REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. E159 OF 2024

KENYA POWER & LIGHTING COMPANY...……..…. ….APPELLANT

VERSUS

MARY SYEVUTHA PETER ……..……...…….……....… RESPONDENT

JUDGMENT

1. The Appellant herein is aggrieved by the ruling delivered on 1.11.24 in Malindi CMCC No. E227 of 2023 in which the trial Magistrate dismissed its application dated 4.9.23.

2. The Appellant has filed this Appeal raising the following grounds:
    1. ***That the Learned Trial Magistrate erred in law by failing to consider and to find out that subject matter is purely under the purview of the Energy Act No.1 of 2019.***
    2. ***That the Learned Trial Court erred in fact, law and principle as she ignored the fact the crux of the matter against the Appellant in the suit is about electricity charges, apparatus, connections and disconnections as set out in the Energy Act No. 1 of 2019.***
    3. ***That the Learned Trial Magistrate delivered a ruling per incuriam on the issue of doctrine of exhaustion by confirming that the Trial Court had jurisdiction on the misdirected basis that the Orders sought were obtainable before the Trial Court contrary to the well settled dicta that once the law establishes an avenue from which a dispute may be settled and Orders obtained, then Courts should restrain from exercising jurisdiction.***
    4. ***That the Learned Trial Magistrate misapprehended the principles governing and/or what constitutes the doctrine of exhaustion thereby arriving at an erroneous decision with regard in the issue of jurisdiction raised by the Appellant.***
    5. ***That the Learned Trial Magistrate erred in law in failing to appreciate the overwhelming Constitutional and statutory provisions tendered to demonstrate that the Trial Court lacked jurisdiction.***
    6. ***That the Learned Trial Magistrate erred both in law and in fact by holding that the dispute resolution Tribunals under the Energy Act are not vested with powers to grant injunctive and compensatory Orders for the alleged***

disconnection and electricity charges and thus failed to appreciate the Jurisdiction of the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal as clearly set out in the Law.

7. ***That the Learned Trial Magistrate erred in Law and principle by ignoring the binding authorities of the Superior Courts adduced in the Appellant's Submissions.***
8. ***That the manner in which the Learned Trial Court conducted proceedings with regard to the Appellant's Application in clear and open bias to rubber stamp its predetermined opinion of merely awarding Orders to the Respondent.***
9. ***That the Learned Trial Court confirmed its clear and open bias against the Appellant by declaring that the Appellant's Replying Affidavit is defective and thus continued to condemn the Appellant unheard by disregarding its pleadings.***
10. ***THAT the Honourable Trial Court erred in principle by holding that the Respondent had met the threshold set in Giella Vs Cassman Brown and Ordered reconnection of electricity to her without a condition for payment of pending and future bills when they accrue.***

3. The Appellant prayed that the Appeal be allowed with costs and that the impugned ruling be declared null and void for want of jurisdiction. The Appellant further prayed for a declaration that it was condemned unheard in violation of the principles of natural justice.

4. Being a first appeal, this Court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (**See Selle v Associated Motor Boat Co. [1968] EA 123**).

5. The record shows that the Respondent had instituted a suit by way of a plaint dated 5.8.23 against the Appellant seeking reconnection of electricity power to her premises through meter account nos. 31736283 and 36185528, return of her meter for account no. 43310105, an injunction restraining the Appellant from arbitrarily and unjustifiably interfering with her electricity power supply, general and exemplary damages for loss of business, mental anguish and psychological torture suffered as a result of the actions of the Appellant and its employees and costs.

6. The Appellant then filed an application dated 4.9.23, seeking stay of execution of the orders of 22.8.23 as well as review and setting aside of the same, on ground that the court lacked jurisdiction to entertain the Respondent's application giving rise to the orders as well as the suit. The application was dismissed in the ruling of 1.11.24 that is the subject of this Appeal.

7. Parties filed their written submissions which I have duly considered. In her submissions, the Respondent has raised preliminary issues which the Appellant did not address but which must be dispensed with in the first instance.

8. The Respondent contends that there is no appeal before the Court as the same stood dismissed on 31.7.24 for failure to file the record of appeal and submissions as directed by the Court. The record however shows that on 17.10.24, the Court admitted the record of appeal and submissions, though filed late. In any event, the Respondent filed submissions on the appeal and on 17.2.25, asked the Court to give a judgment date. I accordingly, find the submissions by the Respondent in this regard unmerited.

9. The Respondent has further submitted that the Appellant has failed to include in the record of appeal, the order appealed against thereby rendering the record of appeal incomplete, incompetent and fatally defective.

10. Order 42 Rule 2 of the Civil Procedure Rules provides:

> ***Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.***

11. Rule 13(4) of the same order stipulates the documents that ought to be on the court record before allowing the appeal to go for hearing as follows:

> ***Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—***
>
> ***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

12. The law is that a judgment, order or decree appealed from must be included in the record under the *proviso* to the above rule. Further that the court cannot dispense with the production of the same.

13. In the instant case, while the record does not contain the order emanating from the impugned ruling dated 1.11.23, it does contain the ruling itself which contains the full decision of the trial court. Further, the Appeal was admitted to hearing and directions duly given. At no time

did the Respondent raise the issue when the matter came up before the Court. In any event, the Respondent has not shown or even suggested that she will suffer any prejudice on account of the missing order. In this regard, I associate with Musinga, J. (as he then was) who in **South Nyanza Sugar Co. Ltd v Daniel Obara Nyandoro [2010] KEHC 1007 (KLR)** stated:

> ***In my view, it will amount to a miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under sections 1A and 1B for this court to summarily reject the appeal for want of a decree.***

14. In view of the foregoing, I find no merit in this issue.

15. Turning to the merits of the Appeal, the Appellant's complaint is that it was condemned unheard and that the trial court lacked jurisdiction to entertain the suit and application in question.

16. The Appellant contends that the dispute in the Respondent's suit falls within the jurisdiction of the Energy & Petroleum Regulatory Authority (the Authority). The Respondent however claims that her claim in the suit goes beyond what the Authority has power to determine.

17. The Authority is established under Section 9 of the Energy Act. Section 159(3) of the Act provides as follows:

> ***If any dispute arises under this section as to recalculation of electrical energy consumed by consumer or as to interference with any meter, such dispute shall be referred to the Authority for determination.***

18. Section 160(3) lists some of the disputes for referral to the authority:

> ***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 alleged defects in any apparatus or protective devices; or***
>
> ***(e) any unsuitable apparatus or protective devices, it shall be referred to the Authority.***

19. It is quite evident that the essence of the Appellant's challenge of the jurisdiction of the trial court is anchored on the doctrine of exhaustion, a fact noted by the trial Magistrate. Black's Law Dictionary, Tenth Edition defines exhaustion as follows:

> ***"exhaustion of remedies". The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary."***

20. The tenor of Section 9 of the Fair Administrative Action Act (FAAA) is similar. It provides for judicial review as follows:

> ***(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.***
>
> ***(2) 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.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***
>
> ***(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.***

21. Section 9(2) of the FAAA is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion.

22. The doctrine of exhaustion accords with Article 159(2)(c) of the Constitution which recognizes and entrenches the use of alternative mechanisms for dispute resolution in the following terms:

> ***(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-***
>
> ***(c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.***

23. The doctrine of exhaustion encourages disputants to seek other means of resolving their conflicts rather than, or before coming to court. The jurisdiction of the court should only be invoked when all other means of dispute resolution fail or are exhausted. This was the holding in the case of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** wherein the Court of Appeal stated:

> ***It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.***

24. While the general rule is that courts should be the fora of last resort whenever a dispute arises, there are exceptions. Inadequacy of the remedy available in alternative dispute resolution mechanisms is one such exception.

25. In **Republic v Cabinet Secretary of the National Treasury & 5 others Ex parte Gitson Energy Ltd [2021] eKLR**, Nyamweya, J. (as she then was) speaking to the said exceptions stated:

> ***In considering whether an alternative remedy is effective, the Court must consider the adequacy of the alternative remedy as a matter of substance in addition to its availability. In this respect the alternative remedy should be convenient, expeditious and effective in practical terms, and the procedure employed should provide the claimant with the outcome sought as a matter of substance. It is for this reason that section 9 (4) of the Fair Administrative Action Act, provides that the Court may, in***

> ***exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.***

26. On its part, the Supreme Court addressed its mind to the doctrine of exhaustion in **Petition No 007 of 2023 Abidha Nicholus v The Attorney General & 7 others; (The National Environmental Complaints Committee & 5 others -Interested Parties)** and stated:

> ***We agree with the above reasoning and find that the viability of an alternative remedy does not necessarily bar an individual form seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.***

27. Flowing from the cited authorities, it is clear that inadequacy of an existing alternative means of redress will entitle a party to move to court for appropriate relief, and the court will not be restrained from providing such relief.

28. In the present case, the reliefs sought by the Respondent in the suit in question, go beyond what is available under the Act through the Authority. In addition to reconnection of electricity power to her premises which falls within the purview of the Authority, the Respondent also sought an injunction restraining the Appellant from arbitrarily and unjustifiably interfering with her electricity power supply, general and exemplary damages for loss of business, mental anguish and psychological torture. The Respondent is in my view, entitled to move to court for the reliefs sought and the court will not be restrained from providing the same if so persuaded.

29. On the ground that the Appellant was condemned unheard, it was submitted that the trial court disregarded the Appellant's replying affidavit and proceeded to condemn it unheard, thus violating the principles of natural justice. Further that the affidavit was 29 paragraphs long and not 14 as the trial court indicated.

30. I have looked at the lower court file. It contains a document titled "respondent's replying affidavit to the notice of motion dated 2nd August 2023". This document was filed on 11.9.23 and indicates it is by Husni Mbarak Ahmed Bassadiq, an engineer in the Commercial and Sales Services of Appellant based in Malindi. Page 1 and 2 contain 14 paragraphs. However, page 3 begins with paragraph 6 and proceeds on a tangent in the form of submissions setting out issues for determination and then submitting on each of the issues.

31. The replying affidavit in the record of appeal which contains 29 paragraphs and duly signed by the deponent is clearly not the one in the court file. It does not have a court stamp indicating when or if at all it was filed. In this regard, I agree with the Respondent's claim that the said replying affidavit does not form part of the trial court record.

32. It is noted that the document which begins as an affidavit Husni Mbarak Ahmed Bassadiq ends on page 27, not with his signature, but that of the Appellant's advocates. The affidavit contains no jurat or attestation.

33. The making of affidavits is governed by the Oaths and Statutory Declarations Act. Section 5 thereof provides:

> ***Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.***

34. An affidavit is defined in Black's Law Dictionary Tenth Edition as:

> ***A voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorized to administer oaths.***

35. The elements of an affidavit are that first, the contents therein are facts declared by the deponent. Second, the declaration of facts is voluntary. Third, it must be sworn before an officer authorized to administer oaths. It is the jurat in an affidavit that elevates the declaration of facts to the status of a statement on oath. An affidavit that does not contain a jurat or attestation is thus defective.

36. The Supreme Court had occasion to consider an affidavit that did not comply with the requirements of Section 5 Oaths and Statutory Declarations Act in the case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** and stated:

> ***[8] We have no hesitation in finding that the purported Replying Affidavit filed by the 1st Respondent is fatally defective as the same contravenes all the legal requirements for the making of an affidavit. Hence it has no legal value in the***

> ***matter before us. We have checked all the eight copies of the Replying Affidavit as filed in the Court Registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no Replying Affidavit on record filed by the 1st Respondent***.

37. In the present case, the replying affidavit filed on 11.9.23 does not meet the requirements of Section 5 of the Oaths and Statutory Declarations Act. It is thus defective and therefore no affidavit at all. Accordingly, the trial court cannot be faulted for disregarding the same.

38. On whether the Respondent established a *prima facie* case under the principle established in **Giella v Cassman Brown**, the Appellant relied on the impugned replying affidavit to submit that a notice of disconnection had been issued to the Respondent. Further that the trial court had by its ruling assisted the Respondent to continue stealing electricity from the Appellant yet she had outstanding bills.

39. This Court has already found that the defective replying affidavit filed by the Appellant in the trial court was no affidavit at all. As such, no reliance can be placed thereon. Additionally, the trial court found it was necessary for the Respondent to continue to have electricity supply in the interest of justice as the issue of the outstanding electricity bills could not be resolved at the interlocutory stage; that if it was found that the Respondent had outstanding bills then the same could be recovered from her or disconnection at that stage could be lawfully done. In the circumstances of the case, I find no reason to interfere with this finding.

40. In the end and in view of the foregoing, I find that the Appeal lacks merit and the same is dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED in MALINDI this 13th day of February 2026

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M. THANDE

JUDGE