



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.122 OF 2009

SAMUEL MBORA GITONGA (Suing as an administrator of the estate of the late

MBURU GACHAGUA also known as MBORA GACHAGUA)

GACHAGUA SAW MILLS LTD.....PLAINTIFFS

VERSES

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

RULING

1. The plaintiffs filed this suit seeking orders of both permanent and mandatory injunctions against the defendant from disconnecting power from its premises and further general and special damages of Kshs. 150,000 per day pursuant to the said disconnection.

2. The defendant filed a defence and raised a preliminary objection on a point of law namely that;

“Pursuant to the provisions of Section 61(3) of the Energy Act (No.12) 2006 this dispute should have been referred to the Energy Regulatory Commission and this honourable court does not have jurisdiction to hear and determine the same.”

3. The defendant therefore pray that this suit should be dismissed with costs.

4. The parties over some time have attempted to determine the matter by way of mediation but from the records it appears that the matter was not settled. The parties came back to the court for determination but what stands on the way is the above preliminary objection which must be decided as a matter of priority as was indicated in the now famous case of **OWNER OF THE MOTOR VESSEL ‘LILIAN VS. CALTEX OIL KENYA (1989) KLR 1** where the court rendered itself as follows;

".... 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 its tools in respect of the matter before it the moment it holds that it is without jurisdiction."

5. The parties were ordered to file written submissions to determine the same which they have complied.

6. The defendant submitted that the matter in issue fell clearly under the provisions of **Section 61(3) of the Energy Act** (now repealed) which states as hereunder.

" 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 Commission."

7. The defendant further cited **Section 6 of the said Act** which gives the powers of the Commission which includes inter alia;

"(k) Examine and approve meters used or intended to be used for ascertaining the quantity of energy;

(h) Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act;

(o) Impose sanctions and penalties on persons who are in breach of any of the provisions of this Act or any regulations made there under"

8. In a nutshell the defendant submits that the issues as raised by the plaintiffs should have been deal with by the Commission and consequently the objection be upheld, and the suit to be dismissed with costs. The defendant relied on several authorities including **KAKAMEGA ELC NO 337 OF 2017 and KISII HCCA NO 93 OF 2016** where essentially the defendant was Kenya Power.

9. The plaintiff on the other hand vide their submissions have vehemently objected to the said preliminary objection on the grounds that the issues they have raised in their plaint cannot be adjudicated upon by the Commission. They submitted that the jurisdiction vested to this court under Article 165 of the Constitution cannot be taken away by a quasi-tribunal like the Commission.

10. They submitted that the issue at hand is to do with the defendant disconnecting electricity from its premises without any notice which caused them to suffer loss and many employees lost their jobs. They said that the Commission has no mandate to issue injunctive reliefs as well as damages as prayed in the plaint. They thus prayed for the objection to be dismissed.

11. The plaintiffs relied on the authority of **ALAN.E. DONOVAN VS K.P.L.C (2019) eKLR** where the court found that the remedies that can be issued by the Commission were administrative in nature.

ANALYSIS AND DETERMINATION

12. The court having gone through the pleadings and in particular the submissions is in agreement that the question of jurisdiction must be determined before any other issue. It is unfortunate that the parties have wasted about a decade in this matter and mediation route did not aid them.

13. Having stated so, it is not in dispute that the prevailing Act that govern the parties was the now repealed **Energy Act 2006**. The said Act under Section 6 establishes Energy Regulatory Commission which duties are as stated above.

14 **Section 61(3)** cited above indicates the areas where the Commission is mandated to deal with. The issues which the plaintiffs complained of includes disconnection of power because of disputed accounts and charges. The plaintiff's prayers were injunctive reliefs against the defendant. They as indicated above, prayed for damages as well.

15. Does the prayers of injunction part of the mandate of the Commission? I do not think so. In as much as it is mandated to deal with the disputes under **Section 61(3)** above, it is not mandated to issue any injunctive orders whether permanent or temporary. The powers vested in it are clear and it includes the complaints as raised by the plaintiffs namely the question of disconnection of power whether lawfully or not by the defendant.

16. Having stated so the issues raised are overlapping in nature in the sense that the issue of illegal disconnection, billings and such other charges are clearly the mandate of the Commission. However, and while the complaining party is waiting for the Commission to act, what happens when there is such a breach that cannot await the decision of the Commission like in this case where there was a disconnection.?

17. The same lens should be applied where the defendant who is, as is known, a monopoly is complaining against a customer like in this case the plaintiff. Should it await the Commission's decision while the breach is ongoing? I do not think so.

18. The best approach which in this case is prudent is to decide to pursue peremptory redress namely injunctive reliefs while the issues awaits the determination of the court or the Commission. As a matter of fact, nothing stops the court from ordering the matter to be referred to the Commission while protecting the interest of both parties.

19. The court in the above case of **ALAN. E. DONOVAN** relied on by the plaintiffs explained itself on the issue of **"predominant purpose"**. It stated as hereunder;

"From the following this line of thought, it is evident, that in circumstances where two dispute resolution bodies have concurrent or overlapping jurisdiction over a matter, it can be resolved by the body/court which has the power to determine the substantial questions raised in the case and which can provide the most sufficient remedy to the dispute and bring the matter to a definite close."

20. In this case the court is seized of the powers to determine the issues raised in the plaint including the question of damages. There is no express provision in the Act which empowers the Commission to award special or general damages.

21. The court has considered the authorities cited by the parties and they are generally persuasive to this court. Moreover, they can be distinguished from this matter as they seemed not to have sought as their main prayers orders of injunction and damages. To the extent that

the Commission cannot issue any orders of injunction as well as damages that mandate is left to the courts. Nothing oust the jurisdiction of this court to make any orders although where the legislature has mandated another body to carry out any action, this court is precluded from “trespassing” so to speak unless it goes beyond its mandate.

22. From the foregoing reasons, this court humbly finds that the preliminary objection is unsustainable as **Section 61(3) of the Energy Act (no. 12) 2006**, now repealed, does not anticipate the prayers of injunction and damages as prayed for in the plaint herein. Neither was the commission mandate to issue those orders.

23. The preliminary objection is hereby dismissed with costs to the plaintiff.

Dated signed and delivered electronically in Nakuru this 4th March 2021.

H. K. CHEMITEI

JUDGE.