



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 2 OF 2021 (E 003/2021)

1. NATHAN OMBATI SOIRE

2. EVANS ONWONGA NYAMATO

3. RAMANDEEP SINGH

4. FRANKLINE NYAWIRA

5. ALICE KERUBO RICHARD

6. ONDIEKI KEMUNTO VALMY

7. FREDRICK SHAVN GENERAL TRADING CO. LTD

8. POPPY ENTERPRISES LTD.....PLAINTIFFS

VERSUS

THE KENYA POWER &

LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

1. The defendant contests this court's jurisdiction to hear and determine the instant suit on the grounds that it lacks jurisdiction. The defendant's Notice of Preliminary Objection dated 5th April, 2021 reads as follows;

a. This Honorable court lacks jurisdiction to hear and determine this dispute and application together with all consequential orders should be dismissed with costs as the same offends the provisions of Sections 3, 10, 11(e), (f) (i) (k) and (l) ; 23, 24, 36, 40, 42, 159 (3), 160 (3) and 224 (2) (e) of the Energy Act, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations 2012 as read together with Article 159 (2) (c) and 169 (1) (d) and (2) of the Constitution of Kenya, 2010 and Sections 9 (2) and (3) Fair Administration Act, 2015.

2. The parties disposed of the preliminary objection by way of written submissions. Counsel for the defendant submitted that the case before this court was about reconnection, disconnection and billings of electricity supply. Therefore, the dispute ought to have been referred to the Energy & Petroleum Regulatory Authority (formerly the Energy Regulatory Commission) or the Energy & Petroleum Tribunal according to the Energy Act, 2019.

3. Counsel cited the cases of *John Musakali vs. Speaker County of Bungoma & 4 others [2015] eKLR*, *Amy Kagendo Mate vs. Prime Bank Credit Reference Bureau Africa Ltd [2013] eKLR*, *Speaker of national Assembly vs Njenga Karume [1992]1KLR 425* *Cyrus Komo Njoroge vs. Kiringa Njoroge Cachoka & 2 Others [2015] eKLR* and *Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR* to emphasize the need to adhere to the dispute resolution avenues available in law.

4. It was submitted that Article 159 (2) (c) of the Constitution expressly recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Article 169 (1) (d) on the other hand makes provisions for establishment of any other court or local tribunal by an Act of Parliament. Counsel urged that the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal are such creatures of Parliament created by the Energy Act, 2019.

5. According to the defendant's counsel Sections 3, 9, 10, 11(e), (f) (i) (k) and (l); 23, 24, 36, 40, 42, 159 (3), 160 (3) 167; 168 and 224 (2)

(e) of the Energy Act, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations 2012 vest jurisdiction on the Authority to handle the disputes arising in this case.

6. On the jurisdiction of the Energy & Petroleum Tribunal, counsel submitted that Section 36 (3) of the Energy Act grants the Tribunal original civil jurisdiction on any dispute between the licensee and a third party. Counsel submitted that it was common knowledge that the defendant was a licensee according to the Act. It was submitted that under subsection (5) the Tribunal had powers to grant equitable reliefs. According to section 37 of the Act, appeals from the Tribunal lay with the High Court.

7. The court was informed that members of the Energy and Petroleum Tribunal had been appointed vide Gazette Notice Number 5890 dated 3rd March 2020 which was published in the Kenya Gazette Supplement Volume CXXII No. 155 of 2020 dated 21st August 2020. The court was also urged to take judicial notice of the fact that the Deputy Chief Justice had overseen the swearing in of the members of the Energy and Petroleum Tribunal in Nairobi on 21st October 2020.

8. In the event that the Tribunal had not been constituted under the law which was vehemently denied by the defendant, that did not amount to grant of jurisdiction to this court. Counsel referred to the case of **Adero Adero and Another vs. Ulinzi Sacco Society Limited [2002] eKLR** where the court held that non-constitution of the forum created by statute to adjudicate on specified disputes could not have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

9. Counsel further submitted that under Section 9(2) and (3) of the Fair Administration Act, the court could not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any written law were first exhausted. He argued that whereas the applicant's case was couched as a civil action, it was in fact a review of the defendant's decision. The defendant submitted that Section 9 of the Fair Administration Act deprived this court of jurisdiction to entertain the suit in the first instance. The court was thus urged to dismiss the suit with costs to the defendant.

10. In rebuttal, the plaintiffs' counsel submitted that although six members of the Energy Petroleum Tribunal had been appointed and sworn in, the President had not appointed the Chairman of the Tribunal. Given the primary and critical role of the Chairman, the Tribunal had not been able to sit to discharge its statutory mandate. Counsel submitted that the Tribunal could not function in law without a duly appointed Chairman.

11. He submitted that the cause of action in the present case did not fall within the mandate of the Energy & Petroleum Regulatory Authority under **Section 160 (3)** of the Act. He argued that the plaintiffs' claim was based on the disconnection of power by the defendant when the plaintiffs did not have unpaid bills. Their dispute was not on billing by the defendant which was a matter that would fall under the jurisdiction of the Authority.

12. Counsel argued that since the Act was silent on whether the Authority or Tribunal had jurisdiction to deal with a case where the defendant disconnected electrical energy supply to consumers who did not have unpaid charges, the court had jurisdiction over the matter. He referred to the case of **Narok County Council vs Trans Mara County Council & Another Civil Appeal No. 25 of 2000** where the Court of Appeal held that where a statute was silent on what was to be done in the event of a disagreement the High Court would have jurisdiction on the matter.

13. This case was distinguished from the cases cited by the defendant on the grounds that in those cases the fora for dispute resolution provided in the relevant statute existed and was functioning unlike the present case. The plaintiffs also emphasized that the Authority did not have jurisdiction in this matter unlike the cases cited by the defendant. Counsel argued that the Authority had no jurisdiction to grant equitable reliefs under the Act. He relied on the cases of **Republic vs Public Procurement Administrative Review Board & Another, exparte Selex Sistemi Integrati, NBI HCMA No. 1260 of 2007 [2008] KLR 728**, **East African Railways Corp. & Authority Sefu [1973] EA 327** and **Republic vs Returning Officer of Kamkunji Constituency & the Electoral Commission of Kenya HCMCA No. 13 of 2008 [2008]eKLR** where the courts held that statutory provisions should not be construed to oust or restrict the jurisdiction of the court in the absence of clear and unambiguous language to that effect. That where there was a lacuna with respect to enforcement of remedies provided under the Constitution or Act of Parliament, an aggrieved party was left with no alternative but to invoke the jurisdiction of the court.

14. Relying on the case of **Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 2 Others [2018] eKLR** the plaintiffs' counsel submitted that since the Authority had no jurisdiction to grant the equitable reliefs sought in the Plaintiff, then the resolution provided in the Act was not an alternative dispute resolution mechanism that was convenient, beneficial and efficacious. He also relied on the case of **National Gender & Equality Majority Leader, County Assembly of Nakuru & 4 Others [2019] eKLR** in support of the submissions that the doctrine of exhaustion did not apply where the alternative forum did not give the litigant audience before it.

15. Counsel also presented to the court the option to stay the proceedings pending the determination on the issue of disconnection of electrical energy by the Authority. He submitted that this court had inherent jurisdiction to make any orders to meet the ends of justice including staying the proceedings pending the determination of the Authority on disconnection.

16. Responding to the plaintiffs' submissions, the defendant's counsel insisted that jurisdiction was either present ab-initio or absent forever. He reiterated that the purported non-functionality of the Tribunal did not of itself amount to grant of jurisdiction to this Court as held in **Adero and Another (supra)**. Counsel submitted that the courts were consistent as regards the jurisdiction of the courts in such matters. This court was urged not to depart from sound jurisprudence as doing so would create confusion and a lack of direction to subordinate courts.

ANALYSIS AND DETERMINATION

17. An objection to the court's jurisdiction may be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from the Constitution or Statute. If a court finds that it lacks jurisdiction to hear and determine a

matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. (See **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others, S.C. Application No. 2 of 2012 [2012] eKLR** and **Lillian 'S' [1989] KLR 1**)

18. The defendant's contention is that the matter before this court falls within the jurisdiction of both the Energy and Petroleum Tribunal and the Energy and Petroleum Regulatory Authority. The plaintiffs' position on the other hand is that while the Energy and Petroleum Tribunal has jurisdiction over the matter it is not properly constituted as the President is yet to appoint a Chairperson in accordance with Section 12 (1) (a) of the Energy Act. The jurisdiction of the Energy and Petroleum Regulatory Authority is however denied by the plaintiffs.

19. In their pleadings, the plaintiffs claimed that they were lawful customers of the defendant with respect to power supply agreements for their respective businesses located at Market Plaza Plot LR Kisii Municipality Block 111/77, Kisii Town. They claimed that at about 8:00 a.m. on 23rd March 2021, the defendant disconnected from the pole power supply to the whole building known as Market Plaza thus affecting all the tenants on the premises, on the ground that some tenants owed the defendant huge unpaid power bills. However, the tenants each had individual power supply agreements and individual meters and account numbers with the defendant. The plaintiffs listed their individual meters and account numbers in the pleadings and asserted that as at 23rd March 2021, none of them had unpaid bills. Despite the fact that they were not in breach, the defendant disconnected the power supply leaving the plaintiffs without power.

20. The plaintiffs conceded in their pleadings that the Tribunal had jurisdiction to hear the matter but claimed that it was not able to discharge its duty as the President was yet to appoint a Chairman. They denied that the Authority had jurisdiction to hear the matter and asserted that this court has jurisdiction to determine the suit pending the appointment of the Chairman of the Tribunal. The orders sought by the plaintiffs in their pleadings were;

- a. A mandatory injunction to compel the defendant to restore power to Plot LR Kisii Municipality Block 111/77 and in particular the plaintiffs' individual meters and accounts;
- b. Loss of profits;
- c. General aggravated damages for the illegal disconnection of power on the plaintiffs' meters and accounts;
- d. Costs of the claim;
- e. Interest on a, b and c above at court rates.

21. The defendant denied all the averments made in the pleadings in its Statement of Defence. In the alternative, the defendant claimed that that if at all it had disconnected power to the premises as alleged, it did so pursuant to Section 160 of the Energy Act. It also claimed that the plaintiffs were guilty of offences under Sections 155, 168 and 185 of the Energy Act. The defendant accused the plaintiffs of conjuring up the suit to unjustly enrich themselves. The jurisdiction of this court was also denied. The defendant asserted that the Tribunal and the Authority had jurisdiction to hear the matter.

22. The dispute between the parties from the pleadings which are summarized above concerns the disconnection of power supply to the plaintiffs' business premises. Both parties agree that such matters are governed by the Energy Act which was enacted to regulate the production, supply and use of electricity among other purposes. The Act establishes an Energy and Petroleum Regulatory Authority ("the Authority") and an Energy and Petroleum Tribunal ("the Tribunal") under sections 9 and 25 respectively to perform various functions under the Act.

23. Courts have consistently held that an aggrieved party must first exhaust all dispute resolution mechanisms provided under the law before proceeding to court. In **Speaker of the National Assembly v James Njenga Karume [1992] Civil Application No Nai 92 Of 1992 (Nai 40/92 UR) eKLR** the Court of Appeal held;

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

24. The Court of Appeal has also variously cautioned courts against expanding its jurisdiction to hear and determine matters over which it otherwise lacks jurisdiction. Litigants are also warned against drafting their pleadings with the intent to bypass dispute resolution mechanisms provided under the Statute. In **United Millers Limited v Kenya Bureau of Standards & 5 others [2021] eKLR** the Court of Appeal held;

In Council v Trans Mara County Council & Another [2000] eKLR). And in the case of Godfrey Muthinja Kabiru, (Supra) this Court stated thus:

We may further add that in the case of Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (2019) eKLR the Court in addressing similar circumstances was emphatic that:

"In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the 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 the 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".

25. Makhandia JA in **Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 others Civil Appeal No. 153 of 2019 [2020] eKLR** also held;

*“To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”*

26. In the case of **United Millers Limited v Kenya Bureau of Standards & 5 others [2021] eKLR** the Court of Appeal held that as much as a party is required to follow the dispute resolution provided under Statute there are certain instances when the alternative dispute mechanism may not be ideal and the case may be referred to court. The court held;

“Indeed in its own submissions the appellant concedes to this fact. It has been said that the rationale for the doctrine is that it serves the purpose of ensuring that there is postponement of judicial intervention of matters to ensure a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts which accords well with Article 159 of the Constitution that commands courts to encourage alternative means of dispute resolution.

However, the doctrine is not cast in stone. There may be occasions where the invocation of the doctrine would not serve the values enshrined in the Constitution or law in which case a party may perfectly be entitled to move to court directly.”

27. The jurisdiction of the Tribunal is provided under **Section 36** of the **Energy Act**. At sub section 3 thereof, the Act provides that the Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees. Sub section 5 provides that the Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

28. The composition of the Tribunal is provided for under **Section 26** of the Act thus;

(1) The Tribunal shall consist of not more than seven members as follows —

(a) a chairperson who shall be appointed by the President from among persons qualified to be judges of the High Court and who has at least five years' experience in energy and petroleum matters; and

(b) six other persons possessing knowledge and experience in law, petroleum and energy and who are not in the employment of the Government, Agency or the Authority

29. The quorum of the conduct of the business of the Tribunal is under **Section 33** of the Act as follows;

33. (1) The Chairperson shall preside at all sittings of the Tribunal at which he is present and in the absence of the Chairperson the Vice-Chairperson shall preside.

(2) The quorum of the Tribunal shall be three members including the Chairperson or the Vice-Chairperson as the case may be.

30. The Act provides that the Tribunal is comprised of the Chairperson and six members. It is agreed that the six members of the Tribunal under Section 26 (1) (b) above were appointed. The Kenya Gazette Vol. CXXII No. 155 indicates that six individuals were appointed to be members of the Tribunal, for a period of three (3) years, with effect from the 27th March, 2020. The contention by the plaintiffs that the President has not appointed a Chairperson to the Tribunal is not denied by the defendant. From the above provisions, the importance of the Chairperson's role in the Tribunal cannot be overemphasized. Section 32 of the Act provides that the Chairperson is responsible for ensuring the orderly and expeditious discharge of the business of the Tribunal. Chairperson or Vice- Chairperson are also critical for the Tribunal to attain the require quorum to hear disputes including the matter before this court. The defendant has not demonstrated to the satisfaction of this court that the Tribunal is fully operational. Reference of the matter to the Tribunal would therefore not serve the purpose of expedient resolution of the dispute as envisioned under Article 159 of the Constitution would therefore be a fit situation

31. It is also the defendant's contention that the Authority has the necessary jurisdiction to hear and determine this matter pursuant to **Section 11 (e), (f), (i), (k) and (l)** of the Act which provide as follows;

(e) make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act;

(f) issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled;

(i) investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;

(k) issue orders or directions to ensure compliance with this Act;

(l) impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;

32. **Section 160** of the Act provides for instances when supply of electrical energy may be refused or discontinued. According to **Section 160 (3)** disputes arising under that Section are referred to the Authority. The provision stipulates;

(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; or

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

33. The plaintiffs' main complaint in this suit is the disconnection of power supply from their business premises by the defendant. The plaintiffs insist that the Authority lacks jurisdiction to deal with the matter on the basis that they do not owe the defendant. However, the defendant denies that the plaintiffs do not owe it. The defendant also accuses the plaintiffs of committing offences under **Section 155** which concerns security and protection of meters, **Section 168** which relates to unauthorized, fraudulent or improper supply or use of electrical energy and **Section 185** which deals with hindering, obstructing or interfering with the exercise of licensee's powers.

34. Contrary to the position taken by the plaintiffs, the Authority is empowered to resolve disputes relating to disconnection of electricity supply by a licensee such as the defendant. The Authority is also empowered to issue orders in writing requiring acts to be performed or prohibiting acts from being performed or done, and may prescribe periods upon which such acts shall be performed or such conditions shall be fulfilled under **Section 11 (f)** above. It follows that the Authority would have the power to order reconnection of electricity supply where it finds that the disconnection by the defendant was improper. The Authority would be best placed to resolve the disputes relating to disconnection of electricity supply as it has the relevant expertise and technical competence on such matters. In the case of **Mutanga Tea and Coffee Company Ltd v Shikara Ltd and Another Malindi Civil Appeal No. 54 of 2014 [2015] eKLR** the Court of Appeal held;

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.

35. Since it has not been demonstrated that the Tribunal which is empowered to determine the claim for loss of profits and damages is properly constituted, those matters are properly before this court. The High Court's jurisdiction to determine those issues is derived from Article 165 (3) (a) which provides that the High Court has unlimited original jurisdiction in civil matters. However, those issues shall be stayed pending the determination by the Authority on whether the disconnection by the defendant was proper.

36. The upshot of the foregoing is that the preliminary objection is partially successful. I hereby make the following orders;

a. This matter is hereby referred to the Energy and Petroleum Regulatory Authority to hear and determine whether the defendant lawfully disconnected power supply to the whole Plot LR Kisii Municipality Block 111/77 and in particular the Plaintiffs meters and accounts numbers A/C 32863155, A/C 35913450, A/C 26482398 A/C 116305988 A/C 53103545, A/C 104440862 A/C 15945330 A/C 26482331.

b. This suit is stayed pending the determination of the Authority in (a) above.

c. Costs shall be in the cause

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF JUNE 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Bunde h/b Mr. Ochillo For the Plaintiffs

Mr. Ododa h/b Mr. Ochieng For the Defendant

Ms. Rael

Court Assistant