



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL NO. 9 OF 2017**

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

***V E R S U S***

**JAMES NJUE NJIRU.....RESPONDENT**

**J U D G M E N T**

1. The appellant was dissatisfied with the judgment of Hon. R.O. Oigara, Principal Magistrate delivered on 22/02/2017 and lodged this appeal.
2. The respondent's claim against the appellant was for breach of contract to supply or render service. The respondent claimed that he had performed his part of the contract and was entitled to a remedy against the appellant. Judgment was entered in favour of the respondent directing the defendant to commence and complete installation of electricity supply and provide a meter to plot No. 818 Kigumo. The appellant was condemned to meet the costs of the suit.
3. The grounds of appeal may be condensed as follows:-
  - (a) That the learned trial magistrate erred in fact and in law by dismissing the appellant's preliminary objection challenging the jurisdiction of the court which was well grounded on the provisions of Section 61(3) of the Energy Act (Cap. 314 Laws of Kenya).
  - (b) That the learned magistrate erred in law and in fact by holding that the suit was purely founded on the law of contract.
  - (c) That the learned magistrate awarded damages that were inordinately high.
  - (d) That the learned magistrate erred in law and fact by misconstruing the purport and effect of Section 100 of the Civil Procedure Act Cap. 21 and allowed the respondent to pursue his claim for general damages on the basis that there was an error in the judgment.
4. The appellant was represented by Messrs C.B. Mwangela & Co. advocates while Guantai & Associates represented the respondent. By consent, the parties argued the appeal by way written submissions.
5. On jurisdiction the appellant submitted that the dispute was subject to the provisions of Section 61(3) of the Energy Act which provides that any dispute listed therein shall be determined by the Energy Regulatory Commission.
6. The appellant relied on the following cases:-

*(a) KENYA HORTICULTURES EXPORTERS LTD [1977] VS KENYA POWER & LIGHTING COMPANY LTD (2011) eKLR where it was held that a dispute on the amount of charge or other sum in dispute, and the consumer has failed to comply with the request within 48 hours should be determined by the Commission.*

*(b) ALICE MWERU NGAI VS KENYA POWER & LIGHTING COMPANY LTD. [ 2015] eKLR where a preliminary objection based on lack of jurisdiction was upheld in a dispute where the defendant was alleged to have trespassed on the plaintiff's land.*

7. The respondent submitted that the dispute in question was based purely on contract and did not fall under Section 61(3) of the Act. The section deals with charges, deposits and tariffs among other disputes and that the claim of the respondent had nothing to do with the disputes listed therein.

8. It was further argued that for Section 61(3) to apply, a consumer must have already had electricity installed. In this case the respondent had only paid for installation of electricity which service was yet to be rendered. The matter fell squarely within the jurisdiction of the court.

9. The appellant cited Section 9 of the Fair Administrative Act, [2015] in arguing that the respondent should have exhausted the remedies available and the relevant statutes before going to the High Court. It provides:-

*The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.*

10. It was further submitted that the term “administrative action” includes:-

*(i) the powers and duties exercised by authorities or quasi-judicial tribunals; or*

*(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.*

11. It is the appellant's contention that the dispute ought to have been heard by the Energy Regulatory Commission and not by the magistrate's court.

12. The appellant stated that the learned magistrate misconstrued the purport and effect of Section 100 of the Civil Procedure Act, Cap. 21 thereby allowing the plaintiff to pursue his claim of general damages. According to the appellant, the respondent's remedy lay in lodging an appeal in the high court for review of the judgment

13. The respondent submitted that the court has power under Section 100 of the Act to amend or rectify any defect or error in the proceedings. The magistrate had failed to consider the issue of damages which was part of the claim. The amendment therefore served to rectify the oversight made by the court.

14. I have identified the issues for determination as twofold:-

*(a) Whether the magistrate's court was possessed of jurisdiction to hear and determine the suit;*

*(b) Whether it was in order to amend the judgment and provide for damages.*

15. The duty of an appellate court was explained in the case of **MWANGI VS WAMBUGU, [1984] KLR 453** where it was held:-

*A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is*

*not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.*

16. The question of jurisdiction was explained in the case of **OWNERS OF MOTOR VESSEL LILLIAN "S" VS CALTEX OIL (KENYA) KTD 1989 KLR 1**, the court of Appeal stated:-

*Without jurisdiction a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings, pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*

17. The law applicable in this case is Section 61(3) of the Act which provides:-

*61(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 device; or*

*(e) any unsuitable apparatus or protective devices; it shall be referred to the Commission.*

18. Section 4 of the Act establishes the Energy Regulatory Commission with the following functions:-

*(a) to regulate -*

*(i) importation, exportation, generation, transmission, distribution, supply and use of electrical energy;*

*(ii) importation, exportation, transportation, refining, storage and sale of petroleum and petroleum products;*

*(iii) production, distribution, supply and use of renewable and other forms of energy;*

*(b) protect the interest of consumer, investor and other stakeholders interest; among others.*

19. The respondent avers that the issue was argued a bit too late in the day. The magistrate dismissed the preliminary objection on grounds that the decision relied on by the appellant was not relevant. It is important to state that it was a misdirection on part of the learned magistrate not to examine the relevant provisions of the law. It is trite law that a preliminary objection may be raised at any time of the proceedings.

20. It is not in dispute that the respondent had entered into a contract for connection of electric energy and that the requisite dues had been paid. The respondent's grievance was that the appellant had failed/neglected to connect power to the respondent's premises for a period of 3 years. It is not denied that the contract existed between the parties. The main issue in this appeal is whether any dispute arising from such a contract falls within the ambit of Section 61(3).

21. The respondent argued that the dispute in question was not determinable by the Energy Regulatory Commission for the reason that he was not a consumer. The Act defines "consumer" as:-

*Any person supplied or entitled to be supplied with electrical energy or petroleum, but does not*

*include a person supplied with electrical energy or petroleum for delivery or supply to another person.*

22. Section 5 of the Act sets out the functions of the Energy Regulatory Commission, among them,

*5(b) protect the interest of consumer, investor and other stakeholders interest.*

23. The definition of the word “consumer” and the reading of Section 5(b) is clear in my mind that the respondent having signed the supply contract was for all intents and purposes a consumer whose interest were subject to protection by the Commission.

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 NGAJI (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.

30. Having found that the magistrate's court had no jurisdiction to determine the respondent's claim, I hereby set aside the entire judgment delivered on 25/01/2017 and amended on 22/02/2017 plus all consequential orders.

31. The appeal is hereby allowed with costs to the appellant.

32. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF APRIL, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Wambugu for Mwongera for appellant**

**Mr. Guantai for respondent**