



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 73 OF 2017

KENYA POWER & LIGHTING

COMPANY LIMITED.....APPELLANT

VERSUS

WILLIAM ROMAN MCTOUGH.....RESPONDENT

(Being an Appeal from the Ruling and Orders in

Kisumu CMCC NO. 453 OF 2017 delivered by

Hon. M. Agutu (RM) on 12th October, 2017)

JUDGMENT

1. **WILLIAM ROMAN MCTOUGH** (*hereinafter referred to as Respondent*) sued **KENYA POWER & LIGHTING COMPANY LIMITED** (*hereinafter referred to as Appellant*) in the lower Court claiming damages for the following orders:

a. A declaration that the imposing by the Defendant to the Plaintiff to pay a debit of Kshs.430,144.31 is unlawful.

b. A permanent injunction to issue directed at the Defendant, its employees, workers, agents and/or whomsoever jointly and severally, restraining them from disconnecting electricity power to Plaintiff's electricity account number 4060256-01 at Scottish Tartan Hotel, Kisumu

c. Costs of the suit

d. Any other remedy

2. Contemporaneously with the Plaint, Respondent filed a Notice of Motion dated 25.8.17 seeking the following orders:

a. A temporary injunction to issue directed at the Defendant, its employees, workers, agents and/or whomsoever jointly and severally, restraining them from disconnecting electricity power to Plaintiff's electricity account number 4060256-01 at Scottish Tartan Hotel, Kisumu pending the Hearing of the Application

b. Costs

3. On 7.9.17, Appellant filed a response to the Respondent's Notice of Motion. Appellant correspondingly filed a Notice of Preliminary Objection dated 5.9.17 claiming that the Honourable Court does not have jurisdiction to hear this 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.

4. In a Ruling delivered on 12th October, 2017, the Trial Court found that the Preliminary Objection was misplaced and overruled it. The Court also found that the Respondent's application for injunction was merited and allowed it.

5. The Appellant being dissatisfied with the Lower Courts's decision preferred this Appeal and on 24.10.17 filed the Memorandum of Appeal dated 19.10.17 which sets out 2 grounds of Appeal that:-

1. The Learned Trial Magistrate erred in law and in fact in finding that the Trial Court had jurisdiction to hear this matter without the same being first considered and determined by the Energy Regulation Commission

2. The Learned Trial Magistrate erred in dismissing the Preliminary Objection raised by the Appellant

SUBMISSIONS BY THE PARTIES

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

Appellant's Submissions

7. Appellant holds the view the dispute between the parties relates to illegal or improper use of electrical energy which under the provisions of Section 61(3) of *the Act* lies with the Energy Regulatory Commission (*hereinafter referred to as the Commission*). Further to the foregoing, appellant relied on the following authorities.

i. Royal Reserve Management Company Ltd v Kenya Power & Lighting Company Ltd [2017] eKLR where the court upheld a preliminary objection that it had no jurisdiction pursuant to section 61(3) of the Act, 2006.

ii. Section 61(4) of the Act, which bars the appellant from refusing or discontinuing supply of electrical energy where any dispute referred to in subsection (3) of the Act has been referred to the Commission, or has otherwise been taken to court before a notice of disconnection has been given by the licensee

7. Appellant urged the court to find that a preliminary objection can be raised at any stage in the proceedings. In support thereof, it placed reliance on:

i. Article 159 (2)(d) of the Constitution which mandates the court to administer justice without undue regard to procedural technicalities

ii. Mary Nyambura Mbote v Isaac Wanjohi Wangai [2017] eKLR

Respondent's submissions

8. Respondent holds the view that pursuant to Order 43 (1) and (2) of the Civil Procedure Rules, Appellant cannot appeal against the dismissal of the preliminary objection without leave of court.

9. It was submitted for the respondent that appellant ought to have pleaded the preliminary objection before raising it in the reply to the Respondent's notice of motion. To this end, Respondent placed reliance on *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696* and *Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR*

10. It was additionally submitted for the Respondent that pursuant to the provisions of Section 61 (3) and (4) of the Act, the court had jurisdiction to entertain any suit filed before notice of disconnection has been issued. To this end, Respondent relies on *James Mwaura Ndung'u v Kenya Power and Lighting Co. Ltd [2016] eKLR*; *Kenya Horticultural Exporters (1977) Ltd vs KPLC Ltd [2011] eKLR* and *Trimborn Agricultural Engineering Ltd v Kenya Power & Lighting Co Ltd [2016] eKLR*

Analysis and Determination

11. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear 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.

12. The extent to which an appellate court may interfere with an award of damages is well settled. It must be shown that the trial court in awarding of the damages took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan [1981] KLR 349*).

13. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around the question of court's jurisdiction.

Jurisdiction

14. 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."

15. I am in agreement with the holding in *Mary Nyambura Mbote v Isaac Wanjohi Wangai (Supra)* that the issue of jurisdiction can be raised at any stage in the proceedings whether pleaded or not. The case of *Stephen Onyango Achola & another v Edward Hongo Sule & another [2004] eKLR* is distinguishable from the case hereinsince it was determined before the promulgation of the 2010 Constitution whose Article 159 (2)(d) obligates the court to administer justice without undue regard to procedural technicalities.

16. Consequently; I find that the trial court acted within its jurisdiction when it determined the preliminary objection. I in the same way find that appellants has an equal right to appeal against any decision made on the Preliminary Objection.

17. Section 61 (3) of the Act, 2006 gives 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

18. The jurisdiction of the Court is to be found at sub-section 4 which is to determine disputes under subsection 3 but only *before a notice of disconnection has been given by the licensee.* (See *James Mwaura Ndung'u v Kenya Power and Lighting Co. Ltd (Supra)*).

19. The dispute herein relates to an alleged improper use of electrical energy and alleged defects in the power meter. There is no evidence that notice of disconnection has been given to the respondent by the appellants. Consequently, I find that the trial court was seized of jurisdiction to determine the matter before it.

Disposition

20. As a result, I find that the learned trial Magistrate trial acted judiciously and decline the invitation to revise the orders in favor of the appellants. This appeal is thus found to have no merit and it is dismissed with costs to the respondent.

DATED AND DELIVERED THIS 24th DAY OF May 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Appellant - N/A

For Respondent - Mr. Omondi Holding Brief for Mr. Odeny