



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NUMBER 87 OF 2017**

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

**VERSUS**

**ROSE AKINYI ODENY.....RESPONDENT**

**(Appeal against Ruling and Order in Kisumu CMCC NO. 392 of 2017 delivered by Hon. M. Agutu (RM) on 17<sup>th</sup> November, 2017)**

**JUDGMENT**

1. **ROSE AKINYI ODENY**(*hereinafter referred to as respondent*)sued **KENYA POWER & LIGHTING COMPANY LIMITED** (*hereinafter referred to as appellant*) in the lower court seeking injunctive orders; loss of profit at Kshs. 50,000/- per month; general damages and costs
2. The defendant/appellant filed a statement of defence and denied the claim and urged the court to dismiss the respondent/plaintiff's claim with costs.
3. On 24<sup>th</sup> July, 2017, appellant filed a Notice of Preliminary Objection dated 21<sup>st</sup> July, 2017 challenging the court's jurisdiction to hear this case.
4. In a ruling delivered on 11<sup>th</sup> November, 2017, the learned trial Magistrate **found that the Preliminary Objection had no merit and overruled it.**

**The Appeal**

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 14.12.17 filed the Memorandum of Appeal dated 13.12.17 which raises 3 grounds of appeal that: -

1. **The Learned Magistrate erred in law and in fact in not upholding the Preliminary Objection in the face of clear provisions of the law contained in the Energy Act No. 12 of 2001 and the Regulations made thereunder**
2. **The Learned Magistrate erred in law and in failing to appreciate the import and weight of precedent as contained in the list of authorities relied on by the Appellant**
3. **The Learned Magistrate erred in law and in fact and in the process misapprehended the submission by the Appellant**

**SUBMISSIONS BY THE PARTIES**

6. On 15<sup>th</sup> May, 2018, the parties agreed to canvass the appeal by way of written submissions which the parties dutifully filed.

**Appellant's submissions**

7. Appellant holds the view the dispute between the parties relates to calculation and disconnection of electrical energy which under the provisions of Section 59 (3) and 61 (3) of Energy Act No. 12 of 2001 (*the Act*) lies with the Energy Regulatory Commission (*hereinafter referred to as the Commission*). On jurisdiction, appellant placed reliance on the following authorities.

- i. **Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd [2015] eKLR**

ii. Royal Reserve Management Company Ltd v Kenya Power & Lighting Company Ltd [2017] eKLR

**Respondent's submissions**

8. Respondent holds the view that its claim does not fall under the provisions of Section 59(3) of *the Act* since it is a claim for illegal disconnection of electrical energy and not recalculation of electrical energy. Respondent submitted that Sections 61(3) and (4) indeed vest jurisdiction of energy matters with *the Commission* with the exception where the matter is taken to court before notice of disconnection has been issued as is in this case. Respondent placed reliance on **Eldoret White Castle Motel Limited v Kenya Power and Lighting Company Ltd [2010] eKLR**

**Analysis and Determination**

9. 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.

10. 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**

11. 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. Section 59 (3) of *the Act* applies to disputes relating to defective meters and is therefore not relevant to this case.

13. 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**

14. The dispute between the parties is one of charges for electrical energy under Section 61(3)(a).

15. 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*. The section does not give details of the form and duration of the notice.

16. At paragraph 8 of the plaint, respondent pleaded that the before disconnection of electrical energy, appellant demanded payment of charges and disconnected power supply upon failure by the respondent to pay as demanded. There is however no evidence that a notice of disconnection was issued in terms of Section 61 (2) of *the Act* which provides that the notice be for not less than fourteen days' notice and the same be in writing.

**Disposition**

17. After a careful consideration of the rival submissions, I have come to the conclusion that the learned trial magistrate conclusion that the court was seized of jurisdiction to determine the dispute between the parties herein cannot be faulted. This appeal is thus found to have no merit and it is dismissed with costs to the respondent.

**DATED AND DELIVERED THIS 26th DAY OF July, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

For Appellant - N/A

For Respondent - Mr. Orieyo/My. Yogo