



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 107 OF 2018

1. ELIJAH MUTAHI

2. HENRY MWANGI MBITA

3. JULIET NGIGE

4. KIRIGIAH KOOME

5. WAUYE SANDRA

6. NOAH BARAZA

7. RICHARD MAINA

8. GRACE NJERI GIKURA

9. CAROLINE NYAGAH

10. STEVE BIKO

11. VINCENT JEFFA.....APPELLANTS

VERSUS

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

(Being an appeal from the Ruling and Order of Honourable Muchoki, Resident Magistrate in Mombasa CMCC No. 261 of 2018 delivered on 29th May 2018)

JUDGEMENT

1. The Appellants, filed a suit before the chief magistrate's court, Mombasa vide the plaint dated 12/2/2018, against Kenya Power & Lighting Co. Ltd, the respondent herein. In the aforesaid plaint the appellant sought for judgment in the following terms:

a) A mandatory injunction compelling the Defendant to immediately re-connect electricity supply to the Plaintiffs meters account number 14271762263, 14283806769, 14271762222, 14271762297, 1428919969, 37194915932, 1428301788, 1428301788, 14283017938, 37195006814, 142271762206, 14283806728.

b) Loss of profit as stated in paragraph 12 above.

c) Interest on (b) above Court rate from the date of filing of the suit.

d) General and Aggravated damages for the illegal disconnection of the prepaid electricity supply(token)

e) Costs of the suit be provided for

2. On 15/3/2018, the respondent as the defendant then, filed a Notice of Preliminary Objection dated 15/3/2018 asserting that the Honourable Court did not have jurisdiction to hear the suit as the same is guided by the Energy Act, 2006 (**hereinafter referred to as the Act**) and the Energy (Complaints & Disputes Resolution) Regulations, 2012.

3. The objection was heard and determined by the trial court, which upheld the same and struck out the suit with costs. The appellants were dissatisfied with the ruling of the trial magistrate aforementioned and lodged a Memorandum of Appeal on 20/6/2018. Which sets out 5 grounds of Appeal that: -

1. **The Learned Magistrate erred in law in holding that section 61(3) (a) of the Act ousts the jurisdiction of the Court to hear a dispute concerning rebiling of electricity charges and that the said issue should be referred to the commission. The Learned Principal Magistrate failed to appreciate that section 61(4) of the act gives a Party an option to elect to refer the dispute to the commission or approach the Court depending on which of the two is most suitable to deal with the reliefs that are being sought .The appellants elected to come to Court and the suit was properly before Court**

2. **The Learned Magistrate erred in law in failing to find that granting of equitable orders of injunction is the preserve of a Court of law and not the Energy Regulatory Commission since by dint of its objectives and functions as set out in Section 5&6 of the act ,the commission lacks the power to issue injunctive orders.**

3. **The Learned Magistrate erred in law in summarily dismissing the Appellants' suit when the appellants' claims were not one of those clear and plain cases that the Court had no jurisdiction to entertain the claim.**

4. **The Learned Magistrate erred in law in making a ruling and order whose effect was to deny the Appellants the right to fair hearing contrary to Article 50 (1) of the Constitution.**

5. **The Learned Magistrate erred in law in arriving at a decision that was in all circumstance against the law.**

Submissions by the parties

4. The Appeal was argued by way of written Submissions. In further exposition of the Appeal, both parties cited various authorities.

5. **Mr. Ondeng** Learned Counsel for the Appellants' in urging ground 1,3,5 &5 together, submitted that from the Plaintiff filed by the Appellants it is clear that the Appellants' dispute falls outside the ambits of section 61(3) (a) & (d) of the Act. This is because; the Appellants are seeking compensation for damages suffered because of illegal disconnection of electricity by the Respondents and loss of profit which the commission did not have jurisdiction to award. Further to the foregoing, appellant relied on the decision in **Trimborn Agricultural Engineering Ltd v Kenya power & lighting Co. Ltd [2016]** where the Court held that Section 61(4) of the Act gives a Party an option to either refer the dispute to the commission or approach the Court.

6. Counsel further submitted that under the law, the commission is not bestowed upon powers to grant injunctive reliefs as Section 5(a) of the Act provides that the commission cannot issue equitable orders of injunction. **Mr. Ondeng** also submitted that parliament having realized that fault, the Act was amended to include Section 166 of the energy Act 2019, which gives the authority the power to award damages. For authority, reliance was placed in the case of Kenya **Horticultural Exporters (1977) ltd v Kenya KPLC (2011)eKLR**, where the Court granted the Plaintiff injunctive reliefs and referred the dispute to the commission.

7. **Mr. Okoko** Learned Counsel for the Respondent submitted that indeed the Act was repealed in 2019 but the new Act also establishes the Energy Tribunal under Section 25 of the Act and Section 36 of the Act prescribes the jurisdiction of the Tribunal. However, the Appellants' claim was squarely in the ambits of the commission and therefore the cannons of civil procedure dictate that if a statute provide for a dispute resolution mechanism, then it is binding upon the parties to pursue that procedure. Reliance was placed in the principle in the case of **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**, the Court of Appeal held that;

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

8. On the issue of equitable remedies, **Mr. Okoko** further submitted that Section 5(b) of the Act grants the commission the jurisdiction to protect the interest of the consumer, which forms part of the subject matter of this suit.

9. This being the first appellate court, its duty is to reevaluate the evidence and all the material availed before the trial court so that I may come up with its own conclusions while bearing in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR** and **Selle& Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

10. There is only one issue that falls for determination in the instant appeal, and that is whether the lower court had jurisdiction to determine the dispute in light of the dispute resolution mechanisms provided for under the Energy Act.

11. Jurisdiction goes into the heart and soul of any proceeding and that if there is a valid question or objection in law on a matter proceeding before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection or question should be raised at the earliest opportunity to avoid a wastage of valuable judicial time. As was held in the case of **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1:**

“.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. In upholding the Respondent’s preliminary objection, the learned trial magistrate held that from the pleadings, the Plaintiff’s case is about billing, disconnections and installation of electricity supply By dint of Section 61(3) (a) and (d) of the Act and Rules 2 and 4 of the Energy Complaints and Dispute Resolutions Regulations 2012 the Court is divested of jurisdiction to hear such matters.

13. Section 61 (3) of the Act, 2006 gave the Commission jurisdiction to determine disputes which include those arising out of:

(3) If any dispute arises as to–

(a) any charges; or

(b) the application of any deposit; or

(c) any illegal or improper use of electrical energy; or

(d) any alleged defects in any apparatus or protective devices; or

(e) any unsuitable apparatus or protective devices;

It shall be referred to the Commission

14. Section 61(4) thereof provides that:-

“Where any dispute referred to in sub section (3) has been referred to the Commission, or has otherwise been taken to court before a notice of disconnection has been given by the licensee, the licensee shall not exercise any of the powers conferred by this section until final determination of the dispute ...”

15. Section 6 of the Energy Act provides that the powers of the Commission include *inter alia*, **investigating complaints or disputes between parties with grievances over any matter required under the Energy Act.**

16. It is clear from the foregoing provisions that the Energy Act contains elaborate provisions on the matters that the ERC can hear and determine. The said Commission also has powers to appoint Directors, Inspectors, Officers, or other staff for the proper discharge of the functions of the Commission under the Energy Act. However, the trial Magistrate failed to appreciate that under the aforementioned Sections of the Act there is no provision for compensation for damages suffered because of the illegal disconnection as prayed in the Plaint and that under the Act, the commission did not have the power to issue equitable remedies.

17. This Court is alive to the fact that the Act was repealed by the Energy Act, Act No 1 of 2019. Section 25 of the Energy Act, Act No 1 of 2019, establishes the Energy and Petroleum Tribunal. Section 36 of the Act prescribes the jurisdiction of the Tribunal in the following terms:

“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.”

18. The net effect of this new legal framework that came into force after the ruling on the preliminary objection was to vest upon the Tribunal the jurisdiction to handle all disputes in the sector. That however was never the law under the repealed statute. The court was duty bound to apply the law as it was at the time. This court in **Casablanca Holdings Limited v Kenya Power & Lighting Co. Limited [2018] eKLR** while interpreting the same provision had this to say:-

“The wording of the Energy Act at Section 61(3) as read with Section 6(O) is that the dispute the commission is vested with jurisdiction to entertain and determine are those on technical aspects regarding the duties and obligations of a licensee to the

customer. Accordingly, when it is given powers to resolve disputes about charges, that must be taken to be in the technical sense of determining the propriety and accuracy of computation of such charges noting that it has the statutory duty to determine and regulate the costs and also approve and determine the suitability of equipment to be used to measure electric supply.

The dispute resolution duty vested in the commission by the Act was not intended to usurp the duty of the court to interpret and determine the general principles of law like that revealed in this appeal.

... I do find that Section 61 of the Energy Act did not create an exclusive jurisdiction on the enumerated cases of dispute but left it open for a party to choose whether to go to the commission or court. That is the only reason the legislature added subsection (4) to the provision. It is now time to reiterate and do so reiterate that Section 61 Energy Act is not a statutory Ouster Clause of the court jurisdiction to determine a dispute between a licensee and a customer. The courts have jurisdiction to entertain such dispute but need to always take cognizance of the fact that where the disputes may require expertise hosted within the commission, like where it is a question of what tariffs were chargeable at what time or if it be on the accuracy, propriety or suitability of the appliances and apparatus employed to ascertain value and quantities then it would be necessary to refer the dispute rather than strike it out or at the very list get professional opinion from the commission. And in this era of Alternative Dispute Resolution, such reference may even take the form of referral for mediation or conciliation. Striking out should however, be recognized for what it is, is a draconian remedy that drives a party from the seat of justice unheard and should be employed very cautiously and sparingly”.

19. Similarly, The Energy Act of 2019 under Section 225 on transitional provisions read together with provision 2 of the Fourth Schedule stipulates:

225 The provisions of the Fourth Schedule shall apply.

2. THE ENERGY AND PETROLEUM TRIBUNAL

(a) The Energy and Petroleum Tribunal established under section 25 shall be the successor to the Energy

Tribunal established by the Energy Act (now repealed) and subject to this Act, all rights, duties, obligations, assets and liabilities of the Energy Tribunal existing at the commencement of this Act shall be automatically and fully transferred to the Energy and Petroleum Tribunal and any reference to the Energy Tribunal in any contract or document shall, for all purposes, be deemed to be a reference to the Energy and Petroleum Tribunal established under section 25.

20. Having found that the trial court erred in law when it declined jurisdiction and struck out the suit and that the court had clear jurisdiction it was not free to run away from under the Energy Act 2006(repealed), this appeal is allowed with costs, the trial court order striking out the suit is set aside and in its place substituted an order dismissing the preliminary objection with no order as to costs.

21. Since the Energy Act of 2019 under Section 25 as read together with Section 36 creates an exclusive jurisdiction on the disputes relating to energy and gives the tribunal original civil jurisdiction on any dispute between a licensee and a third party or between licensees and has power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance, I hereby refer this dispute to the Energy and Petroleum Tribunal established under Section 25 of the Energy Act, Act No 1 of 2019, to hear and determine the dispute within the framework of Section 36 of the Energy Act, Act No 1 of 2019.

22. Orders accordingly.

Dated and delivered at Mombasa this 22nd day of May 2020.

P J O OTIENO

JUDGE