**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 228 OF 2011**

**JAMES MWAURA NDUNG'U.....APPELLANT**

**VERSUS**

**KENYA POWER AND LIGHTING CO. LTD.....RESPONDENT**

**JUDGEMENT**

1. James Mwaura Ndungu, the appellant, filed a suit before the chief magistrate's court, Milimani, Nairobi vide the plaint dated 27th July 2009, against Kenya Power & Lighting Co. Ltd, the respondent herein. In the aforesaid plaint the appellant sought for judgment in the following terms:

> *a.* ***An order or permanent injunction restraining the defendant, its servants and/or agents from disconnecting power supply to the plaintiffs residential premises on plot no. 324 Thome, Garden Estate Road in Nairobi;***
>
> *b.* ***An order that kshs.396,366.14 debited on plaintiffs account number 0089832-01 with defendant is illegal;***
>
> *c.* ***General damages;***
>
> d. ***Costs of this suit;***
>
> *e.* ***Interest on (c ) and (d);***
>
> *f.* ***Any other order that this honourable court deems fit to grant.***

2. The respondent filed a notice of preliminary objection in which it challenged the jurisdiction of the subordinate to hear and determine the suit. Hon. L. K. Arika, learned senior resident magistrate received submissions over the preliminary objection and in the end she upheld the same by dismissing the suit. The appellant was aggrieved hence he preferred this appeal.

3. On appeal, the appellant put forward the following grounds of appeal.

> *1.* ***The learned magistrate erred in law and in fact in finding that the only redress prescribed by the Energy Act was to file a complaint before the Energy regulatory Commission contrary to clear provisions in the said statute allowing other dispute resolution mechanisms.***

*2.* ***The learned magistrate erred in law and in fact in relying on case law without due regard to the provisions of the Energy Act to find that the original jurisdiction of the honourable court was ousted.***

*3.* ***The learned magistrate erred in law and in fact in having regard to the transitional provisions of the Electric Power Act which transitional provisions if they did exist have no application to the suit herein having been filed after the commencement of the Energy Act.***

**4.** ***The learned magistrate erred in law and in fact in completely ignoring the provision of Section 61(4) of the Energy Act that prove beyond peradventure that the lower court has jurisdiction to try and determine the matter.***

*5.* ***The learned magistrate erred in law and in fact by finding that the plaintiff claimed not to have been informed of his right to access the tribunal whereas that was not at all the plaintiff's case.***

*6.* ***That the learned judge misdirected herself by failing to consider at all and accord due regard to the submissions that were filed by the appellant in the matter which clearly proved that the jurisdiction of the lower court was not ousted by the Energy Act.***

4. When the appeal came up for hearing, learned counsels from both sides recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. Though the appellant put forward a total of six grounds of appeal, the main issue to be decided on appeal is whether or not the learned senior resident magistrate arrived at the correct decision in finding that the only redress prescribed by the Energy Act was t to file a complaint before the Energy regulatory Commission. It is the submission of the appellant that by the respondent citing rules 6(a) and 6(c ) of the Electric Power (complaints and Disputes Resolution) Rules 2006, it made it clear that the dispute between the appellant and the respondent was one on metering. The appellant submits that there was never a dispute on the accuracy of the meter installed at the appellant's premises by the respondent. It is further argued that the dispute was on billing and not the faultiness or otherwise of the meter. The appellant pointed out that his case was that he had been settling his monthly electricity bill raised on his account by the respondent until he was slapped with an exorbitant bill of ksh.17,556 for the period covering June/July 2008. He claimed that he used to pay an average consumption of ksh.4,800/=. In response to the appellant's query over the issue, the respondent wrote to the appellant claiming that the appellant had been undercharged and the appellant proceeded to debit his account with the disputed sum of kshs.396,366.14. The appellant further argued that the respondent never at any one time sought to establish any fault or tampering with the meter on the appellant's part.

6. It was also argued that the Electric Power Act stood repealed as of 7th July 2007, therefore the suit which was dismissed was filed under the regime of the Energy Act Cap 314 and not the repealed Electric Power Act no. 11 of 1997. Section 61(3), states that when supply of electrical energy may be refused or discontinued: if any dispute arises as to

*a.* ***Any charges or***

*b.* ***The application of and deposit,***

*c.* ***Any illegal improper use of electrical energy or***

*d.* ***Any illegal defects in any apparatus or protective devices or***

*e.* ***Any unsuitable apparatus or protective devices, it shall be referred to the commission.***

7. The appellant has argued that the dispute between him and the respondent is that about charges as

stipulated under Section 61(a) (a). The appellant has pointed out that under Section 61 (4), any of the disputes envisaged under Section 61(3) can be referred to the commission or otherwise taken to court, therefore anyone who refers such a dispute to court is within his right as envisaged under the Act and the court is well vested with jurisdiction to try and determine the matter. The appellant cited the case of Kenya Power & Lighting Co. Ltd =vs= Josep Kiprono Kosgey C.A no.333 of 2005 (Unreported) where the court of Appeal held interalia that the subordinate court had jurisdiction to hearing and determine a dispute on billing. The court further formed the opinion that the provisions of Section 87(1) of the repealed Electric Power Act no.11 of 1997 could not be construed as ousting the court's jurisdiction. The court further held that it was outside the ambit of the said section when the dispute is over a meter hence the High Court and the subordinate had jurisdiction to hear and determine the matter. In short, the appellant is of the view that based on the provisions of the Energy Act, the subordinate court has jurisdiction to hear and determine appellant's case on the merits.

8. The respondent is of the view that Sections 61(3) and 61(4) of the Energy act vests jurisdiction of energy matters with the Energy Regulatory Commission with the exception where the matter is taken to court before notice of disconnection has been issued. The respondent further argued that notice of disconnection was given to the appellant before the suit was filed in court therefore the suit could not therefore competently be handled by the court but could only be entertained by the Energy Regulatory Commission.

9. After a careful consideration of the rival submissions, I have come to the conclusion that the decision of the learned senior resident magistrate cannot be faulted. She came to the correct conclusion. The provisions cited i.e. Sections 61 of the Energy Act and the Energy (Complaints and Disputes Resolution) Regulations, 2012, clearly shows that matters relating to energy should be heard before the Energy Regulatory Commission previously the Energy Regulatory Board. For this reason I find no merit in the appeal. The same is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 3rd day of March, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent