REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 275 OF 2010

JOSEPH KINYANJUI MWAI

t/a Sandworth Printing & Packaging.....APPELLANT

VERSUS

THE KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

JUDGMENT

The appellant filed a complaint dated 8th April 2008 before the

Energy Regulatory Commission. The complainant's prayers were as follows:-

a) A declaration that the respondent has made illegal connections from my supply of electric power to neighbours without a written consent from the complainant and this interferes with the amount of power supply to our company. Refer to paragraphs 7, 21, 22, 24, 25, 28 (i) & annexes 9, 13,

b) That a declaration that the inherited bills for Kshs. 41,002.80 are not payable by the complainant as the previous owner of the property has admitted liability as per annex 23.

c) The sum of Kshs. 53,650,800,000 Billion (Kenya Shillings Fifty Three Billion Six Hundred and Fifty Million Eight Hundred Thousand Shillings Only) to be paid to us in form of damages for period 1998 to December 2007 plus interest at bank rates from January 2008, and all other costs involved. See annex 11 on which computation of damages has been based, and annex 25 for additional damages effective 09/02/2007.

The complaint was dismissed by the commission on 5th March 2009 and this triggered the filing of an appeal before the Energy Tribunal.

The Tribunal delivered its judgment on 20th November, 2009 and dismissed the appellant's appeal. The appeal before this court is against the decision of the Tribunal and is based on the following grounds**:-**

a) Whether the Tribunal erred by delivering an undated and unsigned judgment;

b) Whether the Tribunal erred by construing its jurisdiction narrowly and restrictively.

c) Whether the Tribunal had powers to examine the complaint afresh.

d) Whether the Tribunal erred when it held that the commission did not have jurisdiction to award damages.

e) Whether the Tribunal had powers to award damages upon finding that the commission lacked jurisdiction.

f) Whether the Tribunal re-evaluated the evidence on record and made its own findings on the issue of inherited bills.

g) Whether the Tribunal erred when it failed to investigate and make a finding on the issue of the 3-phase cover.

h) Whether the Tribunal erred when it refused to admit a surveyor's report.

i) Whether the Tribunal erred in making the decision that it did.

It is submitted that the judgment of the Tribunal delivered on 20th November, 2009 was neither signed by the Members of the Tribunal nor was it dated. This made the purported judgment a nullity ab-initio and cannot be said to be a judgment for any purpose. Counsel relies on the case of **GEOFFREY M ASANYO & 3 OTHERS –V- ATTORNEY GENERAL (2019) eKLR** where the Supreme Court held as follows:-

> **"It is also trite that for a Judgment of the Court to be valid, it must be dated signed and delivered in open Court. The High Court, *Makhandia, J,* (as he then was) aptly stated in *South Nyanza Sugar Co. Ltd v. Elijah Ntabo Omoro* Civil Appeal No. 60 of 2005; [2011] eKLR that, *"[i]t is a mandatory requirement that for a judgment of the court to be valid, it must be dated, signed and delivered in open court… Thus a judgment that is neither dated nor delivered in open court is a nullity.* We agree."**

It is further submitted that a judgment which is not signed or dated does not even give a right of appeal. Reference is made to the Court of Appeal decision in **LOKWACHARIA –V- REPUBLIC (2005) eKLR** where it was held:-

> **"The judgment of the High Court appealed from was dated but not signed by one of the two Judges of the High Court. That means there was no valid judgment of the superior court before us. We are therefore, precluded from considering the merits or demerits of the said judgment of the superior court. That being the position we order that the appellant's appeal to this Court be and is hereby allowed and we further order and direct that the appellant's appeal to the High Court be heard de novo before a different bench of two Judges of that court."**

Counsel for the appellant submits that the unsigned decision does not comply with Section 11(2) of the Third Schedule of the now repealed Energy Act, 2006 which provided on how a decision of the Tribunal was to be made. The said section stated as follows:-

> **"Unless a unanimous decision is reached, a decision on any matter before the Tribunal shall be by a majority of votes of the members present and in the case of an equality of votes, the Chairperson or the person presiding shall have a casting vote."**

It is also submitted that Section 10 of the Third Schedule to the 2006 Energy Act provided for the jurisdiction of the Tribunal. According to counsel, the Tribunal exercised appellate, special and original jurisdiction and had powers to investigate independently every complaint referred to it including by way of appeal. It could call witnesses, record evidence and consult experts. The Tribunal erred by construing its jurisdiction narrowly and restricting it to being an ordinary appellate court.

It is further contended that the commission erred by finding that it lacked jurisdiction to award damages yet Sections 5 and 6 of the Energy Act, 2006 granted those powers. Section 5(b) of the Act empowered the Commission to protect the interest of the consumers, investors and other stake holders while Section 5(h) empowered the Commission to perform any other functions that are incidental or consequential to its functions under the Act. Section 6 of the Act empower the commission to impose sanctions and penalties. The commission therefore had wide and unlimited powers to execute its functions. Damages fall squarely within "sanctions" and "penalties" as envisaged in the Act. The Tribunal ought to have considered whether the commission lacked the jurisdiction to award damages.

The appellant also maintain that the Tribunal did not adequately deal with the issue of inherited and illegal connection. It failed to re-evaluate the evidence, examine the bills and relevant documents and arrive at its own conclusion. The bills that were disputed started from Kshs.80, 782 to Kshs.53, 535/78 then dropped to Kshs.7,778/70 and lastly adjusted to Kshs.42, 000. These variations made the inherited bills invalid. There was an issue involving three (3) phase power that was completely ignored. The appellant paid Kshs.62, 382/50 for the three phase power but the same was not connected.

Additionally, counsel for the appellant submit that the Tribunal erred by rejecting an additional surveyor's report on the basis that it was not part of the record before the commission. The decision to exclude the report violated Section 10 of the Third schedule. The Tribunal had jurisdiction to take further evidence and it would have found that the electric pole in issue was erected within the appellant's property and was not on a road reserve as found by the commission.

The appeal is opposed. Counsel for the respondent submit that the dispute started way back in April, 2006 when the appellant made a complaint before the commission. The commission gave directions in January 2008 and these directions led to the filing of a formal complaint by the appellant before the Energy Regulatory Commission. Counsel maintain that on 22nd November, 2009 the appellant wrote to the Tribunal complaining that the copies of the delivered judgment were not signed. On 4th March, 2010, the appellant's advocate wrote a letter to the Tribunal requesting for a signed and certified copy of the judgment. There is a signed and certified copy of the judgment on record. The Energy Act and its Rules do not specifically state that the judgment must be signed. All what is required is that the decision must be delivered in public on a date fixed for that purpose and be published in the Gazette. The decision was gazetted in Gazette Notice No. 2897 of 15th March 2011.

It is also submitted that the Tribunal only has powers to heard appeals as provided under Section 107 of the Act. These are appeals from the commission. There is no inherent or implied power under Rule 8(1) of the Rules. Under the Energy Act, all documents and reports placed before the commission were to be filed before the Tribunal. Any other document or report upon which the appellant intended to rely on could only be filed with the leave of the Tribunal. The tribunal looked at the evidence before the commission and evaluated it before reaching its decision on each issue.

On the issue that the commission had power to award damages, it is contended that the objects and powers of the commission are provided under Sections 5 and 6 of the Act. The powers are to enforce regulations and standards and investigate complaints or disputes. Sanctions and penalties could be imposed by the commission. Both the commission and the Tribunal considered the issue of damages and concluded that there was no jurisdiction to award compensatory damages. It is further submitted that since the commission lacked jurisdiction to award damages, the Tribunal could not have had a wider jurisdiction from the commission from which the appeal was preferred as held in the case of **SHAH V AGUTO (1970) E.A. 263.** The commission found that there was no evidence of any interruption of supply or poor quality of

supply or proof of damage allegedly suffered by the appellant.

According to the respondent, the issue of inherited bills was considered in detail by the commission and the Tribunal. There was a supply agreement dated 20th April, 1994 that was signed by the appellant. The agreement was for supply of electricity for residential purposes and there was no indication of any equipment or motors to be installed. The bills complained of were for electricity consumed by the appellant. The commission reduced the amount due because the respondent could not produce the early part of the account due to delay and change in computer system.

Regarding the issue of three (3) phase electricity supply, it is the respondent's submission that the appellant's claim on this matter was based on two letters from the respondent dated 20th February 1986 and 10th March, 1986. The letters are 8 years before the supply agreement was signed. None of the letters indicate the type of supply that was being requested. The appellant wrote a letter dated 15th March, 1999 talking about additional supply without specifying whether it involved a three phase supply. There is no proof that a cheque for Kshs.39,392/50 dated 14/1/1997 was ever delivered to the respondent or banked. No receipt was issued.

The respondent further contend that the appellant encroached on a road reserve. The finding was based on a physical survey that was accepted by the commission. The appellant tried to introduce a survey report during submissions stage before the Tribunal. The pleadings had by then closed.

Analysis and Determination

The appellant submit that the appeal raises several issues as itemised in his submissions. Counsel for the respondent did not raise any issues different from those raised by the appellant. I do find that the issues raised by the appellant shall be the issues for determination by this court.

The first issue is whether the Tribunal erred by delivering an undated and unsigned judgment. The appellant contend that the Tribunal's judgment was not dated or signed and that any signing after the delivery does not cure that illegality. Page 44 of the record of Appeal filed on 16th July, 2010 has the judgment of the Tribunal. The judgment is not dated or signed. It has the stamp of Sandworth Printing & Packaging of P.O. Box 875, Limuru. There is also a stamp of the appellant Joseph Kinyanjui Mwai of the same address. The judgment was delivered on 20th November, 2009 in the presence of someone who signed for the appellant. It is not clear whether the signature on the judgment is that of the appellant or his advocate.

The appellant on 23rd November, 2009 wrote to the Chairman of the Energy Tribunal. The letter reads as follows:-

23rd November, 2009

The Chairman,

The Energy Tribunal

24th Floor

Nyayo House

NAIROBI

Dear Sir,

'URGENT BY HAND'

RE: ENERGY TRIBUNAL APPEAL CASE NO. 1 OF 2009

JOSEPH KINYANJUI MWAI T/A SANDWORTH PRINTING AND

PACKAGING

–VS-

THE KENYA POWER & LIGHTING COMPANY LIMITED

We refer to your judgement given to us on 20th November 2009 referring above mentioned case, and issued to the media, ourselves and the lawyer for the Respondent. After perusing the document, we found it to be defective due to the following reasons:

a) The document was NOT dated, signed and nor did it have the Tribunal serial stamp.

b) It is therefore not valid and cannot be honoured by ourselves, any

Government Institution and any attempt by the Tribunal or the lawyer for the respondent to enforce any action will be dealt with according to the law of this land.

c) We have already notified the Tribunal through our various submissions that the judgement delivered by ERC on 5th day of March 2009, that it was also defective for the fact that the dates mentioned by ERC as the dates for the arbitration meetings were different from the dates of the minutes for the meetings which were recorded by ERC.

In other words both the judgements, one from the Energy Regulatory

Commission and the other from the Energy Tribunal are defective and technically they cannot be honoured anywhere.

THE TRIBUNAL'S INSTRUCTIONS TO HIGHLIGHT A DEMAND FOR DAMAGES AMOUNT TO KSHS. 53,650,800,000/

It should be noted that from the documents filed with the Energy Regulatory Commission and the Energy Tribunal, that we have never demanded damages amounting to the above quoted figure.

The alarming figure was meant to tamish our company's image in the eyes of the public our claim to KPLC now stands at Kshs. 5,865,700,000/-todate.

THE CONSEQUENCES OF THIS IS AS FOLLOWS:

i. On the day of the judgement, the Tribunal invited the media houses to record and highlight the issue at their broadcasting houses for the public awareness.

ii. My photographs were also taken to be highlighted in all newspapers, locally and in foreign countries the result of which was to endanger my life and damage my image and that of our company, both locally and internationally.

iii. I first heard the news through the radio, that the case I filed against KPLC for damages amounting to Kshs. 53 billion was dismissed. This was followed by the news item that KPLC would be selling their shares and any reasonable person can put the two issues together. This is a clear way of turning the public against me and my company.

We paid a fee of Kshs. 100,000/- to the Energy Tribunal, and our lawyers more than 4,000,000/- to get justice. The outcome of all this was a defective judgement which cannot be honoured anywhere.

We therefore request the Permanent Secretary Ministry of Energy, to refund with interest the amount paid as the current Tribunal has proved to be incompetent and cannot be trusted by Kenyans to deliver justice.

We enclose a copy of the entire judgement to support our argument.

It is only by the grace of God that I went back to the Tribunal Secretary and collected a copy of the judgement, as they were being issued to the other parties, otherwise the purported judgement was meant to destroy me and my company.

Please note that the necessary legal action will be taken against the Energy Tribunal.

It should also be noted that our appeal was not filed out of time as purported by the judgement as the Energy Tribunal Offices were under construction between 9 April 2009 when we presented our complaint, and July 2009. This is a well known fact to the Tribunal.

Yours faithfully,

Joseph K. Mwai

For Sandworth Printing & Packaging

c.c. (1) Hon. Mwai Kibaki CGH, M.P

H.E. The President

Republic of Kenya

State House

NAIROBI

(2) Mr. Patrick M. Nyoike

The Permanent Secretary

Ministry of Energy

Nyayo House

NAIROBI

(3) The Managing Director

Kenya Power & Lighting Co. Ltd.

Stima Plaza

NAIROBI"

At page 61 of the same record of appeal the same judgment is provided and runs from Page 61 to 72. At page 72 the judgment is dated and signed by all the Tribunal members. It is dated 20th November, 2009 and was signed. The last page of the judgment reads as follows:

Order

We have come to the conclusion that there are no valid grounds for interfering with the decision of the Commission. Consequently, we find that this appeal is without any merit and we dismiss it with costs to the Respondent

Orders accordingly.

DATED at Nairobi this 20th day of November, 2009

Mbage N. Ng'ang'a

CHAIRMAN

Kipketer Arap Chumo

MEMBER

Shem Arungu-Olende

MEMBER

Nyaga Kamundi

MEMBER

Delivered in the presence of:

Mr. Joseph Kinyanjui Mwai in person for the Appellant

Mr. K.A. Fraser for the Respondent"

As indicated in the judgment, it was delivered in the presence of the appellant in person and Mr. K.A. Fraser for the Respondent. That judgment was certified on 9th March, 2010 as a true copy of the original. The other judgment at page 44 of the record has only one signature and is the one that was issued to the appellant. Since the Tribunal did indicate that the judgment was delivered in the presence of the appellant in person, the only logical conclusion is that the signature on the judgment on the part reserved for the appellant is that of the appellant. The same signature appears on the receiving stamp of Sandworth Printing & Packaging Company.

The appellant's letter dated 23rd November, 2009 was written three days after the delivery of the judgment. There is proof that the judgment

was signed by the Members of the Tribunal. The appellant does not allege that when the judgment was delivered some of the members were absent. It is not unusual for a party to be provided with an unsigned copy of the Judgment. There is no evidence that the tribunal forwarded the unsigned copy as its official document. The appellant has not established how he got the judgment. His letter of 23rd November2009 simply indicate that the judgment was given to him on 20th November 2021 and it was also issued to the media. It took him three days to peruse the Judgment and realise that it was not signed. It is the appellant who filed both the signed and the unsigned and certified copy of the judgment. There is no indication as to how and when the appellant got the signed judgment. The appellant cannot allege that the judgment was not signed or dated. The judgment was subsequently gazetted in compliance with the law. I am satisfied that the Tribunal's judgment was duly dated and signed by the members of the Tribunal. The judgment of the Tribunal is unanimous and there is no contravention of Section 11(2) of the Third Schedule to the 2006 Energy Act. This ground of appeal fails.

The second and third issues is whether the Tribunal erred by construing its jurisdiction narrowly and restrictively and whether the Tribunal had powers to examined the complaint afresh.

The appellant submit that the Tribunal interpreted its jurisdiction narrowly. It had powers to summon witnesses and take fresh evidence. Section 10 of the Third Schedule of the Energy Act, 2006 states as follows:-

> **"10. (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy sector arising under this Act.**
>
> **(2) For greater certainty, the jurisdiction of the Tribunal shall not include the trial of any criminal offence or the hearing of any dispute that a licensee and any other party may have agreed to settle in accordance with their agreement."**

According to counsel for the appellant, in its appellate jurisdiction. The Tribunal had special and original jurisdiction and could conduct independent investigation. Section 107 of the 2006 Energy Act states as follows:-

> **"Where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part."**

Section 108(1) states as follows:

> **"(1) For the purpose of hearing and determining appeals in accordance with section 107 and of exercising the other powers conferred on it by this Act, there is established a tribunal to be known as the Energy Tribunal, hereinafter referred to as the "Tribunal."**

The dispute herein started before the Electricity Regulatory Board (Commission). The appellant was dissatisfied with the board's decision and filed an appeal before the Energy Tribunal. There is a statement of Appeal dated 26th August, 2008 and an unsigned and undated Memorandum of Appeal as per the Supplementary record of appeal by the respondent filed on 21st December 2010. The grounds of Appeal before the Tribunal as per the Memorandum of Appeal were:-

> **"The appellant Joseph Kinyanju Mwai T/a Sandworth Printing and Packaging aggrieved by the decision of the Energy Regulatory Commission delivered on 5th day of March 2009 appeals from the same on the following main grounds namely;**
>
> **1. THAT the commissions decision is not based on reasoning and is based not on the evidence adduced in the complaint, the submissions, replies to submissions and/or the appellants rejoinder but on extraneous facts**
>
> **2. THAT the commissions decision is based largely if not entirely on the appellants complaint letter against corrupt officials of the respondent dated 2nd January 2008 addressed to His excellency the President and that of 15th January 2008 addressed to the Permanent Secretary Ministry of Energy respectively.**
>
> **3. THE commission's finding that the Appellants averment over the inherited bills for Kshs 41,002/- is itself baseless as the appellant's several readjustment of the bills from Kshs 80,7821- to Kshs 53,535 78/- then by a further Kshs 7,778.70/- and lastly to Kshs. 42,000/- is by itself both express and implied admission of validity of the claim.**
>
> **4. THE Commission's finding under section 57 (3) (a) of the Energy Act 2008 is itself totally untenable as whereas the electric supply lines shall be the property of the respondent its use and/or must be with the knowledge and consent of the customer (Read appellant) which in any case MUST not cause prejudice to the customer's full use of the electricity supply such as causing low voltage resulting in loss of business.**
>
> **5. THE Commission's finding that the respondent is a stranger to the matters of sale of the plot containing the subject-matter herein from one John Karegi Njoroge to the appellant leading to the issue or previous and/or inherited electricity bill of Kshs 41,002.80/- is itself totally unsupported by cogent evident as there is an express admission of the same in paragraph 4 of the sale agreement between the appellant and the vendor dated 8th May, 1994.**
>
> **6. THE Commission erred in not making a clear and concise decision on the issue of 3 phase electric power supply as**

it has ignored to deliberate on whether or not the appellant paid the sum of Kshs. 62,392.50/- and if so was the appellant then not entitled to either a refund of the same with interest or to have the same connected or supplied to him.

7. THE Commission erred in holding that compensation by way of damages was not awardable by the commission and failed to fully understand and embrace the opinion of Mr. Mwenesis opinion as much as that of the appellant's counsel Mr. Ndungu Wariuki that in terms of sections 8 and 52 of the Energy Act, damages are payable to any person for any bodily injuries occasioned by the respondent, his property or his interests.

8. THE Commissions decision in partial as it completely ignores to address or consider the issues raised in the Appellants general submissions, rejoinder and reply to respondents written submissions but rather giving a lot of weight to those of the respondent."

It is evident that the Tribunal was established under Section 108(1) of the Act to deal with Appeals from the Commission. Section 10(c) of the 3rd Schedule does not confer to the Tribunal powers to carry out investigations. What was referred to the Tribunal was an appeal from the Commission. I do find that the Tribunal properly interpreted its jurisdiction.

Another issue is whether both the commission and the Tribunal could have awarded damages to the appellant. The appellant's position is that Section 5(b) of the Energy Act 2006 empowered the Commission to protect the interest of the consumers, investors and other stake holders. The commission is equally empowered under Section 5(h) to perform any other function. According to Counsel, the commissions' powers should not be narrowly interpreted as it had wide and unlimited powers.

Before the commission the appellant claimed a sum of Kshs.53,650,800 (Kenya shillings Fifty Three Billion, Six Hundred and Fifty Million, Eight Hundred Thousand Only) as damages. The claim was covering the period 1998 to December 2007 plus interest from January 2008. The commission in its decision at paragraph 16 noted that there was a rejoinder by the appellant dated 15th October 2018 which revised the claim from Kshs.53,650,800,000 to Kshs.4,916,580,000. In his letter dated 23rd November, 2009 addressed to the Energy Tribunal, the appellant stated that he never claimed Kshs.53,650,800,000 and that by that date the claim stood at Kshs.5,865,700,000.

The **commission** framed four issues for determination. The last issue states as follows:-

"Whether the commission has jurisdiction to award damages as prayed for by the complainant in his complaint and/or whether the complainant is entitled to compensation amounting to Kshs.4,806,590,000 in form of damages for the period 1998 to December 2007, in any event."

The commission had received a legal opinion from one of its external lawyers who seemed to have advised that it had the jurisdiction to award damages. However, the commission found that it lacked jurisdiction to award damages.

The **Tribunal** raised five issues for determination and one of them was "whether the commission erred in holding that it had no jurisdiction to award damages."

The Tribunal noted as follows in its judgment:-

"We have considered the parties' submissions on the issue. We have also mined the relevant provisions of the law. Rule 6 of the Electric Power Rules provides as follows:-

"6. The Board is available to assist complainants in the resolution of complaints in the following matters-

(a) Billing;

(b) Damages;

(c) Disconnection;

(d) health and safety;

(e) installations;

(f) power interruptions;

(g) licensee practice and procedures;

(h) metering:

i) new connections and extensions;

j) reconnections;

k) quality of service;

1) quality of supply;

m) tariffs;

n) way leaves, easements or rights of way; and

o) any other matter required to be regulated under the Act."

The "Board" refers to the Commission which is the successor to the Electricity Regulatory Board. In our view, rule 6 of the Electric Power Rules does not confer jurisdiction upon the Commission to award damages. The provision relates to the types of complaints which an aggrieved person can take to the Commission for investigation and resolution. Our understanding and interpretation of the expression "damages" in rule 6 (b) is that it simply means an injury or a loss suffered by the complainant.

Sections 5 and 6 of the Act deal with the functions and powers of the Commission. There is nothing in these two sections giving power to the Commission to award damages. It is our considered view that section 5 and 6 of the Act emphasise more on the regulatory role of the Commission in the energy sector and that any quasi-judicial functions are primarily incidental and are invoked to supplement the regulatory role of the Commission. If Parliament had intended to confer such jurisdiction on the Commission, it would have expressly done so.

With regard to section 8 of the Act, we are of the view that the provision is concerned with the Commission's liability to pay compensation or damages for injury or loss occasioned by the Commission to a person or property. It has nothing to do with the jurisdiction of the Commission to award damages to a complainant.

We are satisfied that section 52 of the Act relates to a licensee's liability to pay compensation or damages. That section does not give the Commission power to assess or award damages payable by a licensee. We agree with counsel for the Respondent that the jurisdiction to assess or award damages, payable by the Commission or a licensee for liability under the Act, remains with a court of law in exercise of its civil jurisdiction.

We do not see how sections 61 and 63 have any application in conferring jurisdiction to the Commission to award damages. Section 61 deals with instances when supply of electricity may be refused or disconnected, while section 63 deals with the making of subsidiary legislation in form of rules and regulations.

We are therefore satisfied that the Commission was right in holding that it had no jurisdiction to award damages. If we are wrong in finding that the Commission did not have jurisdiction to award damages, we nevertheless find that the Appellant did not adduce sufficient evidence to prove the damages claimed."

The appellant produced his computation on how he incurred loss and was claiming damages. The computation document provided a weekly turnover of Kshs.124,191,670. This made a monthly turnover of Kshs.496,766,680 and annual turnover of Kshs.5,061,200,160. The total claim for a period of Nine (9) years was Kshs.53,680,801,4400/-.

Apart from the statement of claim, there is an Auditor's report for the year ended 31st December 1996. The company had current assets in form of debtors totalling Kshs.4,831,846,760 and Kshs.12,000 as cash at hand. During that period the company made a gross profit of Kshs.630,000,000 and net profit of Kshs.549,739,000 after netting off Kshs.80,261,000 as expenses.

By his rejoinder dated 15th October, 2009 filed by M/s Kariuki & Co. Advocates, at paragraph 9, the appellant stated as follows:

"THAT the complainant reiterates that his claim is for the sum of Kshs.4,916,590,000 as per the Notice of Motion dated 23rd April 2007 more particularly paragraph 11 and any reference to Kshs.53, 650,800,000 is merely speculative."

The record of appeal does not contain any oral evidence that was adduced before the Commission. The decision for the Commission notes at paragraphs 13 and 14 that the complaint was fixed for hearing on 13th February, 2009 and that during hearing, parties agreed by consent to allow the commission to make its decision on the basis of the pleadings filed by the parties.

The issue on damages is two fold. There is the issue as to whether the commission had the jurisdiction to award damages and whether the appellant proved that he was entitled to be awarded the damages totalling to Kshs.4,916,590,000 plus interest and costs as claimed.

Section 4 of the 2006 Energy Act establishes the commission. Section 5 of the Act provides for the objects and functions of the commission. These objects and functions are:-

(a) regulate

(i) importation, exportation, generation, transmission, distribution, supply and use of electrical energy;

(ii) importation, exportation, transportation, refining, storage and sale of petroleum and petroleum products:

(iii) production, distribution, supply and use of renewable and other forms of energy:

(b) protect the interests of consumer, investor and other stakeholder interests;

(c) maintain a list of accredited energy auditors as may be prescribed;

(d) monitor, ensure implementation of, and the observance of the principles of fair competition in the energy sector, in coordination with other statutory authorities;

(e) provide such information and statistics to the Minister as he may from time to time require; and

(f) collect and maintain energy data;

(g) prepare indicative national energy plan;

(h) perform any other function that is incidental or consequential to its functions under this Act or any other written law.

Under Section 1 of the fourth schedule, the commission was the successor of the Energy Regulatory Board. Section 6 of the Act provides for the powers of the commission. The intent and purpose of both Sections 5 and 6 of the Act was to empower the commission to regulate the energy sector. We cannot enlarge the provisions of Section 5(h) which was purposely included to cover functions which should equally relate to those provided under Section 5(a) to 5(g) to include powers to award a stakeholder or complainant kshs.4billion. I do agree with the finding of both the commission and he Tribunal that they lacked the power to award the amount claimed by the appellant. The damages contemplated under Section 6 of the Electric Power Rules does not include the type of damages claimed by the appellant.

The appellant's complaint which led to the prayer for damages can be attributed to his claim that there was loss of business. In his written submissions before the commission, the appellant under paragraph 3 partly states as follows:-

The complaint's company started operations on his plot of land reference number Limuru/Kamirithu/T.526 but stopped operations in December 1998 due to low voltage and dim lighting. The main reasons ae as stated elsewhere but was largely as follows:-

i. Sporadic disconnection of electricity supply to the complainant's premises due to inherited bills.

ii. Illegal connection and supply of power to neighboring premises thus resulting in reduced voltage in turn resulting in the grounding of the company's operations.

Without prejudice to the foregoing the respondent occasioned loss of the following by the complaint.

a) Credit facilities from foreign suppliers.

b) Credit facilities from local banks.

c) Rural customers.

d) Cancellation of import license on raw materials.

e) Withdrawal of proposed working capital under the Credit Guarantee Scheme bank overdraft of Kshs. 350,000 per week with Kenya Commercial Bank intended to meet its urgent orders for Bata Shoe Co. (K) Ltd. (See memo of 17 th April 1989 by KCB marked exhibits 15).

f) The complaints credit banking facility of Kshs. 40 Million from Co-operative merchant bank was also withdrawn. (See letter of 14th September 1998 marked as exhibit 16).

g) Legal action was taken against the complainant company over it's charged property on L.R.Limuru/Kamirithu/T.526 and arrangements made to auction the property by Barclays Bank. This was due to the loss of business occasioned by the respondent (see notification of sale attached herewith marked as exhibit 17).

Having exhibited the purchase orders that were involved i.e. from Bata Shoe Co. (K) Ltd, Kenya Breweries, C.P.C. (K) Ltd, Cussons & Co. (K) Ltd, Interproducts (K) Ltd and Tiger Shoe Co. Ltd we humbly submit that the expected loss would be the sum of Kshs. 53,650,800,000.00

It is evident that the application for electricity was for residential purposes. There is no indication that the appellant was running an industry otherwise he would have been required to obtain change of user of the premises from residential to commercial. The appellant pains a picture of a vibrant business that was making millions. If that was the case, it would have been prudent for him to have purchased a generator that would have enabled him run his lucrative business. The appellant should not have allowed himself not to fulfil his client's orders due to the alleged sporadic disconnections of electricity or the illegal connections. Further, the appellant is on record disputed an inherited bill of

Kshs.41,000. There is no evidence that the subsequent bills were running into millions due to the heavy machines that were operating in the premises. The purchase orders runs into millions. The appellant could have even relocated to another area as the picture he gives show that he had orders running into billions. All this in my view was a concerted effort by the appellant to seek compensation for alleged losses which were never suffered. There are no bank deposits to prove that the appellant was running a business worth what was claimed as damages. The bank statement that was provided was overdrawn to the extent of Kshs.771,742 as on 15th July, 1997.

I do find that the appellant did not prove any loss of business. There is no evidence that the supply of electricity to the appellant's premises was erratic or that there were connections to other consumers which interrupted the supply to the appellant. I am satisfied that this ground of appeal must fail.

The other issue raised by the appellant is whether the Tribunal re-evaluated the evidence on record and made its own findings on the issue of inherited bills. The appellant was disputing the electricity bills in relation to his account. The appellant's position is that his electricity account was opened on 11th September, 1997. The appellant bought his property in 1994 from Mr. John Karegi Njoroge vide a sale agreement dated 8th May, 1994.

The Tribunal noted in its judgment as follows:-

> **"The Tribunal has perused the original record of proceedings before the Commission, including the parties' submissions and the evidence tendered. The Tribunal observes that the evidence produced by the Appellant before the Commission, comprised an agreement of sale of land, dated 8th May, 1994, between the Appellant and a third party; and an electricity supply agreement dated 20th April, 1994, between the Appellant and the Respondent. On the face of it, the latter agreement was for the supply of electricity to residential premises.**
>
> **The Tribunal is satisfied that the Commission dealt with the issue of "inherited" bills exhaustively. The evidence before the Commission overwhelmingly showed that the Appellant had incurred the so called "inherited" bills. The Tribunal is satisfied that the Commission arrived at the right decision on the evidence before it."**

It is evident that the appellant purchased his property in 1994. There is a power supply agreement dated 20th April 1994 for a residential area and the appellant is indicated as the consumer. According to the appellant, the person who sold him the property owned up and admitted that there were bills totalling Kshs.41,002/80 arising from a previous account number 198623001. That amount was incurred before March, 1994 when he bought the property.

Paragraphs 3 and 4 of the Sale agreement between the appellant and John Karegi Njoroge states as follows:-

> **"The vendor has hitherto agreed to that he is the owner of Account Number 198623001 with Kenya Power and Lighting, which current metre reading is unit 235645 and not paid to Kenya Power and Lighting todate and will be paid by the vendor if demanded.**
>
> **The Vendor has hitherto agreed with the Purchaser that a bill of Kshs. 41,002.80 has been inherited from his Account Number 198623001 which was incurred before March 1994 and the Purchaser should not be condemned to pay for what he did not consume."**

The agreement between the appellant and the previous consumer was entered between the two parties. The supply was not interrupted and the appellant continued to benefit from the power supply. The property was sold for Kshs.73,000 but had accumulated a power bill of Ksh.41,002/80. It would have been prudent for the appellant to have deducted the amount due to the respondent for power consumption from the purchase price as opposed to asking the respondent to pursue the previous owner of the property. The arrangements between the appellant and the vendor did not bind the respondent herein. This was supply to known premises that was continued despite the change of consumer. I do find that both the commission and the Tribunal dealt with this issue adequately and I do entirely agree with their findings.

The other issue relates to the request for a three (3) phase power connection. The record of appeal contain letters referring to additional electricity supply to plot number T 526 Limuru/Kamirithu. The appellant wrote a reminder dated 15th march, 1999 indicating that he paid Kshs.39,392/50 vide cheque number 172488 dated 14th January, 1997. The reminder was made almost two years later. The respondent wrote two letters dated 26th February, 1986 and 18th March 1986 in relation to the application for additional electricity. The appellant was requested to provide a sketch plan showing the proper location of his premises. These letters were written in 1986. The appellant's reminder was done in 1999. It is not clear whether those letters refer to the same issue as the appellant's position is that his account started running from 1997. He bought the house in 1994. The cheques for Kshs.39,392/50 seems to have been cleared on 16/6/1997 when the account was overdrawn to the extent of Kshs.829,927. Upon the clearance of the cheque the account debit balance was kshs.790,535. Since the account was overdrawn, the only logical conclusion would have been to increase the account balance by Kshs.39,392 to about Kshs.868,000 instead of reducing the overdraft. There is a cheque for Kshs.35,607 that was cleared on 23rd June, 1997 and this could not have had any effect on the account balance of 16th June, 1997. The respondent contend that no receipt was issued for the alleged payment of Kshs.39,392/50. The appellant did not produce any power application form for the three (3) phase request. The evidence is insufficient to establish the claim that the appellant applied and paid for three (3) phase power connection. This claim was not proved.

There is an issue relating to a surveyor's report that was excluded by the Tribunal. This report is in relation to the erection of an electric pole supply that was found to have been on a road reserve. Paragraph 20 (d) and 20(f) of the Commission's decision reads as follows:-

> **"(d) At a subsequent meeting held on 21st September 2007 (as shown at page 85 of the Complaint) it was observed that the Complainant had encroached onto the road reserve by placing his fence on the road reserve thereby enclosing the electric**

supply line in his homestead.

(f) Consequently, and on a balance of probabilities, the Commission finds that, the Respondent's electric supply line was placed on the road reserve and not on the Complainant's compound."

On its part, the Tribunal made the following observation in its Judgment:-

"However, it is noteworthy that during the meetings of the negotiations between the Complainant and the Respondent convened by officers of the Commission referred to hereinabove, a survey was to be carried out on July 6, 2007 (as shown at page 81 of the minutes of the meeting of 3rd July 2007) in the presence of both parties to ascertain the position of the electricity supply line in relation to the Complainant's plot boundary."

The survey was undertaken in the presence of the parties to the dispute. The result of that survey was that the Complainant (now Appellant) had encroached onto a road reserve: The supply line pole was found to be outside the Appellant's compound.

During the hearing before the Commission the Appellant did not produce any other evidence to show that the supply pole was within his premises. The Appellant argued before us that he had produced a valuation report which the Commission did not take into consideration. During oral submission by his counsel and long after the closure of pleadings, the Appellant attempted to produce before us a purported surveyor's report. The Tribunal refused to admit the document because it had not been part of the evidence before the Commission. The Tribunal also held the view that this was an attempt by the Appellant to ambush the Respondent at a very late stage in the proceedings.

We have perused the original record of the Commission and note that the valuation report the Appellant allegedly produced is an incomplete document. In any event, we do not think that it is of any evidential value in terms of determining the site of the electric power pole.

Consequently, we see no reason for departing from the finding of the Commission in regard to the position of the electric supply line and the electric power pole. In other words, we concur with the Commission that these are on a road reserve and not within the Appellant's premises. We further concur with the Commission's finding that the consent of the Appellant was not necessary for the other consumers to be connected when the supply point to those other consumers was on a road reserve."

This issue related to the appellant's claim that the respondent was connecting electricity to other consumers using his line and this was causing him power fluctuation. In my view the finding by both the commission and the Tribunal that the power pole was on a road reserve does not affect the overall finding that the appellant had not proved his complaint. No sanctions were issue by the Commission or Tribunal for that finding in relation to the locality of the pole. Even if the Tribunal found that the pole was inside the appellant's plot, nothing would have changed its findings. The surveyor's report that was to be produced by the appellant was not part of the record and was properly rejected.

I am satisfied that both the commission and the Tribunal dealt with the appellant's complaint procedurally and came to the correct conclusion. There was no proof that the appellant's power was interrupted or that there were other illegal power connections which made the appellant to suffer loss. The claim for Kshs.4,916,580,000 was not proved. I do find that the appellant suffered no loss at all. No licences for the alleged business were produced. There was no business that was being undertaken in the appellant's premises. The electricity bills just reflect the consumption of a residential house and not a factory.

The upshot is that the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

.....

S. CHITEMBWE

JUDGE