REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 392 OF 2018

IN THE MATTER OF ARTICLES 22(1) & (2)(C), 23, 48, 50(1), 165 AND 258(1) & (2)(C) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF CONSTITUTIONAL PRINCIPLES UNDER ARTICLES 1(1), 2, 3, 4(2), 10, 19, 20, 21, 213(2), 227, 232, AND 259 OF THE CONSTITUTION

IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 35(2) & (3), 40, 46, & 47 OF THE CONSTITUTION

IN THE MATTER OF THE ALLEGED VIOLATION OF THE ENERGY ACT CHAPTER 314; THE COMPETITION ACT NO. 12 OF 2010; THE CONSUMER PROTECTION ACT NO. 46 OF 2012; THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, NO. 33 OF 2015

BETWEEN

OKIYA OMTATAH OKOITI.....1ST PETITIONER

EUNICE NGANGA.....2ND PETITIONER

VERSUS

KENYA POWER AND LIGHTING COMPANY

LIMITED (KPLC).....1ST RESPONDENT

ENERGY REGULATORY COMMISSION (ERC).....2ND RESPONDENT

COMPETITION AUTHORITY OF KENYA.....3RD RESPONDENT

KENYA CONSUMERS PROTECTION

ADVISORY COMMITTEE.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

PETITIONER'S PETITION

1. The Petitioners filed the Petition and Supporting Affidavits on 9th November 2018, and seek the following reliefs from this Court:-

i. A Declaration that Kenya Power & Lighting Company Limited is a monopoly/dominant company.

ii. A Declaration that the monopoly status contravenes Articles 10, 19, 46, 227 and 232 of the Constitution.

iii. A Declaration that the monopoly status is a breach of Sections 3, 9, 50, 56, 57 of the Competition Act.

iv. A Declaration that the Energy Regulatory Commission has failed to license other players to compete with the Kenya Power & Lighting Company Limited as required of it under section 27 of the Energy Act.

v. A Declaration that Competition Authority has failed in its statutory obligations under Section 9 and 50 of the Competition Act.

vi. A Declaration that the Kenya Consumers Protection Advisory Committee has failed in its mandate under Section 90 of the Consumer Protection Act.

vii. A Declaration that government guarantees outlined on page 102 of the 2018 Budget Policy Statement specifically titled- "Table 5: Public-Private Partnership (PPP) Projects- Kenya, Government's Guarantee and Termination Terms with respect to several power stations" is unconstitutional on account of Paragraph 8 (e) of the Fourth Schedule to the Constitution of Kenya on the distribution of functions between the National Government and the Country Government and failure to publish a report on the guarantees within two months after the end of the financial year as required by Article 213 (2) of the Constitution of Kenya.

viii. A Declaration that the impugned actions of the Government are contrary to the principles that guide all aspects of public finance outlined in Article 201 of the Constitution of Kenya.

ix. An Order of Mandamus to compel the Competition Authority to break the monopoly and dominance as required under Section 9, 50, 56, 57 of the Competition Act.

x. An Order of Mandamus to compel the Energy Regulatory Commission to license other companies to distribute electricity everywhere in Kenya without any limitations as to the area of coverage as per Section 27 of the Energy Act.

xi. An Order of Permanent Injunction prohibiting the Respondents from billing the electricity consumers and/or utilising the taxpayers' funds to make payments to any of the entities as outlined on page 102 of the 2018 Budget Policy Statement specifically titled: "Table 5: Public-Private Partnership (PPP) Projects- Kenya, Government's Guarantee and Termination Terms with respect to several power stations."

xii. An Order quashing all the Power Purchase Agreements which the Kenya Power and Lighting Company as signed with Independent Powers Producers.

xiii. An Order that the costs of this suit be provided for.

xiv. Any other relief the court may deem just to grant.

PETITIONER'S CASE

2. The Petitioners allege that the Respondents have violated ***Articles 1 (1), 3 (1), 4 (2), 10, 19, 21, 46, 47, 201, 213 (2), 227 (1), 232*** and ***259 (1) of the Constitution of Kenya, 2010*** and ***Paragraph 8 (e) of Part 2 of the Fourth Schedule to the Constitution of Kenya, 2010***. Additionally, they claim that the Respondents have violated ***Sections 4 (2) (b) and (c) of the National Government Guarantee Act No. 18 of 2011; Sections 4, 5, 90 of the Consumer Protection Act; Sections 3, 9, 50, 56 and 57 of the Competition Act No. 12 of 2010; and Section 27 of the Energy Act***.

3. The Petitioners assert that the Energy Regulatory Commission breached ***Article 3 and 46 of the Constitution*** as it has failed to protect the consumers by licensing only the monopoly, Kenya Power & Lighting Company (KLPLC) to supply electricity thus leaving consumers to bear all the burdens heaped on them by KPLC.

4. It is averred that the 2nd Respondent has failed to discharge its duties imposed under ***Articles 10, 227 and 232 of the Constitution*** for failing to be accountable for its administrative action of licensing only a monopoly in a key sector such as electricity distribution. It is argued that the Constitutional rights, values and principles cannot be attained when the 2nd Respondent has licensed only one monopoly to provide a crucial service.

5. The Petitioners further allege that the 3rd Respondent has failed to investigate impediments to KPLC's competition under its Sectors, and has not publicised the results of such investigations for public consumption as required under ***Section 9 of the Companies Act***. Furthermore, it is asserted that the 3rd Respondent has failed to identify and curtail unwarranted concentration of economic power by KPLC as required under ***Section 50 of the Competition Act***.

6. Moreover, the Petitioners allege that the 3rd Respondent has failed to determine KPLC's unconscionable conduct as per ***Section 56 & 57 of the Act***, and has failed to curtail KPLC's conduct by failing to break the monopoly which has been abused with impunity. The 3rd Respondent is alleged to have failed to uphold the objects of the Competition Act under ***Section 3***, particularly to protect consumers. The Competition Authority has therefore breached ***Articles 3, 10, 46, 47 and 227 of the Constitution***.

7. The 4th Respondent is alleged to have failed in its obligations under ***Section 90 of the Consumer Protection Act*** to provide advice to consumers on their rights and responsibilities regarding electricity supply. Additionally, it has failed to create or facilitate the establishment of conflict resolution mechanisms of electricity consumer issues and to investigate electricity consumer complaints as required under ***Section***

90 (f) of the Act. Therefore Kenyans have been forced to rely on good Samaritans in social media groups to access information and assistance as well as money to access courts for redress despite the fact that a statutory body exists for that purpose. It is asserted that the 4th Respondent breached ***Articles 3, 10, 46, 47 and 227 of the Constitution***.

8. It is additionally asserted that the 5th Respondent has failed to advise the other Respondents accordingly.

1ST RESPONDENT'S APPLICATION

9. The 1st Respondent filed a Notice of Motion Application dated 4th March 2019 which is supported by the Affidavit of Imelda Bore under ***Articles 22, 23 & 163 of the Constitution of Kenya 2010, Rules 19 & 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Section 6 (1), 26, 27 & 31of the Energy Act***, and all other enabling provisions of the law.

10. The 1st Respondent seeks for orders that:-

i. The Petition herein be struck out with costs

ii. This Honourable court lacks jurisdiction to entertain the matter at this stage since the Petitioners has not exhausted the available legal channels before approaching this Honourable Court

iii. Costs of this Application be provided

11. The 1st Respondent's Application is premised on the grounds that the issues raised in the Petition are founded in private law and there exists an alternative remedy prescribed by Parliament for resolving the dispute, as stipulated under ***Article 47 of the Constitution*** and ***Section 9 (2) of the Fair Administrative Actions Act***. The 1st Respondent contends that the Petitioners have not exhausted the available statutory and alternative procedures provided by statutes for redress.

12. The 1st Respondent further argues that in any event where a public authority or office fails to comply with statutory provisions, it does not necessarily entail the contravention of human rights or fundamental freedoms nor constitute a constitutional violation. It is further averred that the Petition does not raise a constitutional complaint warranting the invocation of the jurisdiction of the High Court.

THE 2ND RESPONDENTS' RESPONSES

13. The 2nd Respondent filed a Replying Affidavit to the Petition sworn by Dr John Mutua on 18th March 2019 in which it contends that the Petitioner is premature as the Petitioner did not submit their grievances to the 2nd Respondent as required under ***Section 6 (1) of the Energy Act*** with the option to appeal to the Energy Tribunal under ***Section 26 and 107 of the Energy Act***.

14. The 2nd Respondent claims that it ensures fair competition and efficiency in the electric power generation, transmission and distribution and no one entity can obtain a license for electric power generation, transmission and distribution at the same time.

15. The 2nd Respondent contend that the Petitioners allegation that it issues power generation licenses without competitive tendering is misinformed as the Petitioners have not tendered evidence of any entity that applied for a license and was denied. It is asserted that there are other power producers who have been issued with licenses to generate power. Furthermore, the allegation that the 1st Respondent enjoys a monopoly to access, tap, transmit, distribute and retail electricity is untrue.

16. The 2nd Respondent filed a Replying Affidavit sworn by Dr John Mutua on 18th Mach 2019 in support of the 1st Respondent's Application. The 2nd Respondent concurs with the 1st Respondent that the Petition is premature as the Petitioners did not submit their grievances to the 2nd Respondent first as envisaged under ***Section 6 (1) of the Energy Act 2006***.

THE 3RD RESPONDENT'S RESPONSE

17. The 3rd Respondent filed a Replying Affidavit sworn by Boniface Makongo on 26th March 2019, the Legal Manager of the 3rd Respondent. It is contended by the 3rd Respondent, that the Petition herein is pre-mature, fails to disclose proper particulars of the claim and most importantly does not disclose the cause of action against the 3rd Respondent.

18. It is 3rd Respondents contention that although the Petitioners plead infringement of array of provisions under Bill of rights in the constitution, they fail to demonstrate through evidence, how these rights have been violated so as to fall with the ambit of seeking redress under ***Article 23(1) of the Constitution of Kenya, 2010*** which invokes the jurisdiction of the Honourable Court.

19. The 3rd Respondent further argue that the Petitioners have not made any claim of illegality; procedural impropriety, ultra vires or failure to adhere to or observe rules of natural justice and that the issues raised of the Petitioners' rights and freedoms being violated have not been demonstrated.

20. The 3rd Respondent assert that, the ***Energy Act, Cap 314; Competition Act No. 12 of 2010, ("Competition Act") and the Public Procurement and Disposal Act 2015*** are self-enforcing statues which provide for a complaints mechanisms and competent Tribunal to

address reviews or appeals from decisions made by the regulators. It is 3rd Respondent's positon that no redress per se lies in the first instance before this Honourable Court until such remedies have been exhausted.

21. The 3rd Respondent urges under ***Section 31 to 38 and 70A of the Competition Act*** they provide for an elaborate process of conduct of investigations; fair hearing and remedies, upon conclusion of investigations and where there is breach of ***Competition Act***. ***Section 24 (2) of the Competition Act*** sets out various infringements that must be contravened for an undertaking to be deemed to have abused its dominance. The 3rd Respondent aver that the Petitioners have not demonstrated that the 1st Respondent is dominant pursuant to ***Section 23 of the Competition Act*** nor have they demonstrated how ***Section 24(1) & (2) of the Competition Act*** have bene infringed by the 1st Respondent, to warrant the Authority to investigate it. Additionally it is stated that no complaint has been filed within the 3rd Respondent to this effect.

22. The abuse of dominance and consumer complaints which are substance of the Complaint by the Petitioners against the 3rd Respondent, it is stated by the 3rd Respondent, that the Competition Act provides for the Right of Appeal to the Competition Tribunal under ***Section 40 and Part VII***. It is urged that the Petitioners have never involved this Section by filing a complaint with the 3rd Respondent with respect to the matter that fall within its jurisdiction.

23. The 3rd Respondent further aver that under the provisions of the ***Fair Administrative Actions Act 2015***, the High Court or subordinate Court shall not review an administrative decision and/or action unless the mechanisms including internal mechanism for appeals or review and all other remedies available under any other written law are first exhausted.

24. The 3rd Respondent supports the 1st Respondent's Application dated 4th March 2019 and urges the Court to dismiss and/or struck out the Petitioners Petition.

THE 4TH AND 5TH RESPONDENTS

25. The 4th and 5th respondents did not appear nor did they file any response or submissions.

PETITIONERS RESPONSES

26. The Petitioners filed a Replying Affidavit sworn by Eunice Nganga on 29th March 2019, averring that, *inter alia*, only the High Court is equipped with the jurisdiction to grant the reliefs sought in the Petition, as provided under ***Articles 22 and 258 of the Constitution*** where a party litigates in the public interest.

27. It is further asserted that the alternative remedies prescribed by Parliament do not vest those forums with the jurisdiction to adjudicate matters concerning the enforcement of the Bill of Rights and/or determination of questions whether acts or omissions are constitutional. Moreover, it is argued that the alternative (statutory) remedies would not be sufficient, efficient, expedient and economical to meet the ends of justice as it would require the Petitioners to approach each of the bodies separately.

ANALYSIS AND DETERMINATION

28. I have very carefully considered the pleadings in support of the petition and in opposition of the same. I have also considered the 1st Respondent's Notice of Motion seeking to have the Petitioners Petition struck out on the ground of this court's lack of jurisdiction to entertain the matter at this stage and parties rival submissions. From the above the following issues arise for determination.

a) ***Whether the court has jurisdiction to determine the petition herein?***

b) ***Whether there exists an alternative remedy to the Petitioners that is sufficient, effective, expedient and economical?***

c) ***Whether the petition is premature?***

A. WHETHER THE COURT HAS JURISDICTION TO DETERMINE THE PETITION HEREIN?

29. The 1st Respondent in its Notice of Motion dated 4th March 2019 urge that this honourable court lacks jurisdiction at this stage to determine this Petition, since the petitioners have not exhausted the available legal channels before approaching this honourable Court. The 1st Respondent contention is that the crux of the petition is disputes that ought to be determined by quasi-judicial organs established under the ***Energy Act, the Competition Act, the Consumer Protection Act*** and the ***Public Procurement*** and ***Asset Disposal Act***.

30. The 2nd Respondent on its part contend, the Petitioners complaint against it for; failing to licence other entities apart from the 1st Respondent to distribute electricity, failing to review tariffs and failing to sanction allegedly skewed power purchase Agreements are all complaints which the 2nd Respondent is empowered to investigate and adjudicate under ***Section 6 of the Energy Act***.

31. Under ***Section 6 of the Energy Act***; the 2nd Respondent is empowered to among others; ***investigate complaints on dispute between parties with grievances over* ANY *matter required to be regulated under the Energy Act***. The 2nd Respondent's regulatory powers include inter alia to:-

a) ***Issue, renew, modify, suspend or revoke licenses and permits for all undertakings and activities in the energy sector;***

b) Set, review and adjust electric power tariffs and tariff structures, and investigate tariff charges, whether or not a specific application has been made for tariff adjustment;

c) Approve electric power purchase and network service contracts for all persons engaging in electric power undertakings.

32. Under ***Section 107 of the Energy Act*** is also express, that a party aggrieved with any decision of the commission ought to file an appeal with the Energy Tribunal.

33. On the other hand, the ***Energy (Complaints and Disputes Resolution) Regulations 2012***. Regulation 4 affirms the judication of the 2nd Respondent as the forum of first resort with respect to any dispute arising out of the Energy Act. The regulations equality set out in detail the procedure and timelines for resolution of such disputes.

34. The 3rd Respondent aver that the ***Energy Act, Competition Act No.12 of 2010 (Competition Act) and the Public Procurement and Disposal Act 2015*** are self – enforcing statutes which provide for a complaints mechanisms and competent tribunals to address reviews or appeals from decision made by the regulators, hence no redress per se lies in the first instance before this honourable court until such remedy have been exhausted.

35. ***Section 31 to 36 and 70A of the Competition Act*** provides for an elaborate process of conduct of investigations; fair hearing and remedies, upon conclusion of investigations and where there is breach of the competition Act; ***Section 24(2) of the Competition Act*** sets out various infringements, that must be contravened for an undertaking to be deemed to have abused its dominance.

36. It is provided with respect to abuse of dominance and consumer complaints, the competition Act provides for the right of Appeal to the Competition Tribunal under ***Section 40 and Part VII of the Act***. The 3rd Respondent contend, that the Petitioners have never invoked the sections by filing a complaint with the 3rd Respondent with respect to the matters that fall within its jurisdiction.

37. The Petitioners contend that this court has jurisdiction to hear this Petition. It is urged that ***jurisdiction of court or tribunal is derived from the constitution, statute or by principle laid out in judicial precedent***. The Petitioners to buttress this point referred to the case of ***Re the matter of Interim Independent Electoral Commission (2011) eKLR (Constitutional Application No. 2 of 2011 at paragraph 29 and 30***.where the Supreme Court held:

"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principle laid out in judicial precedent…"

38. The same position was held in the case of ***Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others (2012) eKLR***, where, at paragraph 68, the Supreme Court stated thus:-

"(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…"

39. The Petitioner further argue that the High Court has original and exclusive jurisdiction, which arises from ***Articles 22(1) & (2)(c), 23, 165(3)(d)(ii), (6) & (7) and 258(1) & (2)(c) of the Constitution and Section 5 (a) of the High Court (Organization and Administration) Act, 2015***, to determine whether the Respondents violated provisions of the Constitution in the manner complained of herein.

40. It is further submitted by the Petitioners that ***Articles 22(1) & (2)(c), 23, 165(3)(d)(ii), (6) & (7) and 258 (1) & (2) (c) of the Constitution*** read with ***Section 5(a) of the High Court (Organization and Administration) Act, 2015*** clothes the High Court with original and exclusive jurisdiction to determine this Petition.

41.The Petitioners urge the very limited jurisdiction of the tribunals and similar statutory bodies under ***Section 129(1) & (2) of the EMCA*** does not oust the High Court's jurisdiction to hear and determine matters respecting violations of the Constitution.

42. ***Section 107 of the Energy Act, the Energy (Complaints and Disputes Resolution) Regulations 2012, Regulation 4; Competition Act No. 12 of 2010 (Competition Act) and public procurement & Disposal Act 2015*** which relate to the Petition herein provide in no uncertain terms for a complaints mechanism before respective Tribunals to address review or appeals from decisions made by the regulators. It is clear that such Respondents herein or bodies are forum of first resort for any person or party aggrieved with any matter under the Energy Act and it is only thereafter the matter can be referred to a tribunal. In this matter Petitioners did not demonstrate having filed any complaint with any of the Respondents or the respective tribunals. They have not exhausted the laid down process to justify filing of this petition at the High Court.

43. In the case of ***Republic v. Energy Regulatory Commission Ex-parte Midland Energy Limited [2018] eKLR*** while striking out a Judicial Review Application where the Applicant had bypassed the Energy Tribunal, the Court noted that it was immaterial that the Applicant alleged breach of fundamental rights. The Honourable Judge stated thus;

"At the end of the day, the dispute between the ERC and the applicant relates to revocation of its licence which is within the purview of the Tribunal jurisdiction under section 89(a) of the Energy Act. <u>That the matter is one that may implicate several fundamental rights and freedoms does not, for that reason alone, remove the matter within the competence of that Tribunal</u>.

I also accept that the Energy Tribunal is specialists Tribunal dealing specifically with matters concerning the Energy Act. The membership of the Tribunal comprises not only of legal experts but also persons versed in matters likely to come before the Tribunal. From the reasons I have stated, I find and hold and there are no exceptional circumstances or fats that would call upon this court to by-pass the statutory strictures provided in resolving the dispute. Accordingly, I decline to exercise this court's jurisdiction. 22.

I strike out the Notice of Motion dated 27th December 2017 with costs to the respondent" *[Emphasis added).*

44. Similarly the Court in ***Royal Reserve Management Company Ltd vs. Kenya Power and Lighting Company Limited [2017] eKLR*** affirmed the specialists original jurisdiction of the Energy Regulatory Commission vis-à-vis the unlimited original jurisdiction of this court thus;

"Section 6 of the Energy Act provides that the powers of the Commission include inter alia, investigating complaints or disputes between parties with grievances over any matter required under the Energy Act.

Under Section 5 of the said Act, some of the objects of the ERC are to regulate importation, exportation, supply and use of electrical energy. The Energy Act also protects the interest of the consumer, investor and other stakeholder interests.

It is clear from the foregoing provisions that he Energy Act contains elaborate provisions on the matters that the ERC can hear and determine. The said Commission also has powers to appoint Directors, Inspectors, Officers or other staff for the proper discharge of the functions of the Commission under the Energy Act. It therefore follows that the ERC is well equipped with the necessary expertise to resolve the dispute at hand. Contrary to the argument by Counsel for the respondent, the provisions o section 61(4) of the Energy Act do not mean that a matter that has been filed in Court cannot be referred to the ERC.

A narrow interpretation of the provisions of Article 165 2(a) of the Constitution would mean that each and every dispute that is civil or criminal in nature would be heard in the High Court. Article 169(1)(d) of the Constitution makes provision for the establishment of any other court or local tribunal by an Act of Parliament, other than courts established as required by Article 162(2) of the Constitution. The ERC as such is a creature of Parliament through the powers conferred by Article 169(1)(d) of the Constitution of Kenya. The suit before me is not seeking orders for this court to exercise its supervisory jurisdiction under the provisions of Article 165(6) of the Constitution. The respondent is seeking the hearing and determination of the suit that was filed on 7th February, 2017.

A perusal of the Energy (Complaints and Disputes Resolution) Regulations, 2012 reveals that he ERC has well laid out procedures in place for the hearing of cases such as the one before me. I therefore uphold the preliminary objection and refer the dispute herein to the Energy Regulatory Commission for hearing and final determination. The suit and notice of motion are hereby struck out. Costs are awarded to the defendant/applicant." *[Emphasis added).*

45. In the instant Petition the issues raised squarely fall within the mandate of the 2nd Respondent, Energy Regulatory Commission, and relevant Respondents in this Petition and therefore the relevant Tribunals if need be are the proper forums to adjudicate such disputes.

46. The High Court affirmed the jurisdiction of the Energy Regulatory Commission to deal with the dispute arising from the Energy in the case of ***Mogeni Tea Factory vs. Kenya Power and Lighting Company [2018] eKLR*** where it affirmed the jurisdiction of the Energy Regulatory Commission to deal with the disputes arising from the Energy Act thus;

"The High Court sitting in Mombasa dealt with a similar case ***in Royal Reserve Management Company Ltd v Kenya Power & Lighting Company Ltd [2017]*** *and I* ***agree with the view of that court that the Energy (Complaints and Disputes Regulation, 2012 has laid out procedures in place for the hearing of such cases.*** *Also in* ***James Mwaura Ndung'u vs. Kenya Power sand Lighting Co. Ltd*** *the court clearly stated that matters relating to energy should be heard before the Energy Regulation Commission.*

Article 159(c) of the Constitution provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanics shall be promoted, it is in this spirit that the Energy Act provides for avenues for dispute resolution for energy matters. In International Centre for Policy and Conflict & 5 others v The Hon. Attorney General & 4 others [2013] eKLR *a five Judge bench of this court held that:-*

"Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have bene exhausted…"

I find that as the mechanisms for resolving this disputes are well laid under Energy (Complaints and Dispute) Regulations the matter should be referred to the Commission for resolution.

Accordingly, I uphold the preliminary objection and order that the parties refer the dispute to the Energy Regulatory Commission for hearing and final determination. This suit and the Notice of Motion dated 10th December 2015 are hereby struck out with costs to the defendant." *[Emphasis added).*

47. It is trite that where procedures and processes exist for resolution of disputes such processes must be exhausted first, before a party can approach court. The preposition was clearly enunciated by the ***Court of Appeal in Speaker of National Assembly v. James Njenga Karume (1992) eKLR***.

48. In a five Judge bench of the Court in the ***International Centre for Policy and Conflict & 5 others vs. The Hon. Attorney General & 4 others [2013] eKLR*** the Court affirmed that position thus;-

> ***"Where there exists sufficed and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. In this regard, we refer to the decision in Re Francis Gitau Parsimei & others v. National Alliance Party and others Nairobi Petition No. 356 of 2012 (unreported)*** *in which the Court emphasised the principle that:*
>
> ***"where the Constitution and or a statute establishes a dispute resolution procedure, then that procedure must be used."***
>
> *Indeed as was observed in the case of* ***Bernard Samuel Kasinga v AG & others High Court Petition No. 402 of 2012 (unreported) "The mere fact that the Constitution is cited or invoked is not enough to elevate the matter to a Constitutional matter and confer a licence to the High Court to inquire, arbitrate, … or in any manner deal with the issues which can be dealt with through the dispute resolution procedure provided by statute."*** *(Emphasis added).*

49. From the above, it turns out that, the Petitioners herein ignored a clear statutory provision, by failing to exhaust procedures and processes in existence for resolution of disputes. They filed the present Petition prematurely and as such this court lacks jurisdiction to hear and determine this Petition at this stage.

B. WHETHER THERE EXISTS AN ALTERNATIVE REMEDY TO THE PETITIONERS THAT IS SUFFICIENT, EFFECTIVE EXPEDIENT AND ECONOMICAL?

50. The Petitioners in their submission argue that even if there are other fora for resolution of their grievances as set out in the petition, these fora do not avail the best place to seek redress for their grievances. It is their contention, that they lack locus standi to appear before the Tribunal as set out under the various statutory and that they will be forced to ventilate their grievances in various fora which would be tedious and costly. It is their submissions that this Court is best placed to hear and determine the Petition.

51. The Petitioners contention, that they lack locus standi to appear before the Tribuna, must be tested against the provision of the Energy Act. ***Section 6(1) of the Energy Act (repealed)*** gave powers to the 2nd Respondent to ***"Investigate complaints or disputes between parties with grievances over any matter required to be regulated under the Act."***

52. It is clear from the provisions of ***Section 6 of the Energy Act*** that any person is at liberty to approach the 2nd Respondent on any issue touching the Energy Act, without limitation as to locus Standi. It is not correct as alluded to by the Petitioners, that they would lack locus standi, to originate their claim whether it raises constitutional issues or not, as they are at liberty to approach the 2nd Respondent on any issue touching the Energy Act. The 2nd Respondent is obligated to adjudicate the issues relating to the power purchase agreements; tariffs; competition in the energy section and all other issues raised in this Petition. It is clear, that in the event, the Petitioners are aggrieved with the decision, that an appeal lies with the Energy Tribunal. I find that the Petitioners attempt to fault the alternative remedy as inadequate to be without any basis as no evidence has been laid before this court to that effect.

53. It is now well settled that where parliament has prescribed a mechanism by which certain disputes are to be resolved, save in exceptional circumstances, it is improper for a party to bypass that prescribed statutory process and seek relief from the Courts as has been held in an unbroken consistent line of authorities. The Court of Appeal, in the case of **Speaker of National Assembly v. Njenga Karume (2008) 1 KLR 425** held that:

> ***"In our view there is consideration merit… that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed.***
>
> ***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 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.***
>
> ***Secondly, such alternative dispute resolution mechanism normally have the advantage of ensuring that the issues 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…." (See also the Court of Appeal decision in Samson Chembe Vuko vs. Nelson Kilimo & 2 Others (2016) eKLR"*** *(Emphasis added).*

54. I note that this salutary legal principle has already been upheld and applied by courts for various obvious reasons; that not only has the relevant jurisdiction been donated to them but also those specialized bodies have the necessary expertise and resources to address such complaints. In support of the preposition the court in the case of ***Patrick Musimba vs. National Commission & 4 Others (2016) eKLR*** the Court held thus:-

> ***"Where there is procedure for redress (for violations of Constitutional rights and freedoms) available elsewhere, that redress must be pursued within the rubric provided. This Court must exercise restraint and first give an opportunity to the relevant bodies or State Organs to deal with the dispute as provided in the relevant statute." It is therefore our humble submission that the mere invocation of the right to approach the court for relief under Articles 22 and 258 of the Constitution do not assist the Petitioners herein for such right does not authorize evading the statutory mechanisms established for redress."***

55. In the case such as this one in respect of Energy Act, the 2nd Respondent and Energy Tribunal are constitutionally and statutory mandated to handle all grievances by aggrieved persons, aggrieved by the action of the Commission or a licensing agent in refusing to grant a license and to entertain all appeals from the decision of the Energy Regulatory Commission; the 2nd Respondent herein. The Petitioners in this petition have made extensive allegations on matters concerning licensing of other off-grid electricity suppliers and small investors, billing, electricity rationing and setting, reviewing and adjusting of electricity tariffs. I find that all these allegations and/or claims fall within the province of investigations by the 2nd Respondent as set out under ***Section 5 and 6*** as read with ***Section 27 of the Energy Act, No. 2 of 2006 ("the Energy Act"). Section 6*** thereto empowers the 2nd Respondent to investigate complaints or disputes between parties with grievances over any matter required to be regulated under the Act.

56. The Energy Act makes a provision for an aggrieved party to appeal. ***Section 26 of the Energy Act*** expressly provides that " a person aggrieved by a decision of the (Energy Regulatory) Commission may appeal to the Tribunal within 30 days of the decision. Whereas ***Section 107 of the Energy Act*** provides for appeals from the 2nd Respondents decision as follows:-

> ***"Where under this Act the provision is made for appeals from the decision of the Commission, all such appeals Shall be made to the Energy Tribunal, in accordance with the provisions of this part." (Emphasis added).***
>
> ***The Energy Tribunal is established under Section 108 of the said Act as follows:***
>
> ***"For the purpose of hearing and determining appeals in accordance with Section 107 and of exercising the other powers conferred on it by this act, there is established a tribunal to be known as the Energy Tribunal, hereinafter referred to as the "Tribunal."***

57. In a recent case in the case of ***Okiya Omtatah Okoiti v Kenya Power and Lighting Company & 10 others [2018] eKLR*** the Environment & Land Court, Hon. J. O. Olola J., while considering the issue of jurisdiction of Court on matters arising from the Energy Act, held that ***Section 26 of the Energy Act*** must of necessity apply to an aggrieved party before such a party could invoke the jurisdiction of a court of equal status as the High Court. He emphatically held thus:

> ***"I am satisfied that in a case such as this one where the law provides for a procedure to be followed, the parties are bound to follow the procedure provided by the law before they can invoke the jurisdiction in this Court."***

58. The Petitioners in this Petition allege that the ***Competition Authority of Kenya***, the 3rd Respondent herein, has failed in its statutory mandate to curtail what they allege to be the 1st Respondent's unconscionable conduct. It is clear that under ***Section 70 of the Competition Act***, it empowers the competition Authority ***to investigate consumer complaints relating to prohibited practices such as abuse of dominance; Section 71 establishes the*** competition Tribunal to entertain Appeals from the decisions; directions or orders of the competition Authority.

59. In the case of ***Governor of Kericho County v Kenya Tea Development Agency & 30 others Ex-parte KTDA Management Services Limited [2016] eKLR*** the Court held thus:-

> ***"We agree with the respondent that the allegations raised about price fixing and manipulation falls within the province of investigation by the Competition Authority established under the Competition Act (Chapter 504 of the Laws of Kenya). Under Section 4 of the Act, the Authority is empowered to receive complaints from legal or natural persons or consumer bodies and has the power to investigate restrictive trade practices which include price fixing manipulation.***
>
> ***We are of the view that the Competition Act provides an efficacious remedy for resolution of matters concerning price-fixing and manipulation. This is not to say that the High Court does not have jurisdiction to deal with allegations of breach of fundamental rights and freedoms in such case, it only means that the High Court recognizes that there are other legal bodies that exist to resolve certain disputes. This principle is recognized by Article 159(2)(d) of the Constitution that obliges the Court to promote alternative dispute resolution. Further because of Article's 10 and 21 of the Constitution, these bodies are obliged to give effect to the National values and principles of governance and provisions of the Bill of Rights."*** *(Emphasis added).*

60. From the above I agree with the 1st Respondent, on the power of Competition Authority to receive Complaints from legal or natural person or consumer bodies and to exercise the power to investigate restrictive trade practices. I am satisfied that in cases under Competition Act, the relevant body that is mandated to deal with complaints and investigate restrictive trade practices is the Competition Authority of Kenya. It is a port of first instance for complaints of breaches of its provisions. Under the Competition Act, it should be noted that at any rate it does not prohibit monopolies.

61. As regards ***Public Procurement Administrative Review Board and the Public Procurement and Asset Disposal Act 2015 ("PPAD Act")***, under ***Section 28 of PPAD Act***; it is empowered to review; hear and determine tendering and Asset disposal disputes. The Act, therefore provide for an inbuilt dispute resolution mechanisms. In support of this preposition the 1st Respondent relies in the case of ***Abdalla Abubakar Miraj & another v Kenya Ferry Services Ltd, Mombasa High Court Petition NO. 1 of 2015, Unreported, [2015] eKLR,*** where this Court (Justice Muriithi) after considering the constitutionality of the PPAD Act proceeded to hold as follows:-

> ***"Accordingly, a contention that an act of procurement is not done in accordance with the Constitution must be understood as an assertion that the provisions of the Act, which gives effect to the Constitutional principle have not been complied with. In such circumstances, the correct procedure for enforcement is the mechanisms prescribed in the Statute"*** *(emphasis added).*

62. In view of clear provisions for requirement for compliance with provisions for resolution mechanisms to be applied in cases of allegations raised by the Petitioners, on the issuance of licenses without competitive tendering process, that issue falls within the domain of the Public Procurement Administrative Review Board and not before this court at this stage.

63. From the aforesaid findings herein above it is clear that there exists an alternative remedy that is sufficient, effective, expedient and economical to resolve the issues raised by the Petitioners, herein which, the Petitioners have by passed and rushed to this Court. The Petitioners cannot be allowed to overlook a clearly laid out procedures and processes, that exists for resolution of disputes. Such processes must be exhausted first, before a party approaches a court. The mere fact that the constitutional provisions are cited or the Constitution is invoked is not sufficient reason to elevate the matter to a constitutional status, and confer jurisdiction to the High Court, to inquire, arbitrate, determine or in any manner deal with issues which are required to be dealt with through a clearly prescribed dispute resolution mechanism, that is provided for in a specific statute.

C. WHETHER THE PETITION IS PREMATURE?

64. The Petitioners contention, is that the Petition is not premature, as it seeks declaration, that the Respondents have breached constitutional rights and principles of governing public bodies, and that the Petitioners seek orders of mandamus to compel the Respondents to perform their statutory obligations.

65. It is clear in this Petition, that all the Respondents herein are established by statute; which statutes set out their functions and provide mechanisms for redress of dispute touching on the Respondents discharge to their functions.

66. The Petitioners claim or complaints as already found herein above, could thus be addressed by first approaching the 2nd Respondent; but the Petitioners instead, have rushed to this Court citing a litany of Constitutional provisions. This Court, time and again, has repeatedly guided litigants indispute where there is clear provision requiring exhaustion of remedy before coming to court, to first seek redress as provided by statute before approaching court.

67. In the case of ***Gedfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR,*** Hon. Justice Chacha Mwita stated thus;

> ***"It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights begin a breach of an ordinary statue are redressed thorough a Court of law in the manner allowed by the particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation of infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure."***

68. From the facts of this Petition and from the various authorities referred to herein above, there is no doubt that the Petitioners' Petition is premature. I find that the Petitioners have furthers failed to present a factual basis to warrant the invocation of the constitutional jurisdiction of this Honourable Court.

69. The upshot is that the 1st Respondent's Application dated 4th March 2019 is meritorious. I proceed to make the following orders;-

a) The 1st Respondent's Notice of Motion dated 4th March 2019 is allowed.

b) The jurisdiction of this court has been prematurely invoked.

c) I direct the parties do refer the dispute herein to the Energy Regulatory Commission and/or any other relevant Respondents' bodies herein for hearing and determined of their claims/disputes.

d) The Petition dated 9th November 2018 is hereby struck out.

e) The Petition herein has been brought before the Court in public interest and in exercise of the Courts discretion, I order each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this 15th day of October, 2020.

……

J. A. MAKAU

JUDGE