**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 80 OF 2015**

**ROBAI KADILI AGUFA.....1ST APPELLANT**

**IRENE MARIA MMBOGA AGUFA.....2ND APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT**

(*Being an appeal from the Ruling and Order of Honourable SN Mwangi, Resident Magistrate in Vihiga Senior Principal Magistrate's Court Civil Case Number 70 of 2015 delivered on 17th September 2015*)

**JUDGEMENT**

1. The appellants, having been dissatisfied with the ruling of the trial magistrate aforementioned lodged a Memorandum of Appeal on 28th September 2015 and a Notice of Motion application under Certificate of Urgency on 2nd November 2015 seeking interim orders of restoration of electricity power supply in the appellants' premises by the respondents among other orders, pending hearing and determination of the instant appeal.

2. The court allowed the application and ordered as follows on 15th December 2015: -

> *a) That an interim injunction is hereby granted compelling the Respondent to restore electricity power supply to the Applicants' respective premises under supply contract numbers 223009-01 and 220730-01 forthwith;*
>
> *b) That the Applicants do pay a pre-paid amount of Kenya Shillings Five Thousand (Kshs. 5,000/-) each to the Respondent which money shall be utilized to pay for power consumption until it is over, and thereafter, the Applicant shall continue to pay bills for power consumption after reconnection following this Order until the hearing and determination of this Appeal;*
>
> *c) That the Applicants do file a Record of Appeal within forty-five (45) days from the date hereof and thereafter the appeal be fixed for directions within thirty (30) from the date of filing the Record of Appeal;*
>
> *d) That there be liberty to apply; and*
>
> *e) Costs of the application shall abide by the result of the appeal.*

3. The appellants proceeded to file the record of appeal on 28th January 2016. The prayers in the memorandum of appeal sought, *inter alia*, that the appeal be allowed with costs, the ruling or order of the lower court be set aside and be vacated, and that the main suit proceeds for hearing and or determination before this court or before any other court as may be directed other than a court presided over by the learned magistrate from whose ruling originated the appeal.

4. The appellants set forth the following grounds as the reason for this appeal and the orders sought: -

> *a) The learned magistrate erred in law in relying on speculative issues of facts while upholding the Respondent's preliminary Objection contrary to the known principle of the law;*
>
> *b) The learned magistrate acted in error of law and in fact in arriving at the conclusion that the dispute involved "recalculation" of electricity power bills when the pleadings before her did not support the conclusion and or required discovery;*
>
> *c) The learned magistrate erred in delivering a ruling which was ambiguous and or vague as to the ground upon which the*

*preliminary objection was upheld and the fate of both the Appellants application and suit;*

*d)The learned trial magistrate erred in law and fact in failing to hold that the Respondent had not established that it would suffer any loss and/or irreparable loss that could not be compensated by way of damages;*

*e) The learned magistrate erred in law in failing to consider in full or at all the submissions of the Appellant and in particular the application of Section 61(4) of the Energy Act which confers jurisdiction under the Act to courts and as a result wrongly applied or relied upon rules made by a Minister which do not override the Act to arrive at wrong conclusions on the issue of jurisdiction;*

*f) The learned magistrate misinterpreted the rules of the Energy Minister regarding the nature of disputes to be addressed by Energy Regulatory Commission to divest herself of the jurisdiction conferred on the court by the Constitution and relevant statutes when there existed no provision in the subject rules ousting the jurisdiction of the court;*

*g) The learned magistrate did not understand the real dispute before her and the nature of the claim which went beyond the dispute resolution mechanism provided by the Minister's rules;*

*h) The learned magistrate gave undue regard to procedure considerations in Energy Ministers rules as opposed to the Constitutional duty to administer justice thereby visiting gross injustice to the Appellants by denying them access to lighting provided by a public body; and*

*g) In all circumstances of the case, the learned magistrate did not act judiciously and apply the correct principles of the law to the dispute which was before her.*

5. The appellants filed a civil suit against the respondent Vihiga SPMCCC No. 41 of 2015 on 1st July 2015, stating that they owned and operated bar and restaurant businesses known as Rokad Bar and Restaurant and Roadside Bar and Restaurant, respectively. They averred that they relied on the respondent for electricity power supply through a contract they both got into with the respondent, with consumption being billed every month and the same paid by the appellants to the respondent once due. The appellants claimed that on or about the 28th May 2015 the respondent's technicians disconnected the electricity power supply to the appellants' premises over what the respondent claimed was due to unpaid electricity bills, a claim the appellants vehemently denied. The appellants further stated that they were not indebted to the respondent at the time.

6. The respondent filed grounds of opposition to the application and a notice of preliminary objection to the appellants' suit, stating that the lower court lacked the requisite jurisdiction to entertain the dispute by virtue of Part II, and more specifically Section 6, of the Energy Act, Cap 314, Laws of Kenya, together with the Energy (Complaints and Disputes Resolution) Regulations, 2012 which vested jurisdiction in the Energy Regulatory Commission.

7. In a ruling delivered on 17th September 2015, the trial magistrate, in dismissing the appellants' application and allowing the notice of preliminary objection, stated that the lower court lacked the requisite jurisdiction to determine the matter and that the dispute related to reconnection of electric power supply, and therefore fell within the jurisdiction of the Energy Regulatory Commission and not the magistrate's court. It is the said ruling that forms the basis of the instant appeal.

8. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that it did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by Section 78 of the Civil Procedure Act, Cap 21, Laws of Kenya, which espouses the role of a first appellate court which is to'…*re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions*.' This was also stated by the Court of Appeal in *Peter M. Kariuki vs. Attorney General* [2014] eKLR where court stated that -

'*We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui vs. Republic* (*1984) KLR 729 and Susan Munyi vs. Keshar Shiani Civil Appeal No. 38 of 2002 (unreported).'*

9. In *Ndung'u Dennis vs. Ann Wangari Ndirangu & Another* (2018) eKLR the court quoted the decision in *Selle & another vs. Associated Motor Boat Co Limited & others* (1968) EA 123 in stating the duty of the court in a first appeal as follows: -

'I *accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs. Ali Mohamed Sholan (1955), 22 EACA 270).'*

10. The court reiterated the position stated by the Court of Appeal for East Africa in *Peters vs. Sunday Post Limited* [1958] EA 424, where it was said that: -

*'It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt vs. Thomas (1), [1947] A.C. 484. "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.'*

11. There is only one issue that falls for determination in the instant appeal, and that is whether the lower court had jurisdiction to determine the dispute in light of the dispute resolution mechanisms provided for under the Energy Act.

12. Jurisdiction goes into the heart and soul of any proceeding and that if there is a valid question or objection in law on a matter proceeding before a court of law, either for want of jurisdiction or for some other sufficient reason, then such objection or question should be raised at the earliest opportunity to avoid a wastage of valuable judicial time.

13. The Supreme Court of Kenya, in the case of *Republic vs. Karisa Chengo & 2 others* [2017] eKLR, stated that: -

*'"Jurisdiction" has emerged as a critical concept in litigation. Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350 thus defines "jurisdiction" as "…the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term 'jurisdiction' as follows:*

*"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics…. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

*From these definitions, it is clear that the term "jurisdiction", as further defined by The Black's Law Dictionary, 9th Edition, is the Court's power to entertain, hear and determine a dispute before it.'*

14. In *Owner of Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited* it was held that *'…Jurisdiction of the Court which may be raised by way of Preliminary Objection ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue straight away on the material before it…'* In the case of *John Kipng'eno Koech and 2 Others vs. Nakuru County Assembly and 5 Others* [2013] eKLR the court stated on jurisdiction that -

*'Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter.'*

15. In *Council of County Governors vs. Lake Basin Development Authority & 6 others* [2017] eKLR, the court cited the South African Constitutional Court which had held in *Vuyile Jackson Gcaba vs. Minister for Safety and Security First & Others* that*: -*

*"Jurisdiction is determined on the basis of the pleadings,**[33]**… and not the substantive merits of the case… In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If, however the pleadings, properly interpreted, establish that the applicant is asserting a claim …, one that is to be determined exclusively by… (another court), the High Court would lack jurisdiction…"*

16. The respondent asserted that the lower court's jurisdiction had been ousted on the basis that the instant dispute fell within the ambit of the Energy Regulatory Commission as provided by the Energy Act, section 6(l) of which provided for one of the powers of the commission which is to *'investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act.'* The respondent cited section 3 of the Energy Act on the application of the Act, which states that: -

*'The provisions of this Act shall apply, as hereinafter specified, to every person or body of persons importing, exporting, generating, transmitting, distributing, supplying or using electrical energy; importing, exporting, transporting, refining, storing and selling petroleum or petroleum products; producing, transporting, distributing and supplying of any other form of energy, and to all works or apparatus for any or all of these purposes.'*

17. The respondent submitted that it was a transmitter and supplier and the appellants were users of electric energy. The respondent further submitted that the dispute concerned payment of bills and reconnection of electricity power supply. They contended that the dispute required reconciliation and recalculation the appellants' electricity bills to ascertain what was actually owed by the appellants. That, the respondent stated, was provided for by section 59(3) of the Energy Act, which says that: -

*'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.'*

18. The Respondents submitted that there were also regulations, the Energy (Complaints and Disputes Resolution) Regulations, 2012, which vested jurisdiction on the Energy Regulatory Commission to deal with the dispute raised by the appellants.

19. On their part, the appellants cited the Court of Appeal's decision in *Kenya Power & Lighting Co. Limited vs. Joseph Kiprono Kosgey* [2012] eKLR, which had stated that magistrates' courts had the required jurisdiction to try disputes under the Act. A look at the said decision would reveal that the applicable Act then was the Electric Power Act, No. 11 of 1997, and not the Energy Act, No. 12 of 2006, which is applicable herein and the facts in that case and the reasons given by the appellate court for granting the subordinate court jurisdiction was that the then Electricity Regulatory Board (ERB) ceased to exist upon the repeal of the Electric Power Act, and that the only forum to deal with the dispute was the court. The appellants further submitted that section 61(4) of the Energy Act reserves jurisdiction under the Act for the courts in the following terms: -

*'Where any dispute referred to in subsection (3) has been referred to the Commission, or has otherwise been taken to court before a notice of disconnection has been given by the licensee, the licensee shall not exercise any of the powers conferred by this section until final determination of the dispute:*

*Provided that the prohibition contained in this subsection shall not apply in any case in which the licensee has made a request in writing to the consumer for a deposit with the Commission, in addition and without prejudice to any other deposit the licensee is entitled to require, or the amount of the charge or other sum in dispute, and the consumer has failed to comply with the request within forty-eight hours of the request having been made.'*

20. Section 61(3) of the Act provides as follows:

*'(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.'*

21. The appellants submitted that the word "Court" as used in Section 61(4) included the Magistrate's Courts and that the rules made by the Energy Minister cannot be interpreted as taking away the jurisdiction conferred on the courts by a provision in the main Act. They further submitted that a closer look at the repealed 2006 and the Complaints and Dispute Resolutions 2012, provided for the procedures of filing complaints before the Commission and their disposal which had nothing to do with jurisdiction of the court. They also submitted that the learned trial magistrate misapplied the dispute before the lower court by concluding that it was about the correctness of their billing. The appellants contended that they had no bill owing to the respondent, and therefore there were no errors to be addressed nor bills to be recalculated.

22. The issues raised and submitted by the respondent and appellants brings to the fore the doctrine of exhaustion of remedies and the need to exhibit judicial deference to quasi-judicial organs and dispute resolutions mechanisms outside of the court system.

23. In *Republic vs. Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR it was stated regarding the said doctrine that: -

*'This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:*

> *'Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures*.'

24. The Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others* [2015] eKLR, stated that: -

> *'It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...'*

25. The justification for the doctrine of exhaustion is further captured by this court in *In the Matter of the Mui Coal Basin Local Community* [2015] eKLR**,** where it stated that: -

> *'The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system. The dispute resolution mechanism provided under the Public Procurement and Disposal Act represents the first category of dispute resolution mechanism created under a statute envisaged by the Constitution while the procedures by the Commission on the Administration of Justice established under Article 59(4) of the Constitution would represent the latter category.'*

26. However, the courts should not abdicate from carrying out their constitutional mandate and obligation of upholding and defending the Constitution by reason of the doctrine of exhaustion. It was said in *Republic vs. Independent Electoral and Boundaries Commission and Others ex parte Coalition for Reform and Democracy* Misc. Application No. 637 of 2016 that '*where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved…*'

27. The courts are conscious of the fact that the right of access to court is foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes. Construed in this context of the rule of law, access to court is of cardinal importance. As a result, very serious considerations would need to be taken into account for its limitation to be reasonable and justifiable. This is the test the court should bear in mind when invited to decline jurisdiction.

28. The Court of Appeal, in *Martin Nyaga Wambora & 3 others vs. Speaker of the Senate & 6 others* [2014] eKLR cited the decision in *Tononoka Steels Limited vs. Eastern and Southern Africa Trade Development Bank* Civil Appeal No. 255 of 1998, where it was stated that: -

> *"The right of access to courts can only be taken away by clear and unambiguous words of the Parliament of Kenya… Similarly, in Davies & Another vs. Mistry (1973) EA 463 where Spry VP quoting the case of Pyx Granite & Co. – vs- Ministry of Housing (1960) AC 260 stated that:*
>
> > *"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Court for the determination of his rights is not to be excluded except by clear words."'*

29. I have recapitulated the above facts with a view to establishing the gist of the dispute that is; whether it relates to reconnection, billing (charges) and recalculation of the charges or whether it is an ordinary contractual dispute warranting the determination of court. I am satisfied that from the depositions that the dispute is about electricity charges or bills the respondent claims and the appellants deny. I am in agreement with the respondent that one way or the other, the dispute will have to involve some recalculation to ascertain the correct amount that is to be paid by the appellants, if at all there is any. Such a dispute, in my humble view, falls within the ambit of Section 59(3) of the Energy Act, and therefore the dispute '*...shall be referred to the Commission for determination***.'** The provision is in mandatory y terms. Additionally, section 61(3) of the Energy Act states that disputes relating to 'charges' 'shall' be referred to the commission.

30. In *Royal Reserve Management Company Ltd vs. Kenya Power & Lighting Company Ltd* [2017] eKLR, a dispute which related to facts almost similar to the instant appeal, it was held that: -

> *'It is clear from the foregoing provisions that the 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 of 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 perusal of the Energy (Complaints and Disputes Resolution) Regulations, 2012 reveals that the 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.'*

31. I am in agreement with the position stated in the authority above, together with those of other superior courts that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. This is a matter which falls within the purview of the Energy Regulatory Commission, and it should be heard and determined in accordance with the Energy (Complaints and Disputes Resolution) Regulations, 2012, established under the Energy Act No. 12 of 2006. I agree with the learned trial magistrate in upholding the Preliminary Objection filed by the respondent in her ruling of 17th September 2015. The issue as to whether the transfer of the court file from the Hamisi Law Courts to Vihiga Law Courts was regular does not suffice, now that it has been established that the matter is to be determined by the Energy Regulatory Commission.

32. In the foregoing, I find that the instant appeal lacks merit and I hereby dismiss it in its entirety. The appellants shall bear the costs of the appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF APRIL, 2019**

**W MUSYOKA**

**JUDGE**