REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 279 OF 2011

KENYA HORTICULTURAL EXPORTERS (1977) LTD ……………..……............….PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD..DEFENDANT

R U L I N G

The Plaintiff is an exporter of fresh fruits and vegetables and relies heavily on electric power for cooling and refrigeration in its business. The Defendant is a utility company with a monopoly of supply and distribution of electric power in the country.

The Plaintiff's suit is in respect to the re-billing by the Defendant of the Plaintiff's electricity consumption for a period of 22 months from July 2009 to May 2011. The re-billing resulted in the Defendant making a demand for KShs 7,110,992/69 and a threat to disconnect electric power if the Plaintiff did not pay the same.

The Plaintiff has pleaded that it always paid promptly and regularly all electricity bills submitted to it by the Defendant. The Plaintiff also pleads that the re-billing of its electricity consumption was done without consultation with it and further, that it was based upon a replacement meter. It further pleads that the replacement meter was never shown to it by the Defendant.

The main reliefs sought by the Plaintiff are as follows: -

1. A declaration that the re-billing of Plaintiff's account number 251806-01 with a total of 397,045KWHS and 1,983 KVA purportedly being the uncharged consumption for the months of July 2009 through May 2011 is unlawful.

2. A declaration that the meter number 40008082240 used to measure the Plaintiff's electricity consumption for the months of July 2009 through May 2011 was not defective as contemplated by the Energy Act and more particularly section 59(1) of the Act.

3. A permanent injunction restraining the Defendant from disconnecting, interfering with, reducing, discontinuing or refusing the supply of electricity to the Plaintiff.

4. Alternatively and without prejudice to prayers 1, 2 and 3 above, the Defendant be restrained by way of injunction from disconnecting, reducing, discontinuing or refusing to supply electricity to the Plaintiff pending the submission, hearing and determination of the dispute to the Electricity Regulatory Commission.

Together with the plaint the Plaintiff filed **notice of motion dated 20th July 2011** seeking temporary injunction to restrain the Defendant from disconnecting its electric supply pending disposal of the suit. When that application came up for hearing the Defendant raised a preliminary objection to the suit by **notice dated 28th July 2011**. The main point raised is that the court lacks jurisdiction to hear and determine the suit as well as the application upon the following grounds: -

1. That the legislature has legislated the Plaintiff's remedies under the Energy Act, 2006 and as such this court has no jurisdiction to hear and determine the issues raised in both the suit and the application.

2. That there is in any event no pending complaint by the Plaintiff before the Energy Regulatory Commission to warrant the issuance of the orders sought herein.

3. That both the suit and the application are a nullity.

I have considered the submissions of the learned counsels appearing, including the cases cited. It is the Defendant's case that this court lacks jurisdiction by virtue of **section 61(3)** of the Energy Act, 2006.

Counsel for the Defendant submitted that the Plaintiff's claim is essentially a dispute over charges for electricity consumption on account of faulty or defective meters under **section 59** of the Act. It was his further submission that the dispute ought to be referred to the Energy Regulatory Commission as required by the Act. He further noted that the Commission has power to issue injunctive relief and award damages. He referred court to section 61(1) and (4).

Counsel also submitted that there was no authority exhibited permitting the deponent of the verifying and supporting affidavits to swear the affidavits, and that for that reason the suit and the application were nullities in law.

In his turn learned counsel for the Plaintiff pointed out that an authority under seal authorizing the deponent of the affidavits under **Order 4; rule 1(4)** of the **Civil Procedure Rules** (the **Rules**) was annexed to the plaint. I have seen for myself the same authority, and nothing else needs to be said on this point of objection; it obviously has no merit.

Regarding jurisdiction learned counsel for the Plaintiff submitted that the suit and application do not fall within the parameters of section 61(3) of the Act. He submitted that the suit arose out of a demand made by the Defendant under section 59(1) of the Act for Plaintiff to pay charges on a re-billed period of 22 months.

Counsel further submitted that only disputes falling under section 59 concerning **recalculation** of electricity energy supplied to a consumer, or as to **interference** with any meter, require to be referred to the Commission for determination. In his view the dispute in this suit was not one such.

Learned counsel further submitted that the Plaintiff has not sought in the suit any recalculation of the bill. Nor is the Defendant's demand for KShs 7,110,992/69 based on any alleged interference with any meter by the Plaintiff: it was based on a rebilling of the aforesaid period of 22 months based on a new meter installed in place of an existing meter on the allegation that "the existing meter's ratio was not corresponding to the installed current transformer ratio", or a "mismatch of the meter ratio". Learned counsel wound-up his submissions by saying that only this court has jurisdiction to deal with the issues raised in the suit.

Section 59 of the **Act** provides as follows: -

"59(1) Where a meter used to register the quantity of electrical energy supplied by a licensee to any consumer is found to be defective through no fault of the licensee or the consumer, the licensee may, in consultation with the consumer, determine the reasonable quantity of electrical energy supplied and recalculate the charges due to or from the consumer as appropriate for up to a maximum period of six months from the date the meter is established to be defective:

Provided that if the consumer had reported any suspected defect in the meter and the licensee did not immediately examine the meter, the licensee shall not be entitled to recover from the consumer any charges for more than three months from the date the meter was established to be defective.

(2) Where any meter used to register the quantity of electrical energy supplied by any licensee to any consumer is found to be defective through interference by the consumer, the licensee may determine the reasonable quantity of electrical energy supplied and recalculate the charges due from consumer as appropriate from the date the licensee determines the meter to have been interfered with:

Provided that if the subject meter is no longer suitable for ascertaining the quantity of electrical energy supplied, the licensee shall be entitled to repair or replace the meter at the costs of the consumer who interfered with it.

(3) 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."

The documents in the Plaintiff's list of documents dated 20th and filed on 21st July 2011 include some correspondences from the Defendant, one of which is a letter dated 25th May 2011 addressed to the Plaintiff. It states as follows: -

"**<u>RE: ELECTRICITY CHARGES (REBILLING) ON A/C 2531806-01</u>**

In 2009 we embarked on a program to replace all the ordinary electronic meters for industrial/commercial customers with Automated Meters.

During the above exercise, on 19th June, 2009 your then meter No. 050013154 having a Meter Ratio of 500/5A, was replaced with Meter No. 40008082240 whose meter ratio is 200/5A. Your supply was metered vide Current Transformer (CT) of ratio 500/5A.

In our recent industrial/commercial accounts' inspection at your premises in April, 2011, it was established that there was a mismatch in the CT/Meter ratio since the CTs are of 500/5A rating while the meter was actually rated 200/5A. Consequently the meter was capturing only 2/5th of the consumed units over the June 2009 to April 2011 period.

Following this finding your meter No. 40008082240 with the wrong meter ratio was replaced with meter No 050013484 with the correct meter ratio of 500/5A corresponding to the installed CT for the period July 2009 to May 2011.

This letter is to inform you that we are in the process of evaluating the cost of the unrecorded consumption due to the above CT mismatch over the July 2009 to May 2011 period as per provisions of the Energy Act 2006, section 59. The debit will appear in one of your future bills as "Debit after rebilling" and "VAT Debit." ".

This was followed by a letter dated 17th June 2011 which stated in the pertinent part: -

"As per the provisions of the Energy Act, 2006, section 59(1), your account has hence been debited with a total of 397,045 KWH and 1,983 KVA respectively, being the unbilled consumption for the months of July 2009 through May 2011, which represents 3/5th of the unmetered consumption over the same period…

These units computed at the effective tariff rates have led to your account being debited with a total of KShs 7,110,992.62 included of VAT charges…"

From these correspondences it is clear that the rebilling of the Plaintiff's electricity consumption was **not** on account of a **defective** meter (whether such defect be through no fault of the Defendant or Plaintiff, or whether it be through interference by the Plaintiff). There was simply **no defect** in the meter.

What happened, as explained by the Defendant in its letters to the Plaintiff quoted above, was that when the Defendant replaced ordinary electronic meters with automated meters for industrial/commercial consumers, the Plaintiff's meter was replaced with one of a lower meter ratio of 200/5A instead of a meter ratio of 500/5A. This resulted in the alleged under-billing which the Defendant sought to recover with the re-billing. The Plaintiff has resisted this on the ground that it was not its fault.

There is no dispute that can be referred to the Commission under section 59(3) of the Act. I so hold.

What about under section 61(3) and (4) of the Act? Those sub-sections provide as follows:-

"(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.

(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:

Provided that the prohibition contained in this subsection shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Commission, in addition and without prejudice to any other deposit the licensee is entitled to require, or the amount of the charge or other sum in dispute, and the consumer has failed to comply with the request within forty-eight hours of the request having been made."

There is obviously a dispute between the Plaintiff and the Defendant over electricity consumption charges levied by the Defendant which ought to be referred to the Commission under section 61(3) (a) of the Act. It has not. But this does not appear to oust the jurisdiction of the court. It appears from the wording of subsection (4) that any of the parties to such dispute may elect to take the dispute to court. The Plaintiff elected to come to court, and its suit is properly before the court.

However, because of the mandatory terms of section 61(3),

"… it shall be referred to the commission",

the suit herein must be stayed and the dispute between the parties as disclosed by the pleadings filed herein referred to the Energy Regulatory Commission. It is so ordered. But the interim injunction granted earlier will remain in place until the dispute is resolved by the Commission or until the further order of the court.

Costs of the preliminary objection shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF NOVEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2011