



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 100 OF 2008**

**DORCAS MBATHI.....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LTD.....DEFENDANT**

**RULING**

**The Preliminary Objection**

The Plaintiff instituted the suit herein by way of a Plaint dated 18th July 2008, seeking prayers that the Defendant wrongfully disconnected her electricity in breach of contract. The Defendant has now filed a Notice of Preliminary Objection dated 11th October 2016 against the suit, on the grounds that this Court lacks jurisdiction pursuant to the provisions of section 61(3) of the Energy Act 2006, and that jurisdiction of the subject matter is under the Energy Regulation Commission established under section 4 of the Energy Act 2006.

The Defendant's learned counsel, Anthony M. Mulekyo Advocates, filed submissions dated 27th October 2016 on the said Preliminary Objection, wherein it was argued that the Plaintiff in her Plaint avers that she entered into a contract with the Defendant for supply of electricity, and that she objected to a bill of Kshs 505,843/= she received in 2008. That the Defendant on the other hand stated that the Plaintiff failed to pay for power consumed despite demand for payment. It was the Defendant's submission that if there are disputes on any charges, illegal or improper use of electrical energy, and/or any alleged defects in any apparatus, the concerned party is required to seek the intervention of the Energy Regulation Commission pursuant to section 61(3) of the Energy Act.

However, that the Plaintiff in total disregard of these provisions proceeded to file the suit in this court which is the wrong forum, as the legislature created a specialised body in the name of the Energy Regulation Commission and mandated it with the jurisdiction to deal with certain matters. Reliance was placed on the decision in **Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd, [2015] eKLR** in this regard

The Plaintiff's learned counsel, P.M. Mutuku & Company Advocates filed submissions dated 24th November 2016 in response to the Preliminary Objection. He argued therein that the Plaintiff's case is about unlawful disconnection of power and a dispute on the charges. Further, that unlawful disconnection of supply of electricity energy is not part of the disputes to be taken to the Energy Regulation Commission.

The Plaintiff proposed that the issue of unlawful disconnection of power be suspended and stayed, and

that the issue of the charges be referred to the Energy Regulation Commission by the court. Further, that once the issue of the charges is resolved, the court shall proceed with the case of unlawful disconnection of power. The Plaintiff also proposed that electricity be reinstated by an order of this court on such terms as would be appropriate until the dispute is resolved either by the Energy Regulation Commission or by the court. Reliance was in this regard placed on the judgment of Waweru J. in the case of **Kenya Horticultural Exporters (1977) Ltd vs Kenya Power & Lightening Company Ltd, Civil Case No. 279 of 2011** wherein the judge held that section 61 (3) does not oust the jurisdiction of the court .

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. There are two issues for determination. The first is whether the Defendant's preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, 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 argued 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.”**

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, the issue of jurisdiction of this Court has been raised *vis-a vis* the jurisdiction of the Energy Tribunal. Jurisdiction is always granted by law or other like instrument as held by the Court of Appeal in **The Owners of the Motor Vessel “Lilian S” –VS- Caltex (Kenya) Ltd [1989] KLR 1** .

**“By jurisdiction is meant the authority which a court has to decide matters presented in a formal way for its decision. The limits of this authority are imposed by the stature, charter, or commission under which the court is constituted, and may be extended or restricted by the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”**

Therefore the issue of jurisdiction is a pure point of law that can be raised in a preliminary objection. In addition, this Court is alive to the position that parties should exhaust all statutory and alternative procedures for redress, before moving this Court for remedies, as held by the by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**. The existence of these statutory or alternative remedies do not oust the jurisdiction of the court, however the court will defer to the same when they are applicable or appropriate. The question to be answered is whether the said alternative procedures and remedies are applicable or appropriate in the circumstances of the suit filed herein.

The Defendant relied in this respect on **Section 61(3)** of the Energy Act which 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.”**

This section was the subject of the decision by Waweru J. in the case of **Kenya Horticultural Exporters (1977) Ltd vs Kenya Power and Lighting Company Ltd, (2011) e KLR** wherein the learned Judge held as follows:

**“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.**

**However, because of the mandatory terms of section 61(3),**

**“... it shall be referred to the commission”,**

**the suit herein must be stayed and the dispute between the parties as disclosed by the pleadings filed herein referred to the Energy Regulatory Commission. It is so ordered. But the interim injunction granted earlier will remain in place until the dispute is resolved by the Commission or until the further order of the court.”**

Section 61(4) of the Energy Act that was referred to in the said ruling provides as follows:

**“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:**

**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.”**

The issue herein is about a billing by the Defendant that is disputed by the Plaintiff and that led to disconnection of her electricity, as was the dispute in the cited case. It is also notable in this regard that the case of **Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd, [2015] eKLR** dealt with a different issue of the construction of power lines over land and the compensation payable, and different provisions of the law applied, on the jurisdiction to investigate whether or not the compensation made is adequate which is given to the *Energy Regulatory Commission* under *Section 48(2) of the Energy Act*.

This Court accordingly finds for the above reasons that the Defendant’s Preliminary Objection dated 11th October 2016 does raise a pure point of law, and has merit. However, the Court also notes that the powers of the Energy Regulatory Commission as provided in section 6 of the Energy Act are limited in terms of the remedies that are available to the parties that may appear before it, and there is thus a need to provide recourse to this Court in the event that a party may need it. In addition the option to seek the Court’s intervention is provided for in section 61(4) of the Energy Act with respect to the disputes enumerated in

section 61(3).

I accordingly stay the hearing of this suit and refer the dispute herein as between the Plaintiff and Defendant as disclosed by the pleadings they have filed herein to the Energy Regulatory Commission for further hearing. Parties shall be at liberty to apply, and each party shall meet their respective costs of the said Preliminary Objection.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 7<sup>th</sup> day of February 2017.**

**P. NYAMWEYA**

**JUDGE**