



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 266 of 2004

POLYTHENE INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

THE KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

R U L I N G

The Defendant has applied by chamber summons dated 15th August, 2005 for the main order that matters in dispute in this suit be referred for determination by the Electricity Regulatory Board (hereinafter called the “Board”). There is an alternative prayer that the matters in dispute in the suit be referred to the Board for investigation and report. The application is stated to be brought under section 87 of the Electric Power Act, No. 11 of 1997 (hereinafter called the “Act”) and also under Order 27, rule 9 of the Civil Procedure Rules (the “Rules”). The grounds for the application as stated on the face thereof are to the effect that the matters in dispute are within the jurisdiction of the Board under section 87 aforesaid; that the Plaintiff itself had indicated before filing suit that it would refer the dispute to the Board; and that the Plaintiff has now refused to consent to the dispute being determined by the Board. There is a supporting (erroneously titled “replying”) affidavit sworn by one BEATRICE MESO MUENDO, the Chief Legal Officer of the Defendant, to which a number of documents are annexed.

The Plaintiff has opposed the application upon the grounds set out in the grounds of opposition dated 11th October, 2005. Those grounds are, *inter alia*:-

- (i) ***That the application is incurably defective and ought to be struck out.***
- (ii) ***That the court has no power to grant the order sought under section 87 of the Act or under Order 27, rule 9 of the Rules.***
- (iii) ***That section 87 aforesaid does not oust the Plaintiff’s right to seek redress in a competent court of law.***
- (iv) ***That the application is frivolous because the Plaintiff has not requested for a hearing of the dispute herein by the Board under paragraph (6) of the schedule to the Act as alleged by the Defendant.***
- (v) ***That the application is scandalous and vexatious because the parties in their respective***

pleadings have accepted that the court has jurisdiction to hear and determine the matter, and have in fact agreed on the issues to be determined. The Defendant is therefore estopped from proceeding otherwise, and its application is outside the scope of the pleadings.

(vi) That the court is the best-suited forum to determine the issues in the suit, given the nature of the reliefs sought. In any case section 121 (d) of the Act empowers the Board to investigate complaints only, and it has no powers to grant any of the substantial reliefs sought in the plaint.

(vii) That the Board has no powers to determine a complaint whose basis, as in the instant case, is an alleged offence under the Act.

(viii) That a referral to the Board would deny the Plaintiff the right to elect a suitable forum for the adjudication of its complaints.

(ix) That the application is an abuse of the process of the court.

There is no replying affidavit.

I have considered the submissions of the learned counsels appearing. I must state at the outset that I find nothing defective, let alone incurably defective, about the application. None was pointed out during arguments. Equally, I do not find the application to be scandalous, vexatious or an abuse of the process of the court, and no arguments in that regard were made.

It appears to me that the main issue to be determined in this application is whether the Electricity Regulatory Board has the necessary jurisdiction under the law to hear and determine the dispute herein as disclosed by the primary pleadings. If I should so find, it is trite law that where a statute has invested jurisdiction upon a special inferior tribunal, then the dispute ought to be referred to that tribunal for determination.

Section 87 of the Act provides:-

“87. (1) If any dispute arises between any consumer and the licensee as to whether any meter whereby the value of the supply is ascertained (whether belonging to the consumer or to the licensee), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that difference shall be determined upon the application of either party by the Board, and the Board shall also order by which of the parties the costs of and incidental to the proceedings before it shall be paid, and the decision of the Board shall be final and binding on all parties; and in determining the said costs the Board may take into account any fee paid under section 80.

(2) Subject as aforesaid, the reading of the meter shall be conclusive evidence in the absence of fraud as to the value of the supply.”

The Board thus has jurisdiction to determine two types of dispute:

1. Whether any meter whereby the value of the supply is ascertained is or is not in proper order for correctly registering that value. The meter may belong either to the consumer of the electricity or to the supplier of the same.

2. Whether that value has been correctly registered in any case by any meter.

Does the dispute herein as disclosed by the pleadings fall within the above two types of dispute?

The Plaintiff's claim is set out in paragraphs 4, 5, 6, 7 and 8 of the plaint dated 24th May, 2004. That claim is firstly **“for the regularization of the billing tariffs on the Plaintiff's electricity account and reversal of the irregular and unlawful debit of KShs.17,172,902/99 plus VAT posted on the**

Plaintiff's electricity bill dated 4th May, 2004" (paragraph 4). In paragraph 5 the Plaintiff pleads that the Defendant **"has fraudulently, unlawfully and irregularly re-billed the Plaintiff's account from November, 1999 to January, 2004" with the aforesaid sum.** Particulars of fraud, illegality and irregularity are given. The Plaintiff seeks reversal of that re-billing. In paragraph 6 the Plaintiff seeks **an interlocutory injunction prohibiting the Defendant by itself, servants and agents from disconnecting or interfering with its electricity supply pending hearing and determination of the suit.** In paragraph 7 the Plaintiff has pleaded that the Defendant has **altered the prescribed and authorized billing tariffs without notice as required under the law, and has used unauthorized tariffs to bill the Plaintiff.** Particulars are given. In paragraph 8 the Plaintiff prays for **an account to be taken and for a refund or credit be given of overcharged amounts from December, 2003 until the date of compliance and restoration of the authorized billing tariffs on the Plaintiff's account.**

It seems to me that the Plaintiff's claims go way beyond the disputes that the Board can deal with under section 87 (1) of the Act. The Plaintiff is not complaining **that the meter recording its electricity consumption is not in proper order for correctly registering** the amount billed to it by the Defendant. Nor is it complaining that the amount billed to it has **not been correctly registered by any meter.** The Plaintiff's case is that the Defendant has fraudulently, illegally, irregularly and arbitrarily applied the wrong billing tariffs to charge it large amounts of money for electricity consumption that are not due and that have been backdated a number of years.

In its defence the Defendant has pleaded, *inter alia*, that the meter recording the Plaintiff's consumption of electricity was under-recording, and that as a result the Plaintiff was not being properly charged for the electricity consumed by it; that the meter was under- recording because "the cables for the red and blue phases had been tampered with"; and that the Defendant therefore re-calculated the correct charge for the electricity consumed by the Plaintiff at KShs.17,172,902/99 and billed it accordingly. In its reply to defence the Plaintiff pleaded, *inter alia*, that the Defendant regularly inspected the Plaintiff's electricity and metering installations prior to January, 2004; and that the finding of defect in the Plaintiff's meter and the re-billing by the Defendant were acts that were *ultra vires* its powers, unjustified and unconscionable. The Plaintiff further pleaded that there were no defects in its meter and denied that it had tampered with the meter or the electricity installation.

An agreed statement of issues dated 14th March, 2005 was filed. Among the issues stated therein are:-

"

6. Was the Plaintiff's electricity meter tampered with on or before January, 2004?

.....

10. Is the re-calculation of the Plaintiff's electricity consumption by the Defendant from November, 1999 to January, 2004 lawful and proper?

11. Is the debiting of KShs.17,172,902/99 plus VAT to the Plaintiff's electricity bill by the Defendant lawful and proper?

.....

13. What are the authorized electricity billing rates and tariffs for the Plaintiff's account?

14. Has the Defendant altered the billing rates and tariffs to the Plaintiff's electricity account from January, 2004?

15. Is the billing of the Plaintiff's electricity account in accordance with the authorized rates and tariffs?

16. Is the billing of the Plaintiff's electricity consumption discriminatory?

.....”

It seems to me that all these issues are outside the mandate of the Electricity Regulatory Board as set out in section 87 (1) of the Act. Besides, the prohibitory injunction and the declaration sought in paragraphs (a) and (b) of the reliefs in the plaint cannot be granted by the Board. The substantive dispute in this suit must be determined by the court. That substantive dispute, in my view, is:

1. ***Did the Plaintiff tamper with its electricity meter in order to cause it to under-record the amount of the electricity consumed by it?***
2. ***Did the Defendant apply the correct rates and tariffs in re-billing the Plaintiff for electricity consumption from November, 1999 to January, 2004?***
3. ***Did the Defendant fraudulently, illegally, irregularly and arbitrarily apply the wrong rates and tariffs to the Plaintiff's electricity account in order to over-charge it?***

This is a dispute that is clearly outside the parameters set by section 87 (1) of the Act and must be determined by the court. For the above reasons I must refuse the main prayer of the application by chamber summons dated 15th August, 2005.

I will now consider the alternative prayer for the matters in dispute to be referred to the Board for investigation and report under Order 27, rule 9 of the Rules. That rule states:-

“9. On the application of any party or of its own motion in any suit, the court may issue a commission to any person to make an investigation and report to the court for the purpose-

- (a) of ascertaining any matter in dispute in the suit, whether or not the matter is substantially the whole matter in dispute between the parties; or***
- (b) of ascertaining the value of any property or the extent of any damage thereto, or the amount of returns, profits, damages or mesne profits.”***

In my view, determination of the substantive dispute between the parties herein must depend on the evidence placed before the court. It is the duty of each party to place before court such evidence as it deems necessary in support of its case. As stated by MULLA in “The Code of Civil Procedure”, ACT V OF 1908,

“It is not the object of O 26, r 9 (equivalent to our Order 27, rule 9), to assist a party to collect evidence, where the party can get the evidence itself. A court should not issue writs to commissioners where the parties can themselves get the evidence on the point for which they seek the appointment of a commissioner.”

I do not think that the evidence in the present case will be of so technical or specialized a nature as to render it desirable to refer the matter to an expert for investigation and report. Should this need arise in the course of hearing the suit, the court can always refer any particular matter or issue to the Board, bearing in mind the Board's functions as set out in section 121 of the Act. But for now, such need has not been sufficiently demonstrated.

In the event therefore, the Defendant's application is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JUNE, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF JUNE, 2006.