collateral attack on, and intended to subvert the rulings delivered in **Nairobi Chief Magistrate Court Civil Case Number 9334 of 2018**; and **Nairobi Chief Magistrate Court Civil Case Number 1214 of 2020** without using the proper procedure, and is clearly therefore also in abuse of the process of Court.

The Disposition

21. In the premises, it is the finding of this Court that the application brought by way of the Notice of Motion dated 6th January 2021 is not merited for the foregoing reasons. The prayers sought in the Applicant's Notice of Motion application dated 6th January 2021 are accordingly declined, and the said application is hereby dismissed with no order as to costs.

22. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2021

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2021

J. NGAAH

JUDGE