REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 162 OF 2018

(An appeal from the judgment of Hon. M Nabibya, Senior Resident

Magistrate, in Hamisi SPMCCC No. 26 of 2015, delivered on 2nd March 2018)

KENYA POWER AND LIGHTING CO. LTD.....APPELLANT

VERSUS

GEOFREY ORINA OGANGA.....RESPONDENT

JUDGMENT

1. The suit at the primary court was initiated by the respondent against the appellant, and it arose from disconnection of power to the respondent's business premises. The respondent sought restoration of power to his premises, a declaration that a demand for payment of a bill of Kshs. 425, 511.65 was unjustified and unfounded, and general damages. The trial court took evidence, and found in favour of the respondent, on the basis that the suit was uncontested and the evidence tendered was not rebutted.

2. The appellant was aggrieved, hence the instant appeal. The appeal raises four grounds – that the appellant was not afforded an opportunity to engage an advocate of its own choice after its advocate withdrew from the proceedings on 15th January 2018, the appellant had a right to a fair hearing access to justice and legal representation where substantial justice was likely to occur, the trial court assumed jurisdiction in disregard to sections 6(1) and 63(1) of the Energy Act, and the entire trial was contrary to law and public policy and breached the fundamental rules of natural justice.

3. Directions were taken on 25th February 2020, for disposal of the appeal by way of written submissions. The record before me indicates that only the appellant filed written submissions, on 19th March 2020, dated 13th March 2020. In the said written submissions, the appellant argues only two grounds, that on jurisdiction, and the other on fair hearing.

4. With respect to jurisdiction, the appellant submits that the trial court did not have jurisdiction to handle the dispute, as the relevant statute, the Energy Act, No. 12 of 2006, later repealed and substituted with No. 1 of 2019, had established a procedure and a tribunal for determining disputes such as that was before the trial court. It has cited *Alice Mweru Ngai vs. Kenya Power & Lighting Company Limited* [2015] eKLR, *Royal Reserve Management Company Ltd vs. Kenya Power & Lighting Company Limited* [2017] eKLR and *Robai Kadili Agufa & another vs. Kenya Power & Lighting Company Limited* [2019] eKLR, where the courts had held that where the was a clear procedure for redress of any grievance prescribed by the Constitution or statute, that procedure ought to be strictly adhered to, and proceeded to strike out the suits where the procedures were not followed.

5. The Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, stated emphatically that where jurisdiction is an issue, the trial court ought not to proceed any further, but ought to determine the question, and if it finds that there is no jurisdiction down its tools. See also *Adero & another vs. Ulinzi Sacco Society Limited* [2002] eKLR. It was also stated in *Samson Chembe Vuko vs. Nelson Kilimo & 2 others* [2016] eKLR, that if there was a clear procedure to redress a particular grievance, prescribed by the Constitution or statute, then that procedure ought to be followed.

6. The issue raised by the appellant has been the subject of various decisions in disputes between it and its customers. The position taken in those cases is standard, that since there is a set procedure for handling disputes over electricity bills and power disconnection, and a tribunal or some institution set up to handle such matters, courts should not entertain such matters before the parties have exhausted the procedures set out under that law. See *Alice Mweru Ngai vs. Kenya Power & Lighting Company Limited* [2015] eKLR, *Royal Reserve Management Company Ltd vs. Kenya Power & Lighting Company Limited* [2017] eKLR and *Robai Kadili Agufa & another vs. Kenya Power & Lighting Company Limited* (supra). It is beaten track. Clearly, the first port of call should have been the Energy Regulatory Commission, or its equivalent. In *Joseph Njuguna Mwaura & others vs. Republic* [2013] eKLR, the Court of Appeal stated that no court should exercise jurisdiction in matters over which other arms of government have been vested with jurisdiction to act.

7. Regarding fair hearing, the appellant argues that the trial court proceeded to take evidence from the respondent, in the absence of its advocate, after he withdrew and walked out, and complains that the trial court should have given it time to instruct another advocate.

8. I have looked at the record. The event in question happened on 18th January 2018. The hearing date had been given in open court by the trial court on 14th December 2017, in the presence of the respondent and his advocate, and in the absence of the appellant and its advocate. The respondent indicated that the appellant had been served, and that he was ready to proceed, but nevertheless sought another date to give the appellant a chance. The adjournment was allowed, and marked as the last for the appellant, and the appellant was also condemned to pay court adjournment fees.

9. On 18th January 2018, the respondent and his advocate were in court, but the appellant was not in court. Its advocate was also not in court, but another advocate held his brief, and sought adjournment, saying the notice was too short, as he had other dates fixed prior with respect to matters in other courts. It was also stated that that the advocate had instructions to cause acting and was due to put in an application in that respect. The advocate for the respondent explained that he had served hearing notice on 4th January 2018, and that there was some delay as he sought to serve at Nairobi the advocate who was on record, only to be told that there was another advocate on record, based at Kitale, and then he had to effect service at Kitale. The court declined to allow the adjournment on grounds that the court had previously recorded that the appellant had a last adjournment, and secondly that the order for payment of court adjournment fees had not been complied with by the appellant. The record is thereafter sketchy on what happened, but it would appear that the advocate holding brief for the advocate for the appellant paid the court adjournment fees ordered on 14th December 2017, and thereafter withdrew from the proceedings. The court did not record about the withdrawal; it came from the mouth of the advocate for the respondent. That appears to be what transpired for the record is silent as to whether the respondent was cross-examined by the advocate who held brief for the advocate for the appellant.

10. To my mind, the trial court did not fall into any error in declining to grant the adjournment sought on 18th January 2018 by the advocate holding brief for appellant. The hearing date had been given in open court by the trial court itself. The court even marked the same as the last adjournment for the appellant. I believe the trial court bend backwards on 14th December 2017 to accommodate the appellant. The advocate for the appellant was served on 4th January 2018 for the hearing scheduled for 18th January 2018. I would not rate that as inadequate notice. The rule is a seven clear days. The service in the case allowed more than seven clear days. As there was an order that the adjournment of 14 th December 2017 was the last for the appellant, it should have striven to be ready for the hearing on 18th January 2018. The trial court no doubt did not abuse discretion nor use it capriciously. Secondly, the appellant had been condemned to pay court adjournment fees. Ideally, the order on payment of court adjournment fees ought to have been complied with before 18th January 2018. It was not complied with, and it would appear that the appellant only paid after the court declined to allow the adjournment. The appellant did not have clean hands. It cannot complain that it was not afforded a fair hearing or that it was denied access to justice. In my view, the appellant was the victim of its own disorganisation, which could not be blamed on the respondent or on the trial court.

11. It was submitted that the advocate who was present holding brief for the advocate for the appellant withdrew and walked away, and the court should have thereafter allowed the appellant to appoint another. The trial court did not capture that fact, that the said advocate withdrew from the proceedings, and walked out. That is captured from remarks made by the advocate for the respondent after the oral hearing. Ideally, the trial court should capture such a development, for it goes to the core of the matter. It is about fair hearing, access to justice and legal representation. The record should be clear on everything that transpires. It is a record of a trial court, it should capture everything, since it is on the basis of that record that appellate courts have to determine any issues that way arise relating to events at the trial. Failure to record such incidents makes the record deficient.

12. In the instant case, did that incident mean that the appellant did not get a fair hearing or his right to access to justice was impaired, or he was denied legal representation? I do not think so. The court had on 14th December 2017 given the appellant a last adjournment. It should have done everything to ensure that it was adequately represented in court on 18th January 2018, as the trial court, having given a last adjournment previously, was most certainly going to resist any further adjournment of the matter. Secondly, it was ordered to pay court adjournment fees, it did not obey or comply with that order until the trial court raised it. It would appear that the advocate withdrew only after the trial court declined to allow the adjournment. The appellant was to blame for everything. The tactic to withdraw after the adjournment was declined was a strategy to armstring the court to grant an adjournment. The court acted properly and within its jurisdiction in proceeding with the matter after the advocate withdrew. The issue of adjournment was water under the bridge as at the time the said advocate purportedly withdrew from the proceedings. The appellant was not denied a fair hearing or access to justice or legal representation. Indeed, it would appear that the appellant was bent on delaying the matter by engaging in all many of manoeuvrings.

13. Finally, I find that there is merit with regard to jurisdiction, but there is none with regard to the trial court denying the appellant a fair hearing access to justice or legal representation. I hereby allow the appeal on the ground on jurisdiction, but I shall order that each party bears their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF June 2020

W. MUSYOKA

JUDGE