

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 100 OF 2003

NDUNGU TRANSPORT COMPANY LTD.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

This is a preliminary objection raised by the Counsel for the defendant to this suit on points of law.

Mr. Makari for M/s Kenya Power & Lighting Co. Ltd, the defendant, submitted that by virtue of the provision of section 87 of the Electric Act any dispute between a consumer and a Licensee as to the accuracy of an electric metre such as the present case must be referred to the Electricity Regulatory Board established under Section 119 of the said Act for an arbitration. He added that as this Court has been given appellate jurisdiction in such disputes under section 9 of the schedule to the said Act it does not have jurisdiction to entertain this suit. The second ground advanced by Mr. Makari is that the plaint in this case was not accompanied by a verifying affidavit verifying to the correctness of the plaint sworn on behalf of the plaintiff.

In response to these submissions Mr. Kasamani for the plaintiff opposed the preliminary objection and contended that the plaintiff has come to this Court under Section 83 of the Act on the ground that he has been overcharged by the defendant in the past and seeks an order for an installation of a test metre. He claimed that the Board does not have any jurisdiction to grant an injunction to restrain the defendant. He also added that the defendant has the monopoly in the supply of electricity in this Country.

It appears to me that the claim that this Court does not have jurisdiction to entertain this is suit is valid in view of the provision of section 87 of the Electric Power Act 1997 which stipulates that any dispute between a consumer and the Licensee as to the accuracy of meter has to be settled by the Electricity Regulatory Board established under Section 119 of the said Act. The plaintiff is a consumer of the electricity and the defendant is the licensee and that the plaintiff's complaints in this suit is that it has been overcharged by the defendant and seeks that the meter be tested. This claim falls within the provision of Section 87 of the said Act. To amplify the fact that the legislature has taken away the disputes between such parties from this Court regulation 9 of the schedule to the said Act provides that appeals from the Board have to be lodged before the Minister and appeals against the minister's decision are to be filed in this Court.

In these circumstances I agree with the defendant that this suit was improperly filed in this Court. However it would not be just and fair to dismiss the suit when the dispute can be referred to the Electricity Regulatory Board for settlement. The same is forwarded to the Secretary of the Board. The defendant to have the costs of this Objection.

Dated and delivered this 23rd September, 2003.

B.K. Tanui

JUDGE