



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 143 OF 2009

TRIMBORN AGRICULTURAL

ENGINEERING LTD.....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO LTD..... RESPONDENT

(Being an appeal from the Ruling of Honourable C.A. Otieno Senior Resident

Magistrate, Nakuru in Molo CMCC NO. 267 of 2009 delivered on

1st July 2009)

J U D G M E N T

1. The appeal before the court arises from the ruling of the trial court dated the 1st July 2009 in **Nakuru CMCC NO. 267 of 2009**. The said ruling was to the effect that the appellants application dated 16th March 2009 and the entire suit were struck out with costs.

The genesis of the suit before the trial court is stated in the plaint dated the 16th March 2009 and the defence dated the 24th March 2009. The appellant had entered into a contract with the respondent for supply of electricity power to its premises and an Account No. 046259101 was opened and designated to the appellant.

Following thereafter, and upon continuous supply of electric power to the appellant, monthly bills were issued to the appellant and the appellant paid the same. However in January 2009, and without notice to the appellant, the respondent changed the meter installed in its premises and further without notice, issued bills that were higher than the average for the previous period. Being aggrieved by the high monthly bills, and there having been no amicable settlement of the dispute, the Respondent issued a notice of disconnection of its power supply to the appellant. This prompted the appellant to file the suit together with an application for an injunction to restrain the respondent from discontinuing power supply to its premises pending hearing and determination of the suit.

2. Upon service of the suit and application papers, the respondent filed a defence and raised a preliminary objection the court did not have the necessary jurisdiction to hear the application as that was bestowed upon the Energy Regulatory Commission and sought striking out of both the application dated 16th March 2009 and the entire suit.

Upon hearing the preliminary objection on jurisdiction, the trial court made a finding that the proper forum where the dispute ought to have been referred to was the **Energy Regulatory Commission** created under the **Energy Act 2006** whose functions and duties were

“to investigate complaints and disputes between parties with disputes over any matter required to be regulated under the Act.

The trial court therefore struck out the application and the entire suit with costs.

3. The appellant preferred this appeal on numerous grounds that taken together may be summarised as follows:

1. That the Learned trial Magistrate erred in law in upholding the jurisdiction to entertain and hear the application on injunctive orders and the suit and thereby struck out the same.

2. The learned trial Magistrate erred in law in failing to hold and find that injunctive orders are the preserve of the court only and thus erred in not finding that the court had jurisdiction to grant the orders sought.

3. The trial magistrate erred in failing to find that an injunction being an equitable remedy can only be granted by a court of equity and not any other body.

4. The appellant seeks that the orders dated 1st July 2009 be set aside and substitute them with an order that the court has jurisdiction to hear and determine the suit, and remit the matter back to the lower court for hearing and determination.

5. Parties tendered oral submissions before the trial court on the application dated 16th March 2009. The appellant sought an order of injunction against the respondent to restrain it from disconnecting its power supply to it pending the hearing of the application and suit.

From the above narration, two issues arise for the courts determination.

1. Whether the trial court had jurisdiction to hear the dispute

2. Whether the Energy Regulatory Commission has powers to grant injunctive orders.

3. Whether the trial court was right in striking out the application for injunction and the entire suit.

6. Both counsel filed written submissions that essentially address the above issues.

For the appellant it was submitted that the court is seized with jurisdiction and citing **Section 59(3) of the Energy Act** stated that the Energy Regulatory Commission by dint of its objectives and functions lacks the power to issue injunctions; and that **Section (4) of the said Act** does not oust the courts jurisdiction. The court was referred to the case **Kenya Horticultural Exporters (1977) Ltd vs Kenya KPLC (2011)e KLR** where the Judge held that disputes between a consumer and KPLC over electricity charges and bills ought to be referred to the **Commission under Section 61(3) of the Act**, but that does not oust the court's jurisdiction. The Judge went ahead to hold that subsection (4) gives a party latitude to elect where to take his dispute. The dispute was referred to the Commission without striking out the suit.

On whether the Commission can issue injunctive orders, Counsel submitted that the **Act, by Section 6(4)** may impose sanctions and penalties and not injunctions. He drew a distinction between injunctions and

sanctions and submitted that it is only a court that may issue equitable orders and not a Commission or a tribunal. He urged that the trial court erred in law by striking the suit.

7. The Respondent's submissions are that the dispute hereof falls under the provisions of **Section 59 of the Energy Act No. 12 of 2006** which provides that where a meter is no longer suitable to determine quantity of energy supplied, the licensee is entitled to replace the same at the cost of the consumer who interfered with it, and pursuant to **Section 59(3) of the** for determination. Referring to the case of **Waweru Kariuki vs KPLC NKR HCCC No. 197 of 2009**, it was submitted that the dispute falls under the jurisdiction of the Commission and not the court.

The Respondents agree that the commission has no powers to issue orders of injunction.

8. The court has considered the pleadings, submissions and the trial court's ruling dated the 1st July 2009 together with the grounds of appeal.

The objects and functions of the Energy Regulatory Commission are set out in the **Energy Act, 2006** at **Section 5** that states:

“The objects and functions of the Commission shall be to

(k) investigate and approve meters used or intended to be used for ascertaining the quantity of energy

(l) 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 thereunder.

Section 59(1) states:

“where the meter is found to be defective though no fault of the consumer or the licensee, with consultation of the consumer, it shall determine the reasonable quantity of electrical energy supplied and recalculate the charges due – to a maximum period of six months” (emphasis mine)

Section 61(3) provides:

“If any dispute arises as to

(a) any charges or

(d) any alleged defects on any apparatus or protective devices.

It shall be referred to the Commission

(4) 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:”

(emphasis mine) See **Section 59(1)**

9. Going back to the dispute, there is no dispute that the respondent without any reference and or notice to the appellant interfered with the meter installed in its premises by removing the same and installing a new one and therefore billed it with what it calls astronomical monthly charges and despite its

protestations failed to explain the same and threatened to discontinue its supply of power. I have not seen a notice of intention to discontinue the power supply to the appellant issued by the respondent. Nonetheless, to safeguard such an eventuality, the appellant filed the suit for an injunction in the trial court.

Ordinarily, the dispute ought to have been referred to the Commission to investigate under the provisions of **Section 5(a)** of the Act – Stated above.

10. I have interrogated the said Section. Subsection (o) gives power to the Commission to impose sanctions and penalties if there is a breach of provisions or regulations specified under the Act. In my understanding, a sanction is a punishment for breach of a condition, and so is penalty. The commission has not been given power to issue an **injunction** which is described in the **Blacks Law Dictionary** as a

“prohibitive court order issued by a court of equity at the suit of a party, complainant directed to a party defendant in the action or to a party defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to do, commit or restraining him in the continuance thereof”

It further continues to describe a **“penalty or punishment as a means of enforcing obedience to the law.”**

I totally agree with counsel for the appellant that a Commission or a tribunal has no powers to issue equitable orders of injunction as such orders are the preserve of a Court of Law, and never a tribunal or any other body.

11. The powers donated to the **Commission by Section 5(a) of the Act** are punitive by way of penalties and sanctions and not equitable orders of injunction that only a court can issue. In the case **Horticultural Exporters (1997) Ltd** (Supra), the Judge rendered himself that **Section 61(3) (a) of Energy Regulatory Act** does not seem to oust the jurisdiction of the court over electricity consumption charges.

Section 61(4) of the Act, in my view, gives each party an option to either refer the dispute to the Commission or approach the court. This is to be guided by what reliefs the party would be seeking – either equitable remedies or sanctions. In arriving at the above, I am minded that **Section 61(3)** of the Act is couched in mandatory terms.

I have considered the holding in **Waweru Kiruki vs KPLC(Supra)** where the Learned Judge faced with a meter tampering case held that the dispute ought to have been referred to the Commission he proceeded to strike the case out.

The circumstances in the present suit distinguishable. The respondent removed and exchanged the appellants meter without any notice to them. No reasons were advanced for the removal and exchange. Further, no notice of disconnection was issued by the respondent. Refer to **Section 61(4) of the Act**.

I am persuaded, just like Justice Maraga, J, (as he then was,), in the case **Kenya Horticultural Exporters 1977 Ltd** (Supra),that, the appellant has an option to elect which of the two for a, the court or the Commission was most suitable to deal with reliefs that he may be seeking.

12. For those reasons, the court comes to the finding that the trial court erred in law in striking out the suit. Striking out a suit is most draconian and should only be reverted to in very clear and circumstances, when it is plain that the court has no jurisdiction to entertain the claim. The discretion should be exercised cautiously and sparingly and only in the clearest cases.

This is not one of those clear and plain cases for such discretion to have been exercised against the appellant. **Article 50 and 159 of the Constitution 2010** enjoins courts to dispense substantive justice without undue procedural technicalities. Summary procedure should be discouraged unless in the clearest of circumstances and cases.

13. The court takes note that there is already an order of stay of execution of the trial courts orders pending hearing and determination of this appeal, but on terms. Those orders were issued on the 15th September 2009.

For the above reasons, the appeal is allowed. The trial courts ruling dated 1st July 2009 is set aside and the trial court case, **Nakuru CMCC No. 267 of 2009** is reinstated for hearing and determination. It is remitted back to the Chief Magistrate's Court for hearing and determination before a different Magistrate.

The Respondent shall pay costs of the appeal.

Dated, signed and delivered in open court this 14th day of June 2016

JANET MULWA

JUDGE