



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 27 OF 2016

KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

-VERSUS-

DEROSCH LTD T/A MAKUTI VILLAS KILIFI.....RESPONDENT

(Being an Appeal from the Ruling and Order of the Learned Resident Magistrate

Hon. L.N Juma (Mrs.) delivered on 5th July 2016 in Kilifi SPMCC

No. 357 of 2015)

Coram: Justice R. Nyakundi

Mr. Munyithya for the Appellant

Mr. Omondi Waweru for the Respondent

JUDGMENT

The Appellant herein, feeling hard done by the Ruling and Order of the Learned Resident Magistrate Hon. L.N Juma (Mrs.) delivered on 5th July 2016 in Kilifi SPMCC No. 357 of 2015 instituted the instant appeal vide its Memorandum of Appeal dated 29th July 2016 on the following grounds:

- 1. The learned Magistrate erred in law and fact by confirming that the court had jurisdiction despite the mandatory.*
- 2. provisions of the Energy Act, which provide for a different forum for hearing and determination of the instant and similar matters.*
- 3. The learned Magistrate erred in both law and fact by failing to consider in the very least the authorities filed and cited by the appellant.*
- 4. The learned Magistrate erred in law and fact by assuming jurisdiction of an independent body created under the law.*

On the basis of the foregoing, the appellant prayed for:

- a) The ruling delivered on 5th July 2016 on the preliminary objection dated 27/4/2016 be set aside, and the preliminary objection be upheld.*
- b) That the costs of this appeal be borne by the respondent*

The matter was prosecuted by way of written submissions with the Appellant filing on the 31st August 2018 submissions dated 17th August 2018. The Respondent on its part filed its submissions dated 17th April 2019 on 29th April 2019.

The Appellant's Submissions

Mr. Mukamba begun by outlining in brief the genesis of the dispute. The relevant issue for the instant Appeal arose from the Appellant's Preliminary Objection dated 27th April 2016 on grounds that the trial Court lacked jurisdiction to hear and determine the Plaintiff's application and by extension the entire suit by dint of the provisions Sections 59 of the Energy Act, 2006 which provided a different forum for determination of similar suits. The Trial Court by its ruling dated 5th July 2016 dismissed Appellant's Preliminary Objection finding that it had the jurisdiction a finding which generated the current Appeal.

Regarding the ground that the Trial Court by failing to consider its authorities, the Appellant begun Black's Law Dictionary, 8th Edition definition of a ruling as "*The outcome of a court's decision either on some point of law or on the case as a whole*". It was the Appellant's submission that a ruling on a preliminary point of law as raised by itself is one subject to Order 51 and Order 21 of the Civil Procedure Rules (2010) and the Trial Court did not apply itself to the materials placed before it relying instead on the High Court's decision of 9th October 2015 by Justice P.J. Otieno.

It was the Appellant's submission that had the Trial Court considered the authorities placed before it, the Preliminary Objection would have succeeded as the Court in that instance lacked jurisdiction.

Addressing the Trial Court's lack of jurisdiction, Mr. Mukamba for the Appellant submitted that the dispute as framed by the Respondent in its pleadings was one for hearing by the Energy Regulatory Commission and that the Ruling by Hon. Justice P.J Otieno had findings that were per incuriam the provisions of the Energy Act, 2006 that provided a forum for resolving billing issues and also made contrary to existing precedents. Reliance was placed on **Kokebe Kevin Odhiambo & 12 Others vs Council of Legal Education & 4 others [2016] eKLR**

It was submitted that as the dispute herein solely concerned the issue of rebilling of the Respondent's electricity account number 044501402 by the Appellant, the Respondent's recourse lay elsewhere. It was further submitted that energy matters are governed by the **Energy Act, 2006** that provides for the Appellant's role as licensee and its duties, obligations and powers in regard to its clients.

Reference was made to **Section 59 and 61** of the Act as well as **Regulation 4 of the Energy (Complaints and Dispute Resolution) Regulations 2012** for the submission that the statutory mandated forum for handling these types of disputes was the Energy Regulatory Commission.

It was further submitted that the ERC under the Energy Act, 2006 performed a regulatory role as the matters in dispute were of a technical nature and especially skewed in favour of the licensee that have experts in energy issues. The regulations provided for dispute resolution by Experts or a Dispute Resolution panel of the same under **Regulation 16**.

Mr. Mukamba submitted that the Courts had on multiple occasions observed that the ERC's jurisdiction is paramount and their role at best can be to issue interim relief under **Section 61(4)** before moving parties to the right forum. Reliance was placed on **Kenya Horticultural Exporters (1977) Ltd vs Kenya Power & Lighting Company Ltd [2011] eKLR; Joseph Nzyoki Mwanthi vs Kenya Power & Lighting Co. Ltd [2017]** and **Royal Reserve Management Company Ltd vs Kenya Power & Lighting Company Ltd [2017] eKLR**.

On the basis of the foregoing, the Appellant prayed that the appeal be allowed.

Respondent's Submissions

Mr. Waweru on his part addressed the grounds of appeal as raised by the Appellant in consecutive fashion. On whether the learned trial magistrate erred in law and in fact in confirming that the Court had jurisdiction he submitted that the trial court addressed itself appropriately and therefore correctly held that it was vested with the jurisdiction to entertain and determine the matter. It was submitted that the Learned Magistrate addressed herself to the Appellant's Preliminary Objection dated 27th April 2016 and the Appellant's Submissions filed on 17th April 2016 and proceeded to hold that the trial court was guided by the High Court Ruling by Honourable P.J Otieno delivered on 9th October 2015 wherein Honourable P.J. Otieno in considering the provisions of **Section 89 of the Energy Act** held that the dispute mechanisms provided therein did not provide for a customer like the Plaintiff but a Licence and a Commission. It was submitted that the trial Court therefore correctly rendered itself in stating that it was bound by the said Ruling and would not purport to overturn the same.

Counsel submitted that it was trite law that under the doctrine of precedence the decision of the High Court was binding upon a subordinate Court and the same could only be departed from in clear circumstances to prevent bad decisions from acquiring the force of law. Reliance was placed on **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai Estate of & 4 others [2013] KLR** and **National Bank of Kenya Ltd vs Wilson Ndolo Ayah [2009] eKLR**.

Based on the foregoing, it was submitted that in law the trial court did not wrongly address itself in assuming that it had jurisdiction to entertain the matter and in dismissing the Appellant's Preliminary Objection the same having emanated from a decision of the High Court which was binding upon it.

Mr. Waweru for the Respondent went on to urge that the Appellant ought to have appealed against Ruling of the High Court which by virtue of being binding upon the trial Court conferred jurisdiction upon the trial Court hear and determine the matter. The same not having been appealed against and or set aside, orders emanating from it were valid. That the Appellant having acknowledged the ruling by the Court and having proceeded to fix the matter for hearing directed by the Honourable Justice acquiesced itself to the Jurisdiction of the Honourable Court and are estopped from challenging the same.

Turning to the issue of whether the learned trial magistrate erred in law and fact by failing to consider in the least the authorities filed and cited by the appellant, it was submitted that the Appellants averments and submissions that the trial Court did not address itself to the authorities filed by it was misconceived. According to Counsel, at page 18 of the Ruling appealed against by the Appellant, it was evident the

learned trial magistrate addressed herself to the pleadings filed by the Parties and considered the same in arriving at her Ruling by stating that:

“I have perused the pleadings herein, the written submissions and all authorities attached by the parties which have been very helpful.”

It was submitted that the learned trial magistrate was not bound to quote the authorities attached by the Appellants and by stating that she perused the pleadings, written submissions and all authorities is evidence of having considered the same. In this line of argument, Counsel cited the decision in **Wilfrida Arnodah Itolondo vs Board of Trustees of Kenyatta University Staff Retirement Benefits Scheme [2017] eKLR**.

Regarding the final issue of whether the learned magistrate erred in law and fact by assuming jurisdiction of an independent body created under the law, it was submitted that the learned trial magistrate did not wrongly assume the jurisdiction of an independent body as alleged by the Appellant. Citing **Section 61 (4) of the Energy Act**, Counsel urged that the said provision created a presumption that a dispute arising out of the Energy Act can be properly adjudicated in Court.

It was further submitted that the prayers sought by the Respondent in its Complaint were incapable of being issued by the Commission by virtue of them being equitable remedies. The powers issued to the Commission by the Energy Act as expressly stated under **Section 6 of the Act** did not empower the Commission issue any injunctions. Reliance was placed on **Trimborn Agricultural Engineering Ltd vs Kenya Power & Lighting Co Ltd [2016] eKLR**.

Mr. Waweru submitted that no prejudice would be occasioned on the part of the Appellant in the event the Respondent's suit proceeds to full trial and is determined by the trial magistrate. That the Appellant had not demonstrated in any way that it would suffer any prejudice if the matter here proceeds before the Honourable Court. There being no such explanation and/or demonstration by the Appellant, Counsel prayed that the Court consider the provisions **Article 50(1) of the Constitution** regarding the Respondent's right to a fair hearing.

In conclusion, Counsel submitted that it would occasion great prejudice if the Respondent's suit were dismissed and he prayed that the appeal be dismissed with costs to the Respondent and orders issue that the Respondent's suit does proceed before the learned trial magistrate.

Analysis and Determinations

The duty of a first Appellate court was discussed by the Court of Appeal in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, wherein it held inter alia

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

Instructively, in the case of **Selle and another vs Associated Motor Boat Company Ltd & Others [1968] EA 123**, it was observed thus:-

“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 conclusion. 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 Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

From the evidence on the record and the submissions by counsel, the crux of the instant appeal rests on the decision by the learned trial magistrate delivered on the 5th July 2016 confirming the subordinate court's jurisdiction to entertain the dispute that was before it and dismissing the Appellant's preliminary objection. This appeal therefore turns on whether in making the said decision, properly applied the law on jurisdiction.

As was stated in the renowned case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696** :

“...A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...” Sir Charles Newbold, P at Page 701 proceeded as follows;

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

At the lower court the Appellant had filed a notice of preliminary objection on the basis below:

“1. THAT this Honourable Court lacks jurisdiction to hear and determine the plaintiffs application dated 23/3/16.

2. **THAT this Honourable Court lacks jurisdiction to hear and determine the entire suit by dint of the provisions of Section 59 of the Energy Act, 2006 which provide a different forum for determination of similar suits.**

3. **THAT the instant suit and application dated 23/3/16 are a nullity.”**

In dismissing the appellant’s preliminary objection, the learned trial magistrate reasoned that she was bound by the Ruling made by Otieno P.J delivered on 9th October 2015 wherein Honourable P.J. Otieno in considering the provisions of **Section 89 of the Energy Act** held that the dispute mechanisms provided therein did not provide for a customer like the Plaintiff but a Licence and a Commission and therefore the subordinate court had the jurisdiction to adjudicate on the dispute between the parties.

According to the Appellant, the basis of the lower courts lack of jurisdiction was founded on **Section 59 of the Energy Act, 2006** which provides:

“59. Defective meters

(1) Where a meter used to register the quantity of electrical energy supplied by a licensee to any consumer is found to be defective through no fault of the licensee or the consumer, the licensee may, in consultation with the consumer, determine the reasonable quantity of electrical energy supplied and recalculate the charges due to or from the consumer as appropriate for up to a maximum period of six months from the date the meter is established to be defective:

Provided that if the consumer had reported any suspected defect in the meter and the licensee did not immediately examine the meter, the licensee shall not be entitled to recover from the consumer any charges for more than three months from the date the meter was established to be defective.

(2) Where any meter used to register the quantity of electrical energy supplied by any licensee to any consumer is found to be defective through interference by the consumer, the licensee may determine the reasonable quantity of electrical energy supplied and recalculate the charges due from consumer as appropriate from the date the licensee determines the meter to have been interfered with:

Provided that if the subject meter is no longer suitable for ascertaining the quantity of electrical energy supplied, the licensee shall be entitled to repair or replace the meter at the cost of the consumer who interfered with it.

(3) If any dispute arises under this section as to recalculation of electrical energy supplied to a consumer or as to interference with any meter, such dispute shall be referred to the Commission for determination.” (emphasis supplied)

The Court was also referred to **Section 61(3) of the Act** which provides:

“(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.”

Before a court sitting on appeal is convinced to overturn the findings of a subordinate court, it must be convinced that in reaching the impugned decision, the learned trial magistrate misapprehended the law. In light of the provisions of the Energy Act outlined above, it is clear to me that had the learned trial magistrate taken into consideration the above cited provisions, she would have arrived at a different finding.

It is a generally accepted principle of law that where there exists a laid down statutory procedure for the resolution of a dispute, such procedure ought to be adhered to strictly and exhausted before approaching the High Court for remedies. While the Respondent has put up a spirited argument in support of the lower court’s jurisdiction to tackle the dispute, my position is that **Section 61(3)** is couched in mandatory terms that: **“It shall be referred to the Commission”.**

My stance is similar to that echoed by **Muchemi J** in **Kenya Power & Lighting Company vs James Njue Njiru Civil Appeal No. 9 of 2017 [2018] eKLR** where it was held:

“24. The respondent was under a legal obligation to lodge any grievance against the appellant with the Commission. Section 9 of the Fair Administrative Act provides that the court shall not review any administrative action under the Act unless the

mechanism including internal mechanism for appeal or review and all remedies available under any written law are first exhausted.

25. Article 159 (2)(c) of the Constitution encourages the use of alternative disputes resolution. It provides:-

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

26. The spirit of the Constitution on alternative dispute resolution was recognized in Supreme Court Constitution Application No. 2 of 2011, in the matter of the Advisory of the Court. It observed:-

To allow the application now before us, would constitute an interference with due process and with the rights of parties to be heard before a court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court up to the Supreme Court. This is a situation in which the court must protect the jurisdiction entrusted to the High Court.

27. The observation by the Supreme Court was cited with approval in the case of ALICE MWERU NGAI (supra). The learned judge stated;

It is clear from the above that the plaintiff's first port of call should be the Energy Regulatory Commission and not this court. Where the law has granted to other organs of the Government to handle specific grievances, the court must respect and uphold the law.

28. Similarly, in the case of JOSEPH NJUGUNA MWAURA & OTHERS VS REPUBLIC C.A. Criminal Appeal No. 5 of 2008 Nairobi, the court held:-

In our understanding, courts have no jurisdiction in matters over which other arms of Government have vested jurisdiction to act.

29. *In view of the foregoing decisions and the relevant provisions of the law, the magistrate's court had no jurisdiction to determine the dispute in this appeal. Section 63(1) is couched in mandatory terms that it shall be referred to the Commission. The legislature in enacting Section 61 intended to unclog the courts in matters determinable by tribunals and other quasi-judicial organs. It is the duty of the court to ensure that the provisions of the law in that regard are complied with."*

Similarly, in Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd Civil Appeal No. 474 of 2016 [2017] eKLR it was held:

"I have on my part considered the sort of reliefs sought by the appellant in the plaint. It is apparent from the plaint that the dispute is over the charges and or supply of electricity. In my view, the dispute is a matter which is reserved by statute to be heard and determined by the Energy Regulatory Commission under Section 61(3) (a) of the Energy Act. The Energy Act also provides for any person who is dissatisfied with the decision of the Energy Regulatory Commission to file an appeal with the Energy Tribunal under Section 108 of the aforesaid Act. I am therefore convinced that the learned Senior Resident Magistrate properly dismissed the suit for want of jurisdiction."

Accordingly, I find this appeal has merit and I therefore allow it with costs with the effect that the ruling delivered on 5th July 2016 on the Appellant's preliminary objection dated 27th April 2016 is set aside and the Appellant's preliminary objection is upheld. This suit is therefore referred to the Energy Regulatory Commission for final determination.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MALINDI THIS 12TH DAY OF JULY 2019

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R NYAKUNDI

JUDGE