



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: GITHINJI, RAWAL & MARAGA, J.J.A.)**

**CIVIL APPEAL NO. 333 OF 2005**

**BETWEEN**

**KENYA POWER & LIGHTING CO. LIMITED.....APPELLANT**

**AND**

**JOSEPH KIPRONO KOSGEY.....RESPONDENT**

*(Appeal from the Judgment and Decree of the High Court of Kenya at Eldoret (J. Gacheche, J.) dated 8<sup>th</sup> February, 2005*

in

H.C.C.A. No. 4 of 2003)

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the High Court (*Gacheche, J.*) dismissing an appeal from the ruling of the Resident Magistrate in Eldoret Chief Magistrate's Court, *Civil Case No. 59 of 2002*.

The suit in the subordinate court was filed by the respondent herein against the Kenya Power & Lighting Co. Limited (KPLC) for a mandatory injunction to compel KPLC to reconnect electricity to the respondent's premises, Plot. No. 40 Chuiyat Esso, on which the respondent was operating a posho mill. The respondent averred in the plaint, among other things, that, KPLC had disconnected the electricity supply over a disputed abnormal bill of Kshs.116,310/84 and that he had already referred the dispute to Electricity Regulatory Board (ERB) for determination.

By a contemporaneous chamber summons the respondent applied for an interlocutory mandatory injunction directing KPLC to reconnect the supply pending the determination of the suit, or alternatively pending the determination of the arbitration before the ERB.

Before the application was heard, KPLC filed a Defence averring, among other things, that, the respondent is not entitled to mandatory injunction; that there was no proper dispute before the ERB for

determination; that the respondent had tampered with the electricity meter and had acknowledged liability and undertaken to pay for the misread units; and that the court had no jurisdiction to determine the dispute.

At the hearing of the application, KPLC through their counsel raised a preliminary objection to the suit and the application on the ground that the court had no jurisdiction to entertain the suit. KPLC contended that such a dispute could only be determined through arbitration by the ERB established under **section 119** of the *Electric Power Act – Act No. 11 of 1997* (the Act). On the other hand, the respondent’s counsel contended in essence that the court had power to entertain the suit as ERB had failed to act on the dispute, and further that the court had in any case, jurisdiction to grant a temporary relief before the determination of the dispute by the ERB.

The magistrate’s court ultimately overruled the preliminary objection saying that it had jurisdiction to entertain the dispute as there is no provision in the *Electric Power Act* expressly barring the court from entertaining the dispute. Thereafter, the subordinate court heard the application on its merits and allowed it. That decision precipitated an appeal by KPLC to the High Court. The High Court (*Gacheche, J.*) held, in essence, that the court had no jurisdiction to entertain such a dispute, and that by virtue of **section 87(1)** of the Act, it is only the ERB which had exclusive jurisdiction to determine the dispute. The High Court further held that pending the determination of a dispute referred to the ERB, both the subordinate court and the High Court had jurisdiction to entertain an application for injunction and dismissed the appeal against the grant of a temporary mandatory injunction.

There are two grounds of appeal against the decision of the High Court. However, **Mr. Songok** learned counsel for KPLC abandoned the second ground and argued the first ground which states that:

**“The learned judge erred in law and in fact in holding that the subordinate court had original jurisdiction to entertain the respondent’s application against the appellant in total disregard to section 87 and 119 of the Electrical [sic] power Act.”**

**Mr. Kathili** learned counsel for the respondent did not attend the hearing of the appeal and an application for adjournment made on his behalf was rejected.

The appeal is not obviously against the first holding of the High Court to the effect that both the High Court and the subordinate court had no jurisdiction to entertain the dispute. The appeal is against the second holding namely; that the courts nevertheless have jurisdiction to entertain an application for injunction or for that matter for conservatory orders pending resolution of the dispute by the Board.

It is not necessary to consider the submissions of **Mr. Songok** in detail for two reasons. Firstly, the *Electric Power Act* on which the applicant relies is no longer operative as it was repealed by the *Energy Act, 2006 – Act No. 12 of 2006* which commenced on 7<sup>th</sup> July 2007. The 2006 Act has set up a new body - The Energy Regulatory Commission to deal with various matters including, as stipulated in **section 59(3)**, disputes as to recalculating of electrical energy as a result of a defective meter or as to interference with any meter.

The transition provisions in **section 123** of the 2006 Act do not provide that any pending dispute before the Board under **section 87(1)** of the repealed Act should continue under the Energy Regulatory Commission.

It follows therefore, that the dispute which the respondent referred to the Board under **section 87(1)** of the repealed Act for arbitration by a letter dated 11<sup>th</sup> June, 2002 cannot be determined by arbitration.

Secondly, this Court has in a similar appeal namely; *Eldoret White Castle Motel Limited v The Kenya Power & Lighting Company Limited – Civil Appeal No. 53 of 2005* highlighted the problems of construing **section 87(1)** as ousting the jurisdiction of the courts. The court said in part:

**“Whether or not Parliament by enacting section 87 above intended to deny the High Court the**

**original jurisdiction to deal with even minor complaints on electricity bills by domestic consumers is to our minds doubtful. This country has both large and small consumers of electricity scattered all over the country. The Board was based in Nairobi and had only 7 members. It is doubtful if the Board as constituted would have capacity to handle all disputes from the supply of electricity by the respondent.”**

Further the Court emphasized that the focus of *section 87(1)* is on the meter. *Section 87(1)* so far as it is material provided:

**“If any dispute arises between ...as to whether any meter whereby the value of the supply is ascertained ... is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter...”**

The Court observed:

**“A stage had not been reached when it could be said that the dispute concerned the accuracy or otherwise of the meter. The bill could have been a wrong one. It could also have been arrived at by a wrong computation which would not be an issue regarding the accuracy or otherwise of the meter...”**

It is clear from the defence filed in the suit and from the evidence of *Isaac Okongo Ochong*, an Installation Inspector employed by KPLC, who gave evidence in the subordinate court at the hearing of the interlocutory application that the dispute was not strictly on the accuracy of the meter. Rather, KPLC alleged that the respondent had tampered with the meter by breaking seals to reduce consumption and that the disputed bill was the recalculated bill on the basis of average consumption. There was no complaint that the meter installed was defective or that it had not accurately recorded the consumption.

From the foregoing, we are satisfied that the dispute fell outside the ambit of *section 87(1)* and thus both the High Court and the subordinate court had jurisdiction to determine the dispute. Moreover, since ERB ceased to exist upon the repeal of the *Electric Power Act*, the only forum to deal with the dispute is the court.

In the result, the appeal is dismissed. The dispute to be determined by the subordinate court on priority basis. We make no orders as to costs of this appeal. Orders accordingly.

***Dated and delivered at Eldoret this 20<sup>th</sup> day of September, 2012.***

***E.M. GITHINJI***

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***JUDGE OF APPEAL***

***K. H. RAWAL***

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***JUDGE OF APPEAL***

***D. K. MARAGA***

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***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**