Kenya Power & Lighting Co Ltd v Isaac's Investments Company Ltd (Civil Appeal 534 of 2019) [2023] KEHC 23203 (KLR) (Civ) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23203 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 534 OF 2019

CW MEOLI, J

OCTOBER 5, 2023

BETWEEN

KENYA POWER & LIGHTING CO LTD .... APPELLANT

AND

ISAAC'S INVESTMENTS COMPANY LTD .... RESPONDENT

(Being an appeal from the ruling of D.A. Ocharo (PM) delivered on 13th August, 2019 in Nairobi Milimani CMCC No. 9193 of 2018)

JUDGMENT

1. This appeal emanates from the ruling delivered on 13.08.2019 in Nairobi Milimani CMCC No. 9193 of 2018. The events leading to the ruling were that in 2017, Isaac's Investments Ltd, the Plaintiff in the lower court, (hereafter the Respondent) filed a motion under urgency in the suit filed against Kenya Power & Lighting Co. Ltd, the defendant in the lower court, (hereafter the Appellant).

2. In the suit, the Respondent was seeking a declaration that the Appellant was in breach of contract for supply of electricity; a mandatory order to compel the Appellant to restore electricity with respect to the meters set out in paragraph 5 of the plaint; a permanent injunction to restrain the Appellant by itself, its servants or agents or otherwise howsoever from disconnecting its supply of electricity to the Respondent on all accounts listed in paragraph 5 of the plaint; and costs of the suit.

3. The gist of the Respondent's averments in the suit was that the Appellant owned and operated most electricity transmission and distribution system in the country and sold electricity to over 6.8 million customers; that at all material times the Respondent was a customer of the Appellant and was allocated various account numbers in respect of apartments on a property known as "Legacy One" Apartments situate on Land Reference No. 3129DS/Naivasha Rd/riruta (hereafter the premises); and that the Respondent had let out the apartments within the premises to various tenants, all of whom had fully

settled accounts with the Appellant, while the Common Area Account (A/c No. xxxx) to the said premises had a total accrued debit balance of Kshs. 5,271/-.

4. It was further averred that the Appellant by a letter dated 30.07.2018 wrote to the Respondent demanding an alleged debt of Kshs. 5,131,130/- in respect of Common Area Account (CAA) and attached therewith a billing statement by which the Appellant surreptitiously, invidiously and without basis, justification or cause debited a colossal and erroneous charge of Kshs. 6, 238,506/- on the on the said account whereas as of 10.09.2017, the same had a zero balance. Hence the charge on the account was disputed.

5. The Respondent further averred that despite its request for statements of accounts, on or about 13.10.2018 the Appellant illegally, and un-procedurally disconnected supply of electricity to the CAA of the premises as well as all apartment units let out by the Respondent, in breach of the electricity supply contract with the Respondent and its rights under the Electricity Act. That because of the alleged actions by the Appellant, majority of the Respondent's tenants on the premises terminated their tenancies with the Respondent causing massive loss of revenue in rental income.

6. It was further averred that no circumstance or default had ever arisen to warrant the Appellant's action and the demand for the erroneous charge of Kshs. 6, 238,506/- in the circumstance was unlawful, null and void for all intent and purposes. Therefore, the Appellant was guilty of fraud, misrepresentation and was in breach of its contractual obligation leading to the Respondent's damage and loss.

7. The Appellant entered appearance and filed a notice of preliminary objection on 26.10.2018 premised on the singular ground that the trial court had no jurisdiction to entertain the Respondent's suit, which jurisdiction was, under the provisions of the *Energy Act* 2006 and Energy (Complaints & Dispute Resolution) Regulation 2012, vested in the Energy Regulatory Commission.

8. Thereafter, parties disposed of the Appellant's preliminary objection by way of written submissions. The trial court's ruling disallowing the Appellant's preliminary objection with costs provoked the instant appeal, which is based on the following grounds: -

    1. That the learned magistrate erred in law by ruling in favor of the Respondent and dismissing the Appellant's notice of preliminary objection dated 25.10.2018.

    2. That the learned Magistrate misdirected himself on the issues before the court for determination and consequently erred in making findings on matters that had been pleaded by the parties or submitted on by the parties.

    3. That the learned Magistrate consequently erred in law by finding that section 59(3) and section 61 (3) and (4) of the *Energy Act* Number 12 of 2006 (Now repealed) impliedly gave the court's jurisdiction to handle the disputes surrounding the matters set out in section 61 (3) of the Act despite section 61 (3) explicitly providing in mandatory terms that disputes under the said section be referred to the Commission.

    4. That in finding that the learned Magistrate had jurisdiction to handle the instant dispute, the learned Magistrate erred in law and in fact by relying on case law without due regard to the provisions of the *Energy Act* and the Energy (Complaints and Disputes Resolution) Regulations, 2012 (Now Repealed).

    5. That the learned Magistrate consequently erred in law by failing to find that where there is enabling legislation provides for a separate Dispute Resolution Forum, the court should refer such dispute to the said forum first.

6. That in finding that the learned Magistrate erred in law in finding that the court had jurisdiction to entertain the suit.

7. That the learned trial Magistrate consequently erred in law by failing to order that the Respondent refer this dispute to the Energy and Petroleum Tribunal as envisioned by the provisions of the *Energy Act*, 2006 (Now Repealed).

8. That the learned trial Magistrate erred in law and fact by ignoring the binding authorities of the superior courts adduced in the Appellant's submissions.

9. That the learned trial Magistrate erred in law in finding that the Energy Regulatory Commission has no Jurisdiction to enter Interlocutory Orders as it deems fit.

10. That the learned trial Magistrate erred in law and fact by ignoring the existence of a new *Energy Act*, 2019 that establishes the Energy and Petroleum Tribunal under Section 36 that has original civil jurisdiction on any dispute between a licensee and a third party.

11. That the learned magistrate erred in law by ignoring the transitional provisions under the fourth schedule of the *Energy Act* 2019 under Section 1 and 2 that establishes the Energy and Petroleum Regulatory Authority together with the Energy and Petroleum Tribunal." (sic)

9. The appeal was canvassed by way of written submissions. Counsel for the Appellant asserted that the trial court lacked jurisdiction to hear disputes of the nature presented by the Respondents by dint of the *Energy Act* 2019. The suit being one arising from a disputed electricity bill charged by the Appellant and raising the question whether the Respondent had interfered or tampered with the meter or its readings.

10. Citing the provisions of the *Energy Act* 2006 (now repealed), counsel argued that the dispute fell exclusively within the jurisdiction of the Energy Regulatory Commission (ERC) in the first instance. Further to the foregoing, counsel contended that the *Energy Act* 2019 subsequently transferred all the rights and obligations of the ERC established under the *Energy Act* 2006 (now repealed) to the Energy and Petroleum Regulatory Authority (EPRA) and appeals therefrom lie with the Energy and Petroleum Tribunal (EPT).

11. Addressing grounds 1, 2 & 3 of the Appellant's memorandum of appeal, counsel cited the provisions of Section 59(3) & 61(3) of the *Energy Act* 2006 (now repealed) to argue that the word "shall" as used therein connotes mandatory language as defined in Black's Law Dictionary and the Respondent's cause of action fell within the province of ERC. That upon the repeal of the *Energy Act* 2006 by the *Energy Act* 2019, the transitional provisions under the Fourth Schedule of the latter Act clearly provided that all duties or responsibilities mandatorily bestowed on the ERC by dint of the repealed Act fell upon EPRA and appeals therefrom with the EPT.

12. While calling to aid the of-cited decision of Owners of Motor Vessel "Lillian 'S'", the case of James Mwaura Ndungu v Kenya Power & Lighting Co. Ltd [2016] eKLR and Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd [2015] eKLR counsel submitted that the trial court erred in law in finding that it had jurisdiction to entertain the suit which ought to have been struck out.

13. As concerns grounds 4 & 5 of the memorandum of appeal, counsel cited the *Energy Act* 2019, Article 159 of *the Constitution* and Section 9(2) *Fair Administrative Action Act* and the decision in Speaker of the National Assembly v James Njenga Karume [1992] eKLR to reiterate the fact that the Respondent's cause fell within the purview of EPRA with appeals therefrom lying with EPT and that the exhaustion of Alternative Dispute Resolution (ADR) mechanisms is a key tenet of *the Constitution* 2010.

14. It was argued that the court had no discretion to entertain disputes in respect of which alternative and internal dispute resolution mechanisms are statutorily provided. In conclusion, counsel submitted that there was no application made before the trial court by the Respondent for the waiver of ADR mechanism as provided for in statute. Hence, the trial court lacked the requisite jurisdiction to entertain the suit. He asserted therefore that the appeal ought to be allowed as prayed. The remaining grounds of appeal appear to have been abandoned by the Appellant.

15. In his submissions, counsel for the Respondent contended that the issue in question before the trial court concerned disconnection that was not communicated by way of notice as provided for by the *Energy Act* 2006 (now repealed). That the granting of interim relief arising from disconnection of electricity by the Appellant was not a matter contemplated to fall under the mandate of the ERC as it then was, hence, the proceedings before the lower court were proper. While calling to aid the decision in Kenya Horticultural Exporters (1977) Ltd vs Kenya Power & Lightening Company Ltd, Civil Case No. 279 of 2011 counsel argued that the provisions of Section 61 (3) of the Repealed *Energy Act* did not oust the jurisdiction of the trial court to entertain the suit as filed.

16. It was further submitted that Section 59(3) of the repealed statute was not applicable to the matter as the dispute did not concern a defective meter and recalculation of electrical energy that was being supplied to the Respondent. Counsel contended that at the time of filing the suit and delivery of the impugned ruling, the EPT was not operational there being no members in officer to whom the dispute could be referred; that the members of the Tribunal were gazetted on 03.03.2022 and sworn into office on 21.10.2022. As such there was no competent administrative body fit for the purpose of adjudicating the Respondent's dispute.

17. In augmenting the latter argument and the issue of exhaustion of administrative remedies, counsel relied on the threshold set out by the Supreme Court in NGO Co-ordination Board v EG & 4 Others[2023] KESC 17 (KLR) to assert that the Repealed *Energy Act* did not provide a sufficient dispute resolution mechanism to address the Respondent's claim, unlawful disconnection of electricity not being envisaged as a type dispute to be referred to the ERC. Moreover, the ERC did not have the mandate and or procedure to grant interim relief.

18. Counsel asserted further that the existence of the Energy (Complaints and Disputes Resolution) Regulations, 2012 does not justify ousting the jurisdiction of the magistrate's court, counsel here reiterating the test set out in the NGO Co-ordination Board case.

19. A further argument canvassed was that since the magistrate's court was not endowed with any authority to withdraw or transfer cases before it, the Appellant could have appropriately moved the High Court. In conclusion, the court was urged to dismiss the appeal to forestall further prejudice to the Respondent on account of the present proceedings.

20. The court has perused the record of appeal as well as the original record and the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278.

21. The Court of Appeal stated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

22. The trial court in disallowing the Appellant's Preliminary Objection (PO) before it, expressed itself in part as follows:

> "...I have looked at the plaint herein dated 17th October 2018. The Plaintiff's prayers are a declaration by the court that the Respondent is in breach of the contract for supply of electricity to the Plaintiff and mandatory injunction both prohibitive and mandatory.
>
> The cause of action is a demand by the Defendant of a debt of Kshs. 6, 238,506/- on account of consumption of electricity by the Plaintiff which the Plaintiff considers erroneous and unjustified.
>
> The Law
>
> Jurisdiction in defined in the Black's Law Dictionary 10th Edition at page 980 as a courts power to decide a case or issue a decree.
>
> ...So the question here is whether this court is divested of jurisdiction to hear and determine this matter by dint of Section 59(3) of the *Energy Act* 2006 and Section 61(3) of the same Act.
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> ...The *Civil Procedure Act* (Cap 21 Laws of Kenya) defines court as the High Court or Subordinate Court acting in exercise of its civil jurisdiction.
>
> ...In overall therefore, I am satisfied that this court has jurisdiction to hear and determine this matter. The provision of the *Energy Act* provides alternative remedy which does not take away the jurisdiction of the court as conferred by the *Civil Procedure Act*. I consequently dismiss the preliminary objection by the Defendant with costs to the Plaintiff." (sic)

23. The appeal turns on the sole question whether the trial court misdirected itself in disallowing the Appellant's PO. The preliminary objection leading to the impugned ruling was anchored on the provisions of the *Energy Act* 2006 (now repealed) as read with the provisions of the Energy (Complaints & Dispute Resolution) Regulations 2012. While the notice of PO itself was not specific to the statutory provisions relied on, the Appellant in its submissions narrowed down the objection to the provisions of Section 59(3) and 61(3) of the *Energy Act* 2006 (now repealed) as read with the Energy (Complaints & Dispute Resolution) Regulations 2012. It would be apposite to note at this juncture that the *Energy Act* 2006 has since now been repealed by the *Energy Act* 2019.

24. Notably, the suit before the trial court was instituted and the PO canvassed during the subsistence of the repealed statute whereas the decision of the court was rendered after enactment of the *Energy Act*

2019. That said, the provisions of Section 59(3) and 61(3) of the *Energy Act* 2006 (now repealed) upon which the preliminary objection was premised provided that; -

> " 59(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."

....

61(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.

25. First, the question that ought to concern the court is whether the Appellant's preliminary objection qualified as a pure point of law and whether it was well grounded? Concerning the nature of a preliminary objection, the law is settled. In Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A. stated:

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration......
>
> A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."

26. In the case of Oraro v Mbaja [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

> " A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.
>
> Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

See also Kigwor Company Limited v Samedy Trading Company Limited [2021] eKLR where the Court of Appeal cited the decision of the Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR; and Mulemi v Angwenye & Another (Civil Appeal 170 of 2016) [2021] KECA 214.

27. The PO raised the question whether the lower court was clothed with the requisite jurisdiction to entertain the suit presented by the Respondent. The locus classicus on the question of jurisdiction is the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

28. The Supreme Court Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR on its part further observed on the question of jurisdiction that; -

> "(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation…"

29. Prima facie, the dispute between the parties hereto is civil in nature. The Magistrates Court draws its jurisdiction to entertain civil disputes before it by dint of Section 2 & 5 of the *Civil Procedure Act* and Section 7 of the Magistrates Court's Act 2015. The Appellant's objection was premised on the provisions of Section 59(3) and 61(3) of the *Energy Act* 2006 (now repealed) as read together with the Energy (Complaints & Dispute Resolution) Regulations 2012. The Appellant's contestation being that the Respondent's first port of call in seeking redress for the grievances raised in its suit against the Appellant was the ERC (now EPRA).

30. The plaint discloses that the Appellant was sued in its capacity as a utility supplier and or distributor of electricity and as the owner or operator of most electrical transmission and distribution systems in the country. The gist of the Respondent's averments in the suit was captured earlier in this judgment. The case pleaded against the Appellant was that no circumstance or event of default had arisen or occurred on the part of the Respondent as a consumer to justify the disconnection of the Respondent's electrical supply to any of its apartment's units in the suit premises. And that the Appellant's demand upon which the disconnection was made was based on an erroneous charge of Kshs. 6, 238,506/- on the Respondent's account. Hence the Appellant's actions were in the circumstances unlawful, null and void.

31. The reliefs sought as against the Appellant included: -

(a) A declaration that the Defendant is in breach of contracts for supply of electricity.

(b) That the Defendant be compelled by mandatory order to restore electricity with respect to the matters set out in paragraph 5 of the Plaint.

(c) That a permanent injunction does issue to restrain the Defendant by itself, its servants or agents or otherwise howsoever from disconnecting its supply of electricity to the Plaintiff on all accounts listed in paragraph 5 of the Plaint." (sic)

32. The foundation of the Respondent's complaint is easily discerned from its pleadings and requires no further examination. To my mind, the PO raised a pure point of law challenging the court's jurisdiction to adjudicate over the pleaded dispute.

33. The suit was filed in October 2017 whereas the decision of the trial court was delivered in August 2019. The *Energy Act* 2019 commenced in March of the same year. The decision of the Court of Appeal in Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (Civ) illuminates the question of retrospectivity and the effect of repealed statute, and deserves replication in extenso; -

26. With regard to the first issue, we wish to address ourselves first on the question of the trial court applying the law retrospectively against the backdrop of the well-known principles of law that legislations are deemed to apply prospectively unless of course the legislation provides for its retrospective application..............

27. The issue of the effect of repealed legislation was discussed at length in the case of National Social Security Fund Board Trustees & Others vs. Central Organization of Trade Union (K) [2015] eKLR, where the court held that,

> "We have no hesitation in addition in upholding that once an Act of Parliament is repealed it ceases to exist completely unless the Repealing Act provides otherwise and that the repealed law cannot form an order of Mandamus."
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> The Court cited The Punjab - Haryana Indian Case in the High Court of India National Planners Limited vs. Contributories ETC Air (1958) PH 230 where Bhandari CJ stated as follows;
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> "The effect of repealing a statue is to obliterate it as completely from the records of Parliament as it had never been passed, and it must be considered as a Law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."
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> However, clarity of the same issue of retrospective application of statutes was settled by the Supreme Court in the case of; Samuel Kamau Macharia and Another vs. K.C.B & 2 Others [2012] eKLR where it was held -
>
> "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570)."

28. ....The contention by the appellant is that the respondent was terminated before the enactment of the said Act or before it came into force and thus the trial court ought not to have applied the said law whilst dealing with the matter but rather ought to have applied the provisions of the repealed *Employment Act*.

29. While we are alive to the principle of retrospectivity, this law had been repealed and the only thing the legislators had to consider was the methodology of transiting from the repealed act to the current act and in so doing, had to save what they saw was of importance. Hence, they inserted Section 93 in the current *Employment Act* which provides inter alia;

> "A valid contract of service..... entered into in accordance with the repealed *Employment Act* shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and constructed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly."

30. The above clearly demonstrates that there was a clear intention by the legislators whilst enacting the current *Employment Act* that it would apply retrospectively. In the premises we agree with the trial court's finding that respondent's contract of employment could be construed under the current *Employment Act*. The trial court was thus right in making the decision based on the *Employment Act* 2007. The grounds of appeal and submissions by the appellant to the effect that the trial court erred in law in invoking the current *Employment Act* in determining the claim has no legal basis at all therefore." (sic)

34. Some of the stated objects of the *Energy Act* 2019 include provision of a legal framework for the regulation, production, supply, and use of electricity and for connected purposes. Pursuant to the Fourth Schedule of the *Energy Act*, 2019, the functions of the ERC which transitioned into EPRA, under Section 9 of the later Act include the regulation of transmission, distribution, supply, and use of electrical energy. EPRA's powers under the Act include the power to make and enforce directions to ensure compliance with the Act and with the conditions of licenses issued under the Act; to issue orders in writing requiring acts or things to be performed or done; to prohibit acts or things from being performed or done and to prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled; and to issue orders or directions to ensure compliance with the Act.

35. The Energy (Complaints and Dispute Resolution) Regulations, 2012 (hereafter the Regulations) enacted under the *Energy Act* 2006 remain in force pursuant to the provisions of Section 224 (1) (e) of the *Energy Act* 2019. Regulation 2 and 4 of Regulations provide inter alia that: -

2. These regulations shall apply to any person who has a complaint or a dispute regarding any license, permit, contract, code, conduct, practice, or operation of any party of any matter regulated under the Act.

....

4. These regulations shall apply to complaints and disputes in the following areas –

(a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of services, quality of supply, tariffs, way leaves,

easements or right-of-ways in relation to the generation, transmission, distribution, supply and use of electrical energy.

(b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

(c) any other activity and or matter regulated under the Act".

36. Without restating the averments in the Respondent's plaint dated 17.10.2018, it is evident that its grievances revolved around the issue of billing and disconnection of electricity as captured in paragraphs 12, 13, 14, 15 & 16 of the plaint. Consequently, pursuant to Sections 11, 23, and 24 of the *Energy Act* 2019 as read with Regulations 2 and 4 of the Regulations and applying the dicta in Speaker of the National Assembly v Njenga Karume [1992] 1 KLR 425, it is clear that at the time of determining the (PO) there existed a prescribed procedure for processing a dispute of the kind pleaded by the Respondent against the Appellant. Under the *Energy Act* 2019, the initial jurisdiction for entertaining the Respondent's grievance in the first instance lay with the EPRA, and if aggrieved with EPRA's decision, to prefer an appeal to the EPT and finally to this Court.

37. The foregoing represents settled jurisprudence to be found in multiple decisions of this court including Kenya Power & Lighting Co. Ltd v Samuel Mandere Ogeto [2018] eKLR, Bernard Nyakundi Osugo v Kenya Power & Lighting Co. Ltd [2021] eKLR, Mount Kenya Safari Club Ltd v Kenya Power & Lighting Co. Ltd [2021] eKLR, Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd [2017] eKLR.

38. The rationale behind this line of authorities was spelt out by the Court of Appeal in the case of Mutanga Tea & Company Ltd v Shikara Limited & Another [2015] eKLR. The Plaintiff therein was aggrieved by decisions made inter alia by a local authority under the Physical Planning Act, in connection with a development it was opposed to. Eschewing the mechanism for redress stipulated in Section 29 of the Physical Planning Act, the aggrieved party filed an action in the High Court. The action was struck out in limine on account of a jurisdictional challenge raised by the defendants by way of a preliminary objection.

39. The Court of Appeal dismissed the appeal brought by the aggrieved party, observing that the Physical Planning Act did not envisage the possibility that some aggrieved parties could sidestep the dispute resolution mechanism under the Act to bring their grievances directly to the High Court. I find it useful to quote in extenso the reasoning of the Court of Appeal in that case:

> "The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance.
>
> This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. Speaker Of The National Assembly V. Karume (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by *the Constitution*. In granting the order, the Court made the often-quoted statement that:
>
> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

(See also Kones V. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others (2008) 3 Klr (ER) 296).

It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by *the Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of *the Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that *the Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of *the Constitution* would therefore entail

construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of *the Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In Rich Productions Ltd. V. Kenya Pipeline Company & Another, Petition No. 173 Of 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

"The reason why *the Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not."

40. The Supreme Court on its part in Albert Chaurembo Mumba &7 others v Maurice Munyao & 148 others [2019] eKLR stated that: -

" In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute..

..... To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute."

41. The court has said enough to demonstrate that the trial court misdirected itself in dismissing the Appellant's (PO) and the appeal has merit. Had the lower Court properly addressed the jurisdictional challenge, it would have concluded that it had no jurisdiction to entertain the suit before it and therefore proceeded to strike out the Respondent's claim against the Appellant. The appeal is allowed. The court hereby sets aside the ruling of the lower court delivered on 13th August 2019 and substitutes therefor an order allowing the Appellant's PO with the consequence that the Respondent's suit in the lower court is struck out. The Appellant is awarded costs in the lower court and on this appeal.

DELIVERED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Atika

For the Respondent: N/A

C/A: Carol