



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. E 123 OF 2019**

**SHALIMAR LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT**

**RULING**

1. **Shalimar Limited** (Shalimar) filed this case against **Kenya Power & Lighting Company Limited** (KP&L). Shalimar seeks, by the claim, injunction to restrain KP&L from disconnecting its electricity supply, on a development on LR No. 209/2158. Shalimar filed a Notice of Motion dated 7<sup>th</sup> May 2019 and this court granted it interim injunction.

2. KP&L filed a preliminary objection which is to the effect that the Notice of Motion, by Shalimar failed to comply with the mandatory provisions of the law namely section 36 (3) of The Energy Act, 2019 as read with section 224 (2) (e).

3. KP&L submitted that The Energy Act (the Act) was assented to on 12<sup>th</sup> March 2019 and came into force on 28<sup>th</sup> March 2019. Under Section 9 of the Act a number of Institutions were establish amongst which is The Energy and Petroleum Regulatory Authority (the Authority).

4. It was further submitted that jurisdiction for entertaining disputes between KP&L and third parties is vested in the Energy and Petroleum Tribunal. This indeed is what section 36 of the Act provides, it is stated:

***“ 36. 1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.***

***2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.***

***3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.***

***4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.***

***5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.***

***6) The Tribunal shall hear and determine matters referred to it expeditiously.”***

5. I am inclined to concur with the finding by Justice R.E. Ougo in the case **Joshua Ochana Kiyondi v Kenya Power & Lighting Co. Ltd (2019) eKLR** as follows:

***10. The question of whether or not there had been an interference with the meter was clearly an issue which should have been referred to the Commission for determination by virtue of section 59 (3) and section 61 (3) (c) of the Act. The Act provides a specific procedure for redress of grievances thereby ousting the court’s jurisdiction. The Court of Appeal in Speaker of the National Assembly v James Njenga Karume Civil Application No Nai 92 Of 1992 (Nai 40/92 Ur) [1992] eKLR held as follows:***

***“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.”***

6. I have noted that the Shalimar's learned advocate placed before court a Kenya gazette Notice No 11259 of 26<sup>th</sup> November 2019 which clearly shows that the recruitment of the members of the Energy and Petroleum Tribunal is still ongoing. It is not yet constituted. I am in agreement with the Shalimar's submission that I would be remiss if I failed to grant Shalimar some measure of protection until the Energy and Petroleum Tribunal is constituted.

7. Accordingly in respect to the preliminary objection dated 15<sup>th</sup> May 2019 I grant the following orders:

*(a) The interim injunction granted to the plaintiff on 16<sup>th</sup> May 2019 is extended upto 28<sup>th</sup> May 2020*

*(b) This matter shall be mentioned on 28<sup>th</sup> May 2020 for the parties to inform the court whether the Energy and Petroleum Tribunal has been constituted.*

*(c) Either party is at liberty to apply for this matter to be transferred to the Energy and Petroleum Tribunal.*

*(d) There shall be no costs in respect to the preliminary objection dated 15<sup>th</sup> May 2019.*

**DATED, SIGNED and DELIVERED at NAIROBI this 30th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **30<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**