



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.309 OF 2018

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 1,2,3,10,19,20,22,23,24,25,27,28,35,46,232,258 AND 259

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL FREEDOMS PRACTISE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF CONSUMER PROTECTION ACT, 2012, THE ENERGY ACT AND THE ENERGY MANAGEMENT REGULATIONS, 2012

AND

IN THE MATTER OF THE KENYA POWER AND LIGHTING COMPANY

BEWEEN

ALAN E. DONOVAN.....PETITIONER

VERSUS

KENYA POWER AND LIGHTING COMPANY.....RESPONDENT

RULING

1. The Petitioner filed the petition herein dated 7th September 2018 against the Respondent seeking the following orders:-

- a) A Declaration that the Respondents have violated his guaranteed right to goods and services of reasonable quality and gaining full benefit of the said goods and services as prescribed by Article 46 of the Constitution.
- b) A Declaration that the violation of his right to goods and services of reasonable quality and the enjoyment of their full benefit thereof has occasioned him loss of money as a resource, time spent following up on the issues he has been raising with the Respondents.
- c) A Declaration that Electricity Supply bill of Kenya Six Hundred and Sixteen Thousand and Six Hundred Kshs.616, 600/- on the 18th of June 2018 to the Petitioner is without basis and or justification.
- d) An order directed at the 1st Respondent to bill the Petitioner based solely on the actual meter readings on the tariffs set and approved by law.
- e) An order directed at the 1st Respondent to correct or delete all untrue or misleading information in the electricity bills that affects

the Petitioner; and

f) A Permanent injunction directed to the 1st Respondent from billing or recovering from the Petitioner backdated electricity bills based on the Kshs.10.1 billion contained in their Annual Report and Financial Statements for the year ending 30th June 2017.

g) Any other reliefs that the Court may deem fit and just to grant.

2. The Respondent filed a Replying affidavit by Emily Kirui, Chief Legal Officer-Litigation & Prosecution in the employment of the Respondent sworn on 18th October 2018.

3. The Respondent thereafter filed Notice of Preliminary objection raising the following objections:-

a) THAT this Honourable court lacks the requisite jurisdiction to adjudicate over this dispute by virtue of the provisions of Section 6 (k) and (i) and Section 61 (3) of the Energy Act, 2006 and Energy (Complaints and dispute resolution) Regulations 2012 which vests jurisdiction of this matter in the Energy Regulatory Commission; and

b) THAT this petition should thus be struck out with costs as it is an abuse of process of court.

4. The court directed the Preliminary objection be determined by way of written submissions. The Respondent filed submissions on the notice of preliminary objection dated on 5th February 2019 on the even date whereas the petitioner filed their response on 1st February 2019.

5. I have considered the preliminary objection and rival submissions and the issue arising for consideration is as follows:-

(a) Whether court has jurisdiction to adjudicate over the dispute by virtue of the provisions of section 6(k) and (l) and section 61(3) of the Energy Act 2006 and Energy (Complaints and dispute resolution) Regulation, 2012 which vests jurisdiction of the matter in the Energy Regulation Commission?

A) Whether court has jurisdiction to adjudicate over the dispute by virtue of the provisions of section 6(k) and (i) and section 61(3) of the Energy Act 2006 and Energy (Complaints and dispute resolution Regulation, 2012 which vests jurisdiction of the matter in the Energy Regulation Commission?

6. The nature of dispute in this petition relates to supply of electricity and billing. The issue revolves around meter readings where the petitioner seeks this court's order to have the respondent directed to bill the petitioner and other consumers based on actual meter readings on the tariffs set and approved by law.

7. The Energy Act 2006, creates the Energy Regulatory Commission; which is empowered, under Section 6 of the Act, to hear and determine matters related to the energy disputes. The section provides amongst others as follows:-

"k) Examine and approve meters used or intended to be used for ascertaining the quantity of energy;

h) Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act;

o) Impose sanctions and penalties on persons who are in breach of any of the provisions of this Act or any regulations made there under"

8. On issues related to disputes the Act provides under **section 59(3) of the Energy Act** as follows:-

"If any dispute arises under this section as to recalculation of electrical energy supplied to a consumer or as to interference with any meter, such dispute shall be referred to the Commission for determination."

Whereas under **section 61(3) of the Energy Act** it is provided:-

"61(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 Commission."

9. Under **Rule 4 of the Energy (Complaints and Disputes Resolution) Regulation 2012** it lists the complaint and disputes to which the regulation applies. It is clearly stated that the regulations apply to complaints and disputes in the following orders:-

"a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.

b) Damages, adulteration under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

c) Any other activity and/or matter regulated under the Act."

10. Looking at **Section 107 of the Act** it is provided that; **"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."** Sections 108 and 110 of the Act further give effect to this.

11. The petitioner has on his part started by looking at the definition of jurisdiction and has contended, that the black dictionary defines jurisdiction as the *"power and authority constitutionally conferred upon (or constitutionally) recognized as existing in a court or Judge to pronounce the sentence of the law, or to averred the remedy provided by law, upon a state of facts, stated or admitted..."*

12. In **Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited 1989** KLR 1 Nyarangi J, (as he then was) expressed himself as follows:-

"....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 that it is without jurisdiction."

13. Further in the case of **Joseph Njuguna Mwaura & others vs Republic C. A Criminal Appeal No. 5 of 2008 (NBI)**, the Court stated as follows:-

"It is incumbent upon any Court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of Court is determined by the existence or lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision making function." In light of the foregoing, we submit that the point raised on jurisdiction of the court indeed to be dealt with at first instance."

14. The petitioner contends that the High court derives its mandate from Article 165 of the Constitution which gives it unlimited original jurisdiction in criminal and civil matters. It also has jurisdiction to hear and determine questions on whether a right or freedom in the Bill of Rights has been violated, denied, infringed or threatened; and to hear matters concerning interpretation of the Constitution. The issues presented in the Petition are mainly on the violation of the rights and freedoms of the Petitioner and as such the High Court has jurisdiction over the matter.

15. **Section 5 of the Energy Act gives the Energy Regulatory Commission** the mandate to regulate import, export, generate, transmit, distribute, supply, and use of electrical energy and petroleum products; and the production and distribution of renewable and other forms of energy.

16. **Section 61(4) of the Act** provides;

"Where any dispute referred to in subsection (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."

17. **Energy (Complaint and Dispute Resolution) Regulations, 2012 Rule 7** provided for a Declaration of a dispute and reference to the Commission. It provides:-

1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.

2) A party to a dispute may refer the dispute to the Commission in form S-2 as set out in the Second Schedule.

3) Where a dispute has been referred to the Commission, the Commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.

4) Where the dispute-

a) Is resolved through mediation in accordance with paragraph (3), the parties shall file their settlement agreement with the Commission within five days, and the agreement shall be final and binding on both parties;

b) Is not resolved through mediation in accordance with paragraph.

(3), the procedures set out in regulations 8 to 16 shall apply.

18. From the above it is clear, that the court jurisdiction is not expressly ousted, as there is a mandatory clause which stipulates where such an action ought to be commenced. The energy related to disputes such as the one before this court fall under section 6; 59(3) and 61 of the Energy Act. The said section are couched in mandatory terms and are to the effect that matters relating to billing, meeting quality of service, quality of goods amongst others are to be heard and determined solely by the Energy Regulatory Commission and not by the court of law; as the commission has the power to determine on the complaints. **Section 6 of the Energy Act** states:-

"The Commission shall have all powers necessary or expedient for the performance of its functions under this Act and in particular, the Commission shall have the power to impose sanctions and penalties on persons who are in breach of any of the provisions of this Act or any regulations made thereunder."

19. Hon. Justice Serگون, J. in **Nairobi HCCA No. 228 of 2011, James Mwaura Ndung'u vs Kenya Power & Lighting Company Ltd** held as follows:-

"The provisions cited i.e Sections 61 of the Energy Act and the Energy (Complaints and Disputes Resolution) Regulations, 2012 clearly shows that matters relating to energy should be heard before the Energy Regulatory Commission previously the Energy Regulatory Board. For this reason I find no merit in the appeal. The same is dismissed with costs to the respondent."

20. The petitioner contends that section 61 of the Energy Act anticipates a party may be in court without reference to the commission. I do not think section 61 (3) of the Act provides so. **Section 61 (3) of the Act** provides:-

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 Commission.

21. The matter before this court is on the other hand a hybrid case, that involves a dispute between parties governed by the Energy Act as well as human rights violations. Both the High court and the Energy Regulation Commission have jurisdiction to hear and determine the issues in the petition. The High court has jurisdiction as far as the question of violation of constitutional right is concerned whereas the Energy Regulatory Commission has jurisdiction to investigate the dispute regarding the electricity charges. I find that concurrent jurisdiction does not mean the jurisdiction of the tribunal precludes that of the court. The only thing that limits the court's jurisdiction is the law. The jurisdiction vested in the commission in my view does not limit the jurisdiction of the High court. The only law that can limit the power of the High court is the constitution which does not give any other body the power to limit the jurisdiction of the High court.

22. It would in view of the above be wrong to conclude that since Energy Act and the Energy (*Complaints ad Dispute Resolution*) Regulations vests jurisdiction in Energy Regulation Commission, the High Court does not have jurisdiction to hear the case. The courts have decided on myriads of cases where two dispute resolution bodies have jurisdiction over the same matter by looking at the issues for determination and the reliefs being sought.

23. In the case of **Mohammed Ali Baadi vs The Attorney General and 11 others (2018) eKLR** was a hybrid where the matter involved interpretation and application of the fundamental rights as well as Environmental issues. Some of the Respondents argued that the High Court did not have the jurisdiction to hear the matter and that the jurisdiction vested in the Nema Tribunal. The court used the '**predominant purpose test**' to reach the conclusion that, since majority of the issues were on the interpretation and application of the fundamental rights and freedoms, that gave the High Court the jurisdiction.

24. In **Patrick Musimba vs National Land Commission and 4 others [2016] eKLR**, the Petitioners filed a petition challenging compulsory acquisition of a piece of land by the Respondents. The Respondents then filed a Preliminary Objection challenging the jurisdiction of the High Court and stated that the court empowered to determine such matters was the Environment and Land Court. The court held that;

"a) In its strict sense the "jurisdiction" of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court. The jurisdiction of the High Court was unlimited save only as provided by the Constitution. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the Constitution. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3)..... of the Constitution further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For example the Judicature Act which conferred the specialized admiralty jurisdiction. The Constitution however did not provide for any other written law to limit the jurisdiction of the High Court.

b) Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act Limited the High Court's jurisdiction in that respect...

c) A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.....It could not have been the intention of the draftsmen of the Constitution that when the Court was faced with a mixture of causes of action touching on the Constitution, especially on fundamental rights, a separationalistic approach was to be adopted by the Court and half the claim dispatched to one Court as the other half was retained."

25. From the following this line of thought, it is evident, that in circumstances where two dispute resolution bodies have concurrent or overlapping jurisdiction over a matter, it can be resolved by the body/court which has the power to determine the substantial questions raised in the case and which can provide the most sufficient remedy to the dispute and bring the matter to a definite close.

26. I find that it is imperative, that this court which should determine the matter should be the one that has the power to not only hear the case but also provide remedies that sufficiently addresses the reliefs being sought. A cursory look at the petition, the reliefs sought and available remedies under the constitution and within the Energy Regulatory Commission would lead to a logical conclusion of deferring remedies available.

27. That such a court should have the jurisdiction to hear the substantial issues and give findings that sufficiently deals with the issues. In this Petition, the substantial issues are on denial, infringement, and violation of the rights of the Petitioner and the reliefs being sought include a declaration of violations of the Petitioner's rights and an injunction against the Respondent. This vests jurisdiction in the High Court given that it is the body with the power to hear such a case and provide the remedies being sought and not any other body.

28. On the other hand, the Energy Regulatory Commission is not a quasi-judicial body and this denotes that the remedies it can provide are merely administrative. The reliefs it can grant will not fully satisfy or exhaust the issues at hand. Taking the matter to the Commission would have been prudent but not just expedient since the issues in the Petition would not have been satisfactory addressed by the Commission. The remedies that the petitioner is seeking could not have been all available to him at the commission.

29. In **Mohamed Ali Baadi vs The Attorney and 11 others (2018) eKLR** the learned Judge stated that:-

"While our jurisprudential policy is to encourage parties to exhaust and honour alternative forum of dispute "A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]... the Government's assertion of non-exhaustion of local remedies will therefore be looked at in this light...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

30. Also in the case of **Republic vs Independent Electoral and Boundaries Commission (I.E.B.C) & Others Ex Parte The National Super Alliance (NASA) Kenya (2017) eKLR** it was stated that;

"a) After exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the Court held: What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved-including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances; find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at state."

31. This matter as I consider it would have been referred to the tribunal for dispute resolution as per our constitution, however the alternative dispute resolution mechanism would not have exhausted the "*predominant issues*" related to violence of human rights. There is challenge of this matter not being determined timely and effectively as submitted by the petitioner. I find that the petitioner has persuaded the court, that in the circumstances of this case, the exhaustion requirement would not result in the values enshrined in the constitution or law to permit the suit to proceed before the Energy Regulatory Commission. I find in this matter there is exception to the exhaustion requirement particularly as the petitioner has pleaded issues that verge on constitutional interpretation and in which an important constitutional value is at stake.

32. The upshot is that I find the Respondent's preliminary objection lacks merit and has to fall. I proceed to make the following orders:-

a) The preliminary objection is without merit and must fall as this matter is in the appropriate forum warranting a response by the Respondent and determination.

b) Costs of the preliminary objection shall be in the cause.

Dated, signed and delivered at Nairobi this 26th day of September, 2019.

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J .A. MAKAU

JUDGE