



**Kenya Power & Lighting Company v Parpia & 2 others (Suing on behalf of the Estate of the late Sherali Gulambusheen Habib) & another (Civil Appeal E617 of 2021) [2024] KEHC 16019 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16019 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E617 OF 2021  
REA OUGO, J  
NOVEMBER 15, 2024**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY ..... APPELLANT**

**AND**

**SAMEERA SHERALI GULAMHUSSEIN PARPIA, AISHA SHERAL PARPIA,  
AND NUREN PAPIA (SUING ON BEHALF OF THE ESTATE OF THE LATE  
SHERALI GULAMBUSHEEN HABIB) ..... 1<sup>ST</sup> RESPONDENT**

**PARAGON PROPERTY CONSULTANT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling delivered by Hon. E. Kagoni  
(PM) on 8th September 2021 in Milimani CMC No E9163 of 2021)*

**JUDGMENT**

1. The respondents filed a suit before the lower court seeking an order of permanent injunction restraining the appellant, his agents, servants and/or employees or in any manner howsoever from disconnecting power supply or threatening to disconnect power supply of Meter Account No: 2263762 INO Group AL-KHAYRIYYA or the entire property known as L.R NO. Ralph Bunch Court, Upperhill and in any way whatsoever from interfering with the respondents' quiet enjoyment of the property.
2. The appellant subsequently filed a notice of preliminary objection on grounds that the lower court lacked jurisdiction to hear and determine the suit and that the same be struck out as it offends the provisions of sections 3, 10, 11(e), (f), (k), & (l); 23; 24; 36; 40; 42; 159 (3); 160 (3) and 224 (2) (e) of the Energy Act, 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159 (2) (c) and 169 (1) (d) and (2) of the Constitution of Kenya, 2010 and sections 9 (2) and (3) Fair Administration Act, 2015.



3. The trial magistrate dismissed the preliminary objection in her ruling dated 08/09/2021 for the following reason:

“ Much as the Commission is mandated to deal with disputes such as the one before the court, the Commission does not have any power to issue injunctions. The question this court asked itself was this, what happens when an alleged breach occurs? Should the Plaintiff wait for the final determination of the issue by the Commission as the alleged breach occurs? The law abhors a vacuum and equity will not suffer a wrong without a remedy. For this reason, and taking note that the Commission is not equipped with injunctive powers under the Energy Act 2019 and taking further note that it is not lawful for a Commission to issue equitable orders of injunction. Again, precedent has settled this issue, the Defendant should have known better. The preliminary objection must fail...”

4. The appellant dissatisfied with the finding of the subordinate court has filed this instant appeal raising the following grounds:

- a. The learned trial magistrate erred in law by not considering that the subject matter is purely under the purview of the Energy Act, 2019.
- b. That the Learned Trial Magistrate erred in law in completely misapprehending the principles governing and/or what constitutes a preliminary objection thereby arriving at an erroneous decision.
- c. The learned trial magistrate erred in law in entertaining and/delving into issues of facts while making a determination on the preliminary objection raised by the appellant.
- d. The learned trial magistrate erred in law in failing to appreciate the facts and overwhelming laws and statutory provisions tendered to prove the trial court had no jurisdiction.
- e. The learned trial magistrate erred in law and in fact when he ignored the fact that the crux of the matter against the appellant in the suit/and the application is about electricity disconnection as set out in the Energy Act, 2019.
- f. The learned trial magistrate erred in law in failing to appreciate the statutory provisions on the jurisdiction of the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal.
- g. The learned trial magistrate erred in law by ignoring the submissions tendered by the appellant which were never controverted by the respondent but irregularly relied on the court’s own misdirection that it had jurisdiction.
- h. The learned trial magistrate erred in law and fact by ignoring the binding authorities of the superior courts adduced in the appellant’s submissions.
- i. The learned trial magistrate erred in law and in fact by taking into account irrelevant considerations.

5. The appellants seek that the ruling of the lower court dated 8/09/2021 be set aside and his preliminary objection dated 25/06/2021 be allowed as prayed.

6. The appellant filed submissions dated 19/03/2024. It argues that the respondent’s claim is purely on the billings, disconnection and reconnection as illustrated in his plaint and application dated 21/06/2021 and 22/06/2021 respectively. It is submitted that the trial magistrate ignored sections



- 11 (f), (i) and (k) of the Energy Act, 2019 which empowers the Energy and Petroleum Regulatory Authority to issue orders or directions requiring acts or things to be performed or done and further prohibiting acts or things from being performed. The genesis of the respondents' suit is an electricity bill and such dispute falls under sections 160 and 36 of the Energy Act, 2019.
7. It was further submitted that sections 3, 9, 10, 11 (e), (f), (i),(k) & (l); 23; 24; 25; 36; 40; 42 and 224 (2) (e) of the Energy Act, 2019 as read with regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 gives the Authority jurisdiction to handle disputes similar to the one filed by the respondent. The dispute resolution mechanism available under the Energy Act, 2019 must be followed. Under the Act, the Authority has powers to investigate and determine complaints or disputes between parties and grant equitable reliefs. The appellant cited the case of *Cyrus Komo Njoroge Gachoka & 2 others* [2015] eKLR where the court held that:
- “...The principle that where the Constitution and or statute has provided a dispute resolution procedure, then that procedure must be strictly followed is well established...
- ...
- The Plaintiff must therefore exhaust the remedy stipulated by the Land Registration Act.”
8. It was submitted that the preliminary objection was grounded on pure points of law and met the threshold of preliminary objections as discussed in *Nairobi HC No. E176 of 2021, Hon. Kennedy Nyagudi v Agricultural Finance Corporation & 2 Others* (unreported).
9. They blamed the trial magistrate for ignoring their submissions The trial court shunned the appellant's authorities and did not cite a single section of the law in her ruling. They argued that their submissions at the lower court were uncontroverted by the respondents. They urged the court to consider the decision of the Court of Appeal in *Kisumu Court of Appeal Civil Appeal No. 42 of 2021, Abidha Nicholus v Attorney General & 7 Others, National Environmental Complaints Committee (NEEC) & 5 Others (Interested Parties)* (Unreported). Finally, they submit that the appellant has expended considerable resources and should be awarded costs as a reprieve.
10. The respondent opposed the appeal. It was submitted that the Energy Regulation Commission cannot issue injunctive orders. In the case of *Trimborn Agricultural Engineering Limited v Kenya Powe & Lighting Company Limited* [2016] eKLR the court held that a commission or tribunal has no power to issue equitable orders of injunction as such orders lie with a court of law.
11. It was argued that the trial court had the jurisdiction to determine the matter. It was also submitted that the preliminary objection did not have the elements of a preliminary objection.

### **Analysis And Determination**

12. I have considered the instant appeal and the rival submissions. In this appeal, the question raised by the appellant is whether the preliminary objection at the subordinate court was merited.
13. The plaint relates to the billing of electricity Account Number 2263762 INO GROUP AL-KHAYRYYA and the disconnection of the power supply. The plaint in paragraphs 6, 7, and 8 reads as follows:
6. On or about 17<sup>th</sup> June 2021, the Defendant through its agents issued a notice on the Plaintiffs threatening to disconnect electricity on Account Number 2263762 INO GROUP AL-KHAYRYYA which belong to a previous tenant with a separate supply agreement with the Defendant.



7. The Plaintiff avers that if the said bill is not paid they will further disconnect electricity on the entire premises by end of day on 21<sup>st</sup> June 2021.
  8. The Plaintiff further avers that the meter account number has not been in use for a long time since the previous Tenants Ino Group Al-Khayryya vacated the premises.
14. The 2<sup>nd</sup> respondent, who is the managing agent of the property known as LR NO 209/289/1/4, averred that they will suffer loss. The tenants they manage include health facilities, hospitals, and advocate offices, all of which depend on electricity. If power in the entire premises is disconnected, it will suffer loss.
  15. The respondents' pleadings clearly state that they contest the issue of billing and disconnection. The Energy Act regulates the production, supply, and use of electricity among other purposes. The Act establishes an Energy and Petroleum Regulatory Authority ("the Authority") and an Energy and Petroleum Tribunal ("the Tribunal") under sections 9 and 25 respectively to perform various functions under the Act.
  16. Courts have consistently held that an aggrieved party must first exhaust all dispute resolution mechanisms provided under the law before proceeding to court. In *Speaker of the National Assembly v James Njenga Karume* [1992] Civil Application No Nai 92 Of 1992 (Nai 40/92 UR) eKLR the Court of Appeal held;

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."
  17. Litigants are also warned against drafting their pleadings with the intent to bypass dispute resolution mechanisms provided under the Statute. *Makhandia JA in Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others* Civil Appeal No. 153 of 2019 [2020] eKLR also held;

"To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."
  18. The jurisdiction of the Tribunal is provided under Section 36 of the Energy Act, at sub-section 3 thereof, the Act provides that the Tribunal shall have original civil jurisdiction on any dispute between



a licensee and a third party or between licensees. Sub-section 5 provides that the Tribunal shall have the power to grant equitable reliefs including but not limited to injunctions, penalties, damages, and specific performance.

19. The appellant submitted that the Authority also has jurisdiction to hear and determine this matter pursuant to sections 11 (e), (f), (i), (k), and (l) of the Act which provides as follows:

“ ....

- (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;
- (i) investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;
- (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;”

20. Section 160 of the Act provides for instances when the supply of electrical energy may be refused or discontinued. According to section 160 (3) disputes arising under that Section are referred to the Authority. The provision stipulates;

“(3) If any dispute arises as to;

- (a) any charges;
- (b) the application of any deposit;
- (c) any illegal or improper use of electrical energy;
- (d) any alleged defects in any apparatus or protective devices; or
- (e) any unsuitable apparatus or protective devices, it shall be referred to the Authority.”

21. The respondent’s main complaint in the suit before the lower court revolves around billing and disconnection of power supply from their business premises by the appellant. Therefore, the dispute between the parties squarely falls within the jurisdiction of the Authority and the Tribunal. In the case of *Mutanga Tea and Coffee Company Ltd v Shikara Ltd and Another* Malindi Civil Appeal No. 54 of 2014 [2015] eKLR the Court of Appeal held;

“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.”

22. The preliminary objection before the subordinate court touched on the court’s jurisdiction to entertain the dispute. Jurisdiction is a matter of law; therefore, the preliminary objection was properly before the court. Considering the foregoing, I set aside the decision of the subordinate court and find



that the preliminary objection dated 25/06/2021 before the lower court is merited. The appellant shall have the cost of the appeal.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2024.**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Wachira -For the Appellant

Mr. Kimanzi -For the Respondent

Wilkister -C/A

