REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 138 OF 2017

consolidated with

CIVIL APPEAL NO. 104 OF 2017

CASABLANCA HOLDINGS LMITED.....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LIMITED.....RESPONDENT

J U D G M E N T

Introduction

1. The two appeals were on the 7/11/2017 consolidated to be heard together for purposes of saving time and on account of the fact that the two concerned two decisions made on the same file at trial. The first appeal was one against a decision refusing to grant an injunction while the latter is against the decision striking out the appeal on account lack of jurisdiction

2. The Appeal in No. 104 of 2007 was against the ruling by the trial court refusing to grant a temporary injunction while that in No. 138 of 2017 was against a decision striking out the suit pursuant to a preliminary objection in which it was contended the court lacked jurisdiction.

3. The memorandum of appeal in 104/2017 is dated 18/5/2017 and filed on 23/5/2017 while that in 138 of 2017 is dated 11/7/017 and filed on 12/7/2017. I take the view that the question of jurisdiction must be determined first and only if it be determined in favour of the appellant would it be necessary to consider if the trial court was right in its determination on the application for injunction.

4. There are only two issues for determination in this appeal as consolidated. The issues are:-

> **i. Was the trial court seized of jurisdiction in the matter?**
>
> **ii. Did the Appellant present a case entitling it to be grant an order of a temporary injunction pending determination of the suit**?

5. In striking out the suit the trial court delivered itself in the following words:-

> ***"The position taken by WAWERU Judge is distinguishable from the present case. In the present case, the plaintiff sought an injunction which was declined by my brother HON. NJAGI SPM. This court cannot therefore take the position taken by the Honourable Judge.***
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> ***The plaintiff's counsel brought up the issue that the plaintiff was not a party to the electricity supply contract in question hence not entitled to pay the outstanding bills. I find this to be a matter of fact and can only be resolved by parties presenting evidence. And such matters can only be resolved during the hearing of the dispute.***(Emphasis provided)
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> ***I am of the finding that this Court has no jurisdiction to entertain the dispute herein. The same sought to be referred to Energy Regulatory Commission. Consequently, I uphold the objection raised by the Defendant".***

6. That decision was evidently grounded on the provisions of Section 61(3) Energy Act because that is what the defendant, now Respondent, pleaded at paragraph 11 of its statement of defense.

7. That section, Section 61, Energy Act provides:-

> **Section 61(3): If any dispute arises to:-**
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> **a) any charges or**
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> **b) the application of any deposit; or**
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> **c) any illegal or improper use of electrical energy; or**
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> **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.**
>
> **Section 61(4): 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:**

8. In my understanding the law under section 61(3) vests upon the Energy Regulatory Commission the power and jurisdiction to determine disputes concerning, charges payable or levied between a licensee and a consumer, improper and a consumer, improper or illegal use of electric energy and defect or suitability of apparatus or protective devices. I interpret the term charges in the provision to mean the level of tariffs charged by the Respondent.

9. The dispute between the parties as pleaded in the plaint at paragraph 5 & 6 was that it paid its power consumption upfront but the Respondent had demanded from it the payment of Kshs.867,790/= arrived at after rebilling, for a period prior to its contract with the respondent, which the Appellant protested maintained was not due nor owing from it.

10. According to paragraph 4 of the Replying Affidavit by Ruth Kasera, the plaintiffs meter was installed in December 2014 in replacement of another meter which had been installed in 2012 but had been removed due to being faulty.

11. When the parties appeared to argue the appeals it emerged that the change was not only in the supply meter but also on change of customer from one Joseph Okoth to the Appellant. In fact the Affidavit by the said Ruth Kasera exhibited a rebilling report and analysis which identified the customer as Joseph Okoth and the period rebilled is disclosed to be January to June 2012. If that be true then the dispute between the parties was on the question of privity of contract – whether the Appellant could be burdened with obligations incurred by the said Joseph Okoth prior to its contract with the respondent.

12. It was not a dispute as to whether the electric power supply consumed by the appellant was accurately measured and billed using suitable and effective apparatus and devices. That, to this Court, was a dispute for the determination by the court and not the tribunal. The wording of the Energy Act at Section 61(3) as read with Section 6(O) is that the dispute the commission is vested with jurisdiction to entertain and determine are those on technical aspects regarding the duties and obligations of a licensee to the customer. Accordingly when it is given powers to resolve disputes about charges, that must be taken to be in the technical sense of determining the propriety and accuracy of computation of such charges noting that it has the statutory duty to determine and regulate the costs and also approve and determine the suitability of equipment to be used to measure electric supply[1].

13. The dispute resolution duty vested in the commission by the Act was not intended to usurp the duty of the court to interpret and determine the general principles of law like that revealed in this appeal. I do not agree with the trial court that Section 61(3) divested it of the jurisdiction to try the suit and do find that it erred in striking out the suit. While it is true that a court of law cannot abrogate to itself jurisdiction not provided by law, it is equally true that it is undesirable for a court of law to ran away from vested jurisdiction and to vest such jurisdiction on a body a jurisdiction not vested by law. Section 61(3) is an Alternative Dispute Resolution intended to resolve factual disputes or to utilize expertise not necessarily domiciled in the court system. Such mechanisms are never designed or intended to relieve the court of its primary duty to interpret and apply the law. To this court, where a dispute rests entirely on the interpretation and application of a provision or principle of the law, such is not suitable tor alternative dispute resolution and must remain the duty of the court

14. In ***Kenya Horticultural Experts (1977) Ltd vs Kenya Power and Lighting Company Ltd [2011] eKLR*** Hatari Waweru J, was very categorical when he said:-

> **"There is obviously a dispute between the Plaintiff and the Defendant over electricity consumption charges levied by the Defendant which ought to be referred to the Commission under Section 61(3)(a) of the Act. It has not. But this does not appear to oust the jurisdiction of the court. It appears from the wording of subsection (4) that any of the parties to such dispute may elect to take the dispute to court. The plaintiff elected to come to court, and its suit is properly before the court".**

15. The trial court in striking out the suit clearly failed to follow a binding decision of a superior court cited to it. That was clearly contrary to the doctrine of precedence imposed by Chapter 10 of the constitution. That was openly erroneous.

16. The law on ouster of a court's jurisdiction as I understand it is that the Ouster Provision must be clear, firm and unambiguous as to leave no doubt that parliament intended to do nothing else but to oust the court's jurisdiction. I have reproduced the provisions of Section 61(4) of

the Energy Act which to me allows both court and commission to entertain disputes between licensee and customer. To me therefore the provisions of Section 61(3) does not oust the court jurisdiction even on the isolated genre of disputes.

17. The supreme court in Judges and Magistrates Vetting Board vs the centre for ***Human Rights and Democracy & Others [2013] eKLR*** I and the law on ouster of court's jurisdiction in the following words:-

> ***"Ouster clauses can be categorized as constitutional or statutory. Where they are statutory ouster clauses, the statute may confer exclusive jurisdiction on the relevant body to determine the relevant matter. In such a case, the relevant body must act under the statute and not outside it".***
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> ***…it is a principle of interpretation adopted in Anisminic, that when a statutory ouster clause is invoked, courts should interpret it in a manner likely to preserve the jurisdiction of the courts***.
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> ***…the courts have a conventional inclination to interpret statutes in a manner that precludes acceding of jurisdiction to other agencies … the court have recognized that indeed, there will be proper instances of jurisdiction being conferred upon other agencies by the legislature but when the legislature does so, it has an obligation to express itself in clear, firm and unequivocal language".***
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> *(emphasis provided)*

18. In coming to that decision the court went on a merited judicial expedition exploring very many decisions of other jurisdictions the confluence of which is that the general understanding is that the duty to determine legal disputes rest with the court but there are instances when due to exigencies or historical needs of the day or just need for expertise the legislature may vest legal rights determination duty on a quasi-judicial tribunal or body. However in ousting jurisdiction there must be exclusive jurisdiction created in a language that leave no room for more than one interpretation – ouster.

19. In this case, I do find that Section 61 of the Energy Act did not create an exclusive jurisdiction on the enumerated cases of dispute but left it open for a party to choose whether to go to the commission or court. That is the only reason the legislature added subsection (4) to the provision. It is now time to reiterate and do so reiterate that Section 61 Energy Act is not a statutory Ouster Clause of the court jurisdiction to determine a dispute between a licensee and a customer. The courts have jurisdiction to entertain such dispute but need to always take cognizance of the fact that where the disputes may require expertise hosted within the commission, like where it is a question of what tariffs were chargeable at what time or if it be on the accuracy, propriety or suitability of the appliances and apparatus employed to ascertain value and quantities then it would be necessary to refer the dispute rather than strike it out or at the very list get professional opinion from the commission. And in this era of Alternative Dispute Resolution, such reference may even take the form of referral for medication or conciliation. Striking out should however, be recognized for what it is, is a draconian remedy that drives a party from the seat of justice unheard and should be employed very cautiously and sparingly.

How about the application for injunction?

20. On 29/4/2016, the trial court, Hon. Njagi, SPM, delivered a ruling by which it dismissed an application by the Appellant using the following words:-

> **"In this suit the court must point out that the Plaintiff/Applicant, has failed to establish a Prima facie case. The case before the court by the Plaintiff/Applicant and the Defense by the Defendant/Respondent has been perused by me and let me point out that the Plaintiff's/Applicant's suit is not likely to succeed on a balance of probability at the trial. Even if the order of injunction is denied, the Plaintiff/Applicant shall not suffer any irreparable harm that cannot be compensated by damages. In this case general damages would be sufficient in the circumstances. Even on a balance of convenience this suit cannot succeed"**.

21. This was a decision on an application for an injunction which decision must be seen to have been one based on the exercise of judicial discretion.

22. The principles upon which an appellate court, even if it be on first Appellate court like this, would interfere with a decision made pursuant to exercise of judicial discretion are now well settled. They are that an appellate court will not interfere with a decision arrived upon the exercise of judicial discretion unless it be demonstrated that in coming to the decision it did reach, the trial court misdirected itself in a material way and thereby arrived at a wrong decision or that the decision was exercised bereft of reasons and therefore amounted to no more than caprice[2].

23. Before the trial court was a suit in which a permanent injunction was sought on the basis that the plaintiff (now appellant) was a customer of the Respondent for the supply of electric power whose consumption was being measured by a pre-paid meter to suggest and connote that the plaintiff would pay in advance for the supply to be offered later.

24. I take judicial notice that in a prepaid arrangement it is not possible to accommodate bills for services rendered because by the time the prepayment get exhausted the service is disconnected. That to me was a real and triable matter which *Ipso facto* presented prima facie case that need to be investigated by court by production of evidence and while that process would be ongoing, it was desirable to preserve the substratum of the suit by an injunction.

25. However, in the suit it was pleaded that by the time the Appellant filed its suit the power had been disconnected and it was thus seeking a

mandatory injunction to restore the supply which was granted *ex-perte* and an order restraining disconnection of the supply on account of non-payment of the sum of Kshs.867,790/= pending determination of the suit. The grant of mandatory order for restoration of supply is not contested here only the dismissal of the prayer for restraining order is in contest.

26. My reading of the proceedings, and documents filed, reveal that the Appellant contended before the trial court that it was being asked to pay a bill for the consumption of power during the period January to June 2012 when its contract with the Respondent commenced in the year 2014. The dispute was to seek to answer the question if the Appellant could be compelled to pay an obligation outside its contract with the Respondent. That question went to the very core of the general rule on privity of contract. That principle dictate that only a party to a contract can derive a benefit or be burdened with its obligations.

27. In ***Savings & Loans (K) Ltd vs Kanyenje Karangaitu Gakombe [2015] eKLR***, the court said:-

> **"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than parties to the contract. Accordingly a contract cannot be enforced either by or against a third party".**

28. With the evidence of rebilling before the contract between the parties was entered into there was a clear prima facie case established which could have entitled a the Appellant to an injunction. That portion of evidence seems to have escaped the trial court. It thus failed to consider a material matter and therefore arrived an erroneous conclusion. Where this happens, even where the decision be discretionary, an appellate court is entitled to interfere. I therefore do interfere with the decision rendered on the 29/4/2016.

29. The other reason, I would upset the decision is that the crux of the decision seem to the only question posed and answered by the court – whether a person who has refused to settle dues for power consumed at their premises using an illegal service line can be granted an injunction.

30. To put in perspective it may be necessary to reproduce the words of the court here: The court said:-

> **"The issue is whether the orders of injunction being equitable remedies being granted to a party that has refused to settle the dues for powers consumed at their premises using an illegal service line. In fact the Court notes that another person and not the plaintiff/applicant, used the power, but it surprises that the account used power was to run the day and the night club. There is no evidence attached by the applicant/plaintiff, to show as to who consumed power for the period from January, 2012 and June 2012. The annextures brought to Court have absolutely no relevance to this case. The plaintiff/applicant did not pay for this power spent. In my humble view, if I had known that they had an outstanding I would not have granted an order of Temporary Injunction. The orders of injunction should have been granted in this place. The application is an abuse of the Court process and the Court should not allow the abuse of the Court process"**.

31. It was inappropriate to isolate that issue as the only issue for determination in an application for a restrictive injunction. Order 40 Rule 1 & 2 dictates that an injunction is intended to protect a right threatened with violation or breach. The court ought to have interrogated if the plaintiff had demonstrated a prima facie case. In failing to consider that cardinal matter, it went into an error of principle.

32. But more fundamentally, the court recognized that the power was consumed by a person other than the plaintiff then discounted that fact by finding that there was no evidence by the plaintiff as to who consumed the power. In doing do, the court unfairly ignored the evidence in the Affidavit of Ruth Kasera who disclosed who the consumer was. Clearly there was an error in both principle and appreciation of the evidence and the conclusion reached is thus insupportable but must be upset. I do upset the decision dismissing the application dated 18/12/2015 and in its place a substitute an order allowing the said application pending the hearing and determination of the suit.

33. Having found that the order striking out its suit was also erroneous and having reinstated the suit, I now remit back the file to the trial court to hear and determine the plaintiff suit on the merits. It shall heard before another magistrate.

34. I award the costs of the Appeal as consolidated to the appellant.

Dated and delivered at Mombasa this 3rd day of December 2018.

P.J.O. OTIENO

JUDGE

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[1] Section 5 & 6, Energy Act, No. 12 of 2006

[2] Omega Enterprises (K) Ltd vs Tourist development corporation[1998] eKLR