



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 93 OF 2016

CORAM: D.S. MAJANJA J.

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

AND

SAMUEL MANDERE OGETO.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon. K.Onjoro, SRM dated 4th November 2016 at the Chief Magistrates Court at Kisii in Civil Case No.627 of 2016)

JUDGMENT

1. This appeal is against an order dismissing the appellant's preliminary objection. The preliminary objection was based on the provisions of **section 61(3)** of the *Energy Act, 2006* which states as follows;

61(3) If any dispute arises as to

(a) any charges;

(b) the application of any deposit;

(c) any illegal or improper use of electrical energy;

(d) any defects in any apparatus or protective devices; or

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

2. The appellant's contention before the trial court was that the suit fell within the provisions of the *Act* and that the proper forum to litigate the matter was before the Energy Regulatory Commission ("the ERC"). The respondent took the contrary position that the dispute did not fall within the provisions of the *Act*. The trial magistrate held that since the respondent's claim was grounded on illegal/unlawful disconnection without reason, the dispute fell outside the scope of **section 63(1)** of the *Act* as it did not concern a dispute on any matters set out in the said provisions.

3. The issue in this appeal is whether the dispute between the appellant and respondent fell within the provisions of the *Act*. In the plaint, the respondent prayed for a permanent injunction restraining the appellant from interfering with his pre-paid electricity accounts. The gravamen of the plaintiff's claim is set out in the plaint and it is as follows;

[3] The plaintiff avers that at all material times of this suit is the owner of electricity accounts no [X], [Y] and [Z] which are located in the plaintiff's plot number NYANCHWA/BLOCK 1/599 and 564 respectively.

[4] The accounts are all prepaid and the plaintiff does not have any outstanding bills whatsoever in relation to the aforesaid accounts.

[5] The defendant without any scintilla of justification disconnected the electricity from the post on the 28th October 2016 which cause the tenants to vacate and other threatening to vacate during the disconnection the plaintiff paid the bill via mpesa on the 27th October 2016 and 4th October 2016 respectively.

4. The question before the trial court was whether the trial court had jurisdiction to entertain the suit since jurisdiction is a fundamental issue. In *Owners of Motor Vessel "Lillian S." Vs Caltex Oil (K) Limited [1989] KLR*, Nyarangi JA stated as follows;

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for 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.

5. I have set out the relevant contents of the plaint which show that the respondent's complaint is that the electricity to his properties was disconnected and that he had no pending electricity bill. Whether the dispute concerned, "illegal/unlawful disconnection" outside the scope of **section 61(3)** of the **Act**, as the trial magistrate held, must be read in the context of the entire **section 61** which circumscribes the circumstances under which the licensee, in this case the appellant, may disconnect electricity to the consumer. The illegal and unlawful disconnection cannot be divorced from the grounds set out in **section 61** of the **Act** since the intent of the **Act** is to provide an alternative dispute resolution process between the licensee and consumer.

6. In addition, the Minister in accordance with powers conferred on him by **section 63(1)(l)** of the **Act** may prescribe, "the procedures for hearings, settlement of disputes or any proceedings before the Commission." Pursuant to this power, the Minister enacted the **Energy (Complainants and Dispute Resolution) Regulations, 2012** ("the **Regulations**"). **Regulation 2** thereof states that the **Regulations** shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct or practice or operation of any party or any matter regulated by the **Act**. **Regulation 4(a)** provides that the **Regulations** shall apply to;

4(a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy. [Emphasis mine]

7. Flowing from the provisions I have cited, I hold that any disconnection whether illegal or otherwise falls within the scope of disputes to be referred to the ERC. The **Act** and **Regulations** point to the fact that there is statutory scheme for resolving disputes between the appellant and its customers and the respondent was obliged to follow the procedure established. In *Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017]eKLR*, the Court of Appeal reiterated this principle that, "[It] is abundantly clear to us that where there is a specific procedure as to redress of grievances, the same ought to be strictly followed."

8. I find that the learned magistrate erred in dismissing the preliminary objection. The subordinate court had no jurisdiction to hear the matter. I allow the appeal and uphold the preliminary objection. Consequently, the suit is struck out. I make no order as to costs before the subordinate court and before this court.

DATED and DELIVERED at KISII this 4th day of July 2018.

D.S. MAJANJA

JUDGE

Mr Nyamwange instructed by Wamaasa, Masese, Nyamwange and Company Advocates for the appellant.

Respondent in person.