



Kenya Power and Lighting Company Limited v Shri Krishina Overseas Limited (Civil Appeal E407 of 2022) [2024] KEHC 10531 (KLR) (Civ) (3 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10531 (KLR)

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

CIVIL

CIVIL APPEAL E407 OF 2022

WM MUSYOKA, J

SEPTEMBER 3, 2024

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

SHRI KRISHINA OVERSEAS LIMITED RESPONDENT

(An appeal arising from orders in the ruling of Hon. G Sogomo, Principal Magistrate, PM, delivered on 31st May 2022, in Milimani CMCCC No. E2585 of 2022)

JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellant, for a declaration that an electricity bill of Kshs. 3,353,279.00, of 9th April 2019, was unjustified and without basis; an injunction to bar the appellant from recovering that amount from the respondent; an injunction to bar the appellant from disconnecting electricity supply to the respondent over the disputed bill; general damages; damages for financial loss; special damages; and costs and interests. The case, by the respondent, was that the appellant had disconnected power to its industrial premises, over the disputed bill, yet the respondent had always paid its bills in time. The plaint, in the primary suit, was filed simultaneously with a Motion, dated 12th May 2022, under certificate of urgency, seeking that the power be reconnected, and injunctions be issued to restrain disconnection of the power, once reconnected, pending the hearing and determination of the dispute.
2. The appellant did not file a defence, ostensibly as summons to enter appearance had not been served. It did file a notice or preliminary objection, dated 17th May 2022, and grounds of opposition, of even date. The preliminary point of law was that the suit offended provisions of the *Energy Act*, Cap 314, Laws of Kenya; the Energy (Complaints and Disputes Resolution) Regulations, 2019; the Fair Administration Act, Cap 7L, Laws of Kenya; and *the Constitution*. The grounds of opposition were



- around the application being misconceived, and not satisfying the grounds for grant of injunctive relief; and the disconnection of the power not being illegal, given that the respondent was indebted to the appellant for power consumed.
3. Directions were given on 18th May 2022, for canvassing of the preliminary objection by way of written submissions. Both sides filed written submissions. The court ruled on the matter on 31st May 2022, dismissing the preliminary objection, and allowing the Motion, dated 12th May 2022. The matter was subsequently referred to the Energy Commission for determination, and the decision of the Energy Commission to be thereafter remitted to the court for adoption. Whereas the court conceded that jurisdiction, to determine the dispute around the charges, lay with the Commission, and not the court, it stated that the Commission had no jurisdiction to grant injunctions.
 4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 13th June 2022, revolve around the trial court erring in failing to find that the dispute was wholly within the purview of the Energy Act, 2019; misapprehending the principles governing preliminary objections; delving into issues of fact instead of confining itself to the issues raised in the preliminary objection; failing to appreciate the facts and the law; ignoring submissions made by the appellant; assuming a jurisdiction that the court did not have; and taking into account irrelevant considerations.
 5. Directions were given, on 14th February 2024, for disposal of the appeal, by way of written submissions. I have only come across written submissions by the appellant, in the file of the papers that were placed before me.
 6. The appellant, relying on *Abidha Nicholus vs. Attorney-General & 7 others, National Environmental Complaints Committee (NEEC) & 3 others (Interested Parties) [2021] eKLR (Kiage, M. Ngugi & Tuiyott, JJA)*, submits that there was a 3-tier mechanism for handling disputes against the appellant, starting with a complaint filed at the Energy and Petroleum Regulatory Authority, followed by an appeal to the Energy and Petroleum Tribunal, and finally to the High Court, upon exhaustion of the appellate process before the Energy and Petroleum Tribunal, with respect to matters relating to billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, among others. Based on *Abidha Nicholus vs. Attorney-General & 7 others, National Environmental Complaints Committee (NEEC) & 3 others (Interested Parties) [2021] eKLR (Kiage, M. Ngugi & Tuiyott, JJA)*, the appellant cites the doctrine of exhaustion, and relies on Article 159(2)(c) of the Constitution and *William Odhiambo Ramogi & 3 others vs. Attorney General & 4 others, Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR (Achode, J. Ngugi, Nyamweya, Ogola & Mrima, JJA)* and *Cyrus Komo Njoroge vs. Kiringa Njoroge Gachoka & 2 Others [2015] KLR*. It is submitted that the trial court ignored section 11(f)(i)(k) of the Energy Act, with respect to what it empowers the Energy and Petroleum Regulatory Authority to do, in terms of the directions it can give for the doing or performance of certain acts.
 7. There is only one issue, in my estimation, for determination, and that is whether the trial court had jurisdiction over the matters in controversy. Once that question is answered, it would dispose of whether there was a proper preliminary objection before the court.
 8. Was the trial court vested with jurisdiction? It is now well settled that jurisdiction goes to the core of any matter, and the court exercises jurisdiction only to the extent that the same is conferred upon it by the Constitution or statute. See *In the Matter of Interim Independent Electoral Commission [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ)* and *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ)*. Where jurisdiction lacks, the court ought to down its



- tools. See Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd [1989] eKLR (Nyarangi, Masime & Kwach, JJA).
9. Disputes around charges for electrical energy, and illegal or improper use of such energy, which cover such matters as billing disconnection and reconnection of power supply, are governed by the legislation relating to energy. Jurisdiction over such disputes is delineated by the provisions of that legislation. Section 3 of the *Energy Act* provides that that statute prevails over any other law with respect to transmission, distribution, supply and use of electrical energy, and all works and apparatus for any of those purposes. Section 9 of the *Energy Act* then establishes the Energy & Petroleum Regulatory Authority, and section 11 of the *Energy Act* vests the said Energy and Petroleum Regulatory Authority with power, among others, to investigate and determine complaints or disputes, make and enforce directions to ensure compliance with the *Energy Act*, issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, issue orders or directions, and to impose fines and sanctions. Then there is section 36 of the *Energy Act*, which establishes the Energy and Petroleum Tribunal, and confers it with appellate jurisdiction over decisions of the Energy and Petroleum Regulatory Authority, and original jurisdiction to handle other disputes. Section 36(5) confers power on the Energy and Petroleum Tribunal to grant the equitable reliefs of injunctions and specific performance. There is also jurisdiction to award damages and impose penalties. The Energy and Petroleum Tribunal has both original and appellate jurisdiction over matters that it has mandate to handle. Under section 37 of the *Energy Act*, a party aggrieved by an order from a decision of the Energy and Petroleum Tribunal has a right to challenge that decision at the High Court.
 10. Clearly, therefore, from the above, there is established a dispute resolution mechanism, with respect to disputes within the energy sector, away from that established under the *Civil Procedure Act*, Cap 21, Laws of Kenya. Under that arrangement, which the court, in *Abidha Nicholus vs. Attorney-General & 7 others, National Environmental Complaints Committee (NEEC) & 3 others (Interested Parties)* [2021] eKLR (Kiage, M. Ngugi & Tuiyott, JJA), described as 3-tier, the dispute ought to be first placed before the Energy and Petroleum Regulatory Authority, and, if either party is not satisfied with the decision of the Energy and Petroleum Regulatory Authority, escalated to the Energy and Petroleum Tribunal on appeal, and, upon either party being aggrieved by the determination by the Energy and Petroleum Tribunal, to the High Court on a further appeal.
 11. These alternative dispute resolution mechanisms have been recognised in Article 159(2)(c) of *the Constitution*. The courts have repeatedly held that Article 159(2)(c) of *the Constitution*, entrenches the doctrine of exhaustion of remedies, and where alternative dispute resolution mechanisms are provided for, in a statute governing a certain sector, those mechanisms ought to be exhausted first before there is resort to the ordinary court process. See *Geoffrey Muthinja & another vs. Samuel Muguria Henry & 1,756 others* [2015] eKLR (Waki, Nambuye & Kiage, JJA) and *Jeremiah Memba Ocharo vs. Evangeline Njoka & 3 others* [2022] eKLR (Mrima, J). See also *Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited* [2013] eKLR (Lenaola, J), *Mike Rubia & another vs. Moses Mwangi & 2 others* [2014] eKLR (Lenaola, J), *Gabriel Mutava & 2 others vs. Managing Director Kenya Ports Authority & another* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA), *Council of Governors vs. Attorney General & 12 others* [2018] eKLR (Mwita, J), *KKB vs. SCM & 5 others* [2022] KEHC 289 (KLR)(Mativo, J) and *Edarus Salim Hussein & 8 others vs. Shariffia Binti Salim & 3 others* [2022] eKLR (Odeny, J).
 12. When the above is taken into account, it would follow that the trial court did not handle the dispute before it within the law. In the first place, it had no jurisdiction at all to handle the dispute. Firstly, because of the alternative dispute resolution mechanism provided for in the governing statute, which requires that the dispute be taken through the alternative process first before being brought to court;



and, secondly, because, upon exhaustion of that alternative dispute resolution mechanism, the matter ought to be escalated, by dint of section 37 of the [Energy Act](#), to the High Court, and not to the magistrate's court. It would follow then that a magistrate's court would have no jurisdiction whatsoever over matters of the kind that was placed before it. In the second place, as it had no jurisdiction in the first place, it had no legal basis or foundation for purporting to refer the dispute to the organs established under the [Energy Act](#). It could only refer a dispute to those organs where it was properly seized of the matter in the first place. In any case, the entity it purported to refer the dispute to, the Energy Commission, no longer exists, for it has been replaced with the Energy and Petroleum Regulatory Authority. In the third place, as there was no authority to entertain the dispute in the first place, the trial court had no jurisdiction to grant the reliefs that it purported to. That jurisdiction is conferred on the Energy and Petroleum Tribunal by section 36(5) of the [Energy Act](#). It was, therefore, erroneous of the trial court to find that there was no jurisdiction, under that mechanism, for grant of equitable reliefs, by the organs set up under the [Energy Act](#), pending hearing and determination of the dispute, and to thereafter confer upon itself jurisdiction that it did not have under the governing legislation.

13. I need to say more on the injunctions and section 36 of the [Energy Act](#). Section 36 confers power on the Energy and Petroleum Tribunal to grant injunctions, but not on the Energy and Petroleum Regulatory Authority. It was, perhaps, on that basis that the trial court held that there was no jurisdiction on the Commission to grant injunctions, and then proceeded to confer upon itself such jurisdiction to enable it grant the relief. However, the fact that the jurisdiction is granted to the Energy and Petroleum Tribunal, and not the Energy and Petroleum Regulatory Authority, would still not be a good excuse for the trial court to confer jurisdiction upon itself, which statute has not vested it with. The provisions of section 36 of the [Energy Act](#) are explicit, the Energy and Petroleum Tribunal can act on matters referred to it. It would follow, therefore, that where the Energy and Petroleum Regulatory Authority is not conferred with some jurisdiction, but the Energy and Petroleum Tribunal is, the way out would be for the Energy and Petroleum Regulatory Authority to refer that aspect of the dispute to the Tribunal, either on own motion or on application. In any case, from my reading of section 36 of the [Energy Act](#), there is nothing that prevents a party from directly approaching the Energy and Petroleum Tribunal, for it has both original and appellate jurisdiction. The concern could be on expedition, on whether the alternative dispute resolution mechanism would be expeditious enough to obviate substantial loss being occasioned on the parties, on account of delay. The answer to that would be section 36(6) of the [Energy Act](#), which enjoins the Tribunal to act expeditiously with respect to the matters that it is seized of.
14. For clarity sake, let me recite the relevant provisions of the [Energy Act](#).
15. Section 3(1) of the [Energy Act](#) provides:

“If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters –

 - a. The importation, exportation, generation, transmission , distribution , supply or use of electrical energy;
 - b. ...
 - c. All works and apparatus for any or all of these purposes.”
16. Section 11 of the [Energy Act](#) states:

“Powers of the Authority



The Authority shall have all powers necessary for the performance of its functions under this Act and in particular, the Authority shall have the power to—

- (a) issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector;
- (b) set, review and approve contracts, tariffs and charges for common user petroleum logistics facilities and petroleum products;
- (c) set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment;
- (d) prescribe the form and manner in which any application for any authority, licence, consent or approval under this Act shall be made and the fees payable in respect of such application;
- (e) make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act;
- (f) issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled;
- (g) formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector in coordination with other statutory authorities;
- (h) approve electric power purchase and network service contracts for all persons engaging in electric power undertakings;
- (i) investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;
- (j) enter, inspect and search any premises where an offence is being committed or is suspected to have been committed;
- (k) issue orders or directions to ensure compliance with this Act;
- (l) impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;
- (m) enter, inspect and search any premises at which any undertaking relating to petroleum operations is carried out or an offence is being committed or is suspected to have been committed;
- (n) issue orders either requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled in furtherance of its powers under the law relating to petroleum;



- (o) impose such sanctions and civil fines not exceeding five hundred thousand shillings per violation per day to secure compliance with orders issued under the law relating to petroleum;
- (p) take or remove, for analysis, testing or for use in evidence in connection with the commission of an offence under the law relating to petroleum, samples of petroleum or other substances from any area where any upstream petroleum operations are being carried on; and
- (q) inspect, take extracts from, or make copies of any document relating to any upstream petroleum operations.”

17. Section 36 of the [Energy Act](#), which states as follows:

“36. Jurisdiction of the Tribunal

1. The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
2. The jurisdiction of this Tribunal shall not include the trial of any criminal offence.
3. The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
4. The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
5. The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
6. The Tribunal shall hear and determine matters referred to it expeditiously.”

18. Section 37(1) of the [Energy Act](#), on the other hand, provides:

“Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.”

19. One other thing, the trial court disposed of the Motion, on reconnection and injunctions, before affording the parties an opportunity to argue it on its merits. What the trial court was called upon to determine was the preliminary issue around jurisdiction, with respect to the suit itself, not the merits of the application for reconnection and injunctions. The directions that it gave, on 18th May 2022, were for canvassing of the preliminary objection by way of written submissions. No subsequent directions were given relating to disposal of the substantive application on reconnection and injunctions. It was, therefore, improper and unfair to determine the prayers for reconnection and injunctions in a ruling reserved to the issues raised in the preliminary objection, and on submissions limited to the points raised in the objection. It amounted to condemning the appellant unheard on the matter of the reconnection and injunctions. Upon disposing of the preliminary objection, and upon finding and



holding that it had jurisdiction to grant injunctive relief, it should have given directions on the disposal of the application, dated 12th May 2022, to afford both sides a fair hearing on the reconnection and injunctions. Of course, this is without prejudice to what I have discussed hereinbefore. My finding and holding remains that there was absolutely no jurisdiction on the part of the trial court to entertain the suit in any way.

20. In view of what I have discussed above, particularly the fact that the trial court had no jurisdiction, the preliminary objection by the appellant was properly grounded, and ought not to have been dismissed. Instead, the preliminary objection should have been upheld, so that the suit before the trial court was struck out, for lack of jurisdiction. Consequently, it is my finding and holding that the appeal herein is merited, and I hereby allow it, so that the orders, made on 31st May 2022, are hereby vacated, and substituted with an order striking out the suit, in Milimani Commercial Court CMCCC No. 2585 of 2022, with costs to the appellant. The appellant shall have costs of this appeal. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3RD DAY OF SEPTEMBER 2024.

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Justus Ododa, Advocate for the appellant.

Ms. Njeru, instructed by John Ogoda & Company, Advocates for the respondent.

