



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 12 OF 2017

ROYAL RESERVE MANAGEMENT COMPANY LTD. PLAINITFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD. DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion on 7th February, 2017, brought under the provisions of Order 40 rules 1, 2 and 3 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Cap 21 Laws of Kenya and all other and further enabling provisions of the Law. It sought the following orders:-

(i) Spent;

(ii) That pending the *interpartes* hearing and determination of the application, there be an order for a site visit by the Deputy Registrar to the plaintiff's place of business and that he compiles a report on the status of the meter installed;

(iii) That an order be made directing the defendant to remove the deliberate looping of the plaintiff's electricity meter;

(iv) That pending the hearing of the main suit there be a mandatory order directing the defendant to reconnect/restore electric power to the plaintiff; and

(v) That costs be provided for.

The application is supported by the affidavit of Sylvester Uduy, a Manager of the plaintiff company, sworn on 7th February, 2017.

2. On being served with the said application, the defendant filed a replying affidavit sworn by Charles Lebo on 20th February, 2017. It also filed a Notice of Preliminary Objection on the said date, to the effect that this court lacks jurisdiction to hear and determine this suit pursuant to section 61(3) of the Energy Act, 2006 and as such the same ought to be referred to the Energy Regulatory Commission. The defendant sought for the suit to be struck out as against the defendant with costs.

3. For ease of reference in determining the preliminary objection, the defendant will hereinafter be referred to as the applicant and the plaintiff as the respondent.

APPLICANT'S SUBMISSIONS

4. Ms. Obura, Learned Counsel for the applicant informed the court that under the provisions of the section 61(3) of the Energy Act, 2006, this court lacks jurisdiction to handle the dispute herein. She stated that any dispute relating to electricity charges is to be heard by the Energy Regulatory Commission (ERC) which is the correct forum.

5. She cited the Court of Appeal decision in the **Owners of the Motor Vessel Lilian 'S' vs Caltex Oil (Kenya) Ltd** [1989] KLR which states that jurisdiction is everything and without it the court should down its tools. Counsel also referred to the case of **Kenya Horticultural Exporters (1977) Ltd vs KPLC Ltd** [2011] eKLR, where the court referred a dispute to the ERC and stayed the suit therein. The court's attention was drawn to the case of **James Mwaura Ndungu vs KPLC Ltd**, Nairobi High Court Civil Appeal No. 228 of 2011 (unreported) where Judge Serگون held that the suit therein should be heard by the ERC. In addition, Ms Obura cited the case of **Alice Mweru Ngai vs KPLC Ltd**. [2015] eKLR where Judge Olao cited **Supreme Court Constitutional Application No. 2 of 2011**, where the Supreme Court held that the court must protect the jurisdiction entrusted to the High Court.

6. Counsel for the applicant implored this court to find that it is the ERC that has jurisdiction to hear the dispute herein. She also prayed for costs.

RESPONDENT'S SUBMISSIONS

7. Ms. Kitoo, Learned Counsel for the respondent submitted that the provisions of Article 165(1) of the Constitution establish the High Court of Kenya and sub-article 3(a) thereof grants the High Court unlimited original jurisdiction. She added that under the provisions of Article 165(6) of the Constitution, the High Court has supervisory jurisdiction over subordinate courts and tribunals. In her view, since there is a contractual arrangement between the applicant and the respondent, this court has jurisdiction to hear the dispute herein, being a dispute contemplated under the provisions of section 61 of the Energy Act. Counsel submitted that the respondent is not being billed as per its consumption.

8. Counsel argued that none of the cases cited by Counsel for the applicant were relevant as they addressed issues of installation of poles and none addressed the issue of deliberate pooling of power from the mains. She further stated that under section 61(4) of the Energy Act, an aggrieved party can approach the High Court.

9. She submitted that no notice of disconnection was given to the respondent. She referred the court to section 61(3) of the Energy Act which provides that once a matter has been referred to the court, the ERC cannot hear it. She prayed for the preliminary objection to be dismissed.

ANALYSIS AND DETERMINATION

The issue for determination is if this court has jurisdiction to hear the suit herein.

10. The issue of preliminary objection was addressed in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd** (1969) EA 696 where Law JA stated as follows:-

“a preliminary objection consists of a point of law which has been pleaded or which by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Sir Charles Newbold P on the other hand held thus:-

“a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. J.B. Ojwang J (as he then was) succinctly put it thus in the case of **Oraro vs Mbaja** [2005] eKLR:

***“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.*”**

12. The submissions of Counsel for the respondent are that the dispute is about overbilling by the applicant who has allegedly looped a yellow cable from the power mains at the respondent's premises. The said cable is said to be supplying electricity to a neighbouring village, for which the respondent is being billed.

13. The respondent deposes in paragraph 5 of its affidavit sworn by Sylvester Uduny dated 7th February, 2017 that electricity was disconnected at its premises on 27th January, 2017. On 31st January, 2017 the applicant's agents went back to their premises alleging that their signal showed that the respondent was still connected to power (electricity) despite the disconnection. The deponent further states that another team of the applicant went to the premises and on opening the switch room discovered a looped cable that was supplying electricity to the outside community for which the respondent was being billed. A photograph of the looped cable was taken and attached to the said affidavit as annexure SU4. The respondent took a photograph of the meter which had a reading of 5100, a copy of the said photograph was attached as annexure SU6 to the respondent's affidavit.

14. The respondent through its electrician, proceeded to write a complaint letter to the appellant, a copy of which is attached to the respondent's affidavit as annexure SU7. The respondent's deponent states that as at the time of swearing his affidavit the meter was still running. The deponent further deposes that in January, 2017 the respondent hotel was closed for renovations yet it received an electricity bill for the sum of Kshs. 600,000/= which was attached to his affidavit as annexure SU8.

15. The applicant in its replying affidavit dated 20th February, 2017 sworn by Charles Lebo, a Senior Technician in the applicant's company admits in paragraphs 6 and 7 of his affidavit that electricity was disconnected from the respondent's premises on 27th January, 2017 because of arrears of payment of the sum of Kshs. 1,220,733.89 as at 1st January, 2017. The applicant further deposes that on 31st January, 2017, it sent its representatives to the respondent's premises to ascertain why the applicant's system showed that there was a signal from the respondent's premises yet electricity had been disconnected.

16. In paragraphs 8, 9 and 10 of the replying affidavit, the deponent states that on 10th February, 2017 he visited the respondent's premises where he confirmed that there was no looping as alleged. He reconnected power supply and tested the various cables and established that no current was passing through the cables. He attached a copy of the photograph he took of the smart meter marked as annexure CL2. He further deposed that he measured the currents on the alleged cable using a clamp meter and found that the same was reading “0 amps”. As such no electricity was being supplied to the neighborhood.

17. In paragraph 12 thereof, he states that the code 5100 referred to by the respondent is not a reading in terms of the units (of electricity) consumed but signifies the current code.

18. This court has recapitulated the above facts with a view to establishing if the gist of the dispute revolves around the amount of money that the respondent is being billed by the applicant for consumption of electricity. This court is satisfied that from the foregoing depositions the dispute is about electricity charges.

19. Parliament in its wisdom set up the ERC to divest mainstream courts of some off the cases it would hear relating to the provisions of the Energy Act. The preliminary objection raised is grounded on the provisions of section 61(3) of the Energy Act, 2006. The said section provides as follows:-

“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.” (emphasis added).

20. 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 ...” (emphasis added).

21. 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.** (emphasis added).

22. Under section 5 of the said Act, some of the objects of the ERC are to regulate importation, exportation, **supply and use of electrical energy.** **The Energy Act also protects the interest of the consumer,** investor and other stakeholder interests. (emphasis added).

23. 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. It therefore follows that the ERC is well equipped with the necessary expertise to resolve the dispute at hand. Contrary to the argument by Counsel for the respondent, the provisions of section 61(4) of the Energy Act do not mean that a matter that has been filed in Court cannot be referred to the ERC.

24. A narrow interpretation of the provisions of Article 165 2(a) of the Constitution would mean that each and every dispute that is civil or criminal in nature would be heard in the High Court. Article 169(1)(d) of the Constitution makes provision for the establishment of any other court or local tribunal by an Act of Parliament, other than courts established as required by Article 162(2) of the Constituion. The ERC as such is a creature of Parliament through the powers conferred by Article 169(1)(d) of the Constitution of Kenya. The suit before me is not seeking orders for this court to exercise its supervisory jurisdiction under the provisions of Article 165(6) of the Constitution. The respondent is seeking the hearing and the determination of the suit that was filed on 7th February, 2017.

25. In the case of the **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).

26. A perusal of the Energy (Complaints and Disputes Resolution) Regulations, 2012 reveals that the ERC has well laid out procedures in place for the hearing of cases such as the one before me. I therefore uphold the preliminary objection and refer the dispute herein to the Energy Regulatory Commission for hearing and final determination. The suit and notice of motion are hereby struck out. Costs are awarded to the defendant/applicant.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of March, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff/respondent

Mr. Kiarie Kariuki for the defendant/applicant

Oliver Musundi - Court Assistant