IN THE COURT OF APPEAL

AT ELDORET

(CORAM: BOSIRE, GITHINJI & WAKI JJ.A)

CIVIL APPEAL NO. 53 OF 2005

BETWEEN

ELDORET WHITE CASTLE MOTEL LIMITED …….....APPELLANT

AND

THE KENYA POWER AND LIGHTING COMPANY LTD ……RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Eldoret (Gacheche J.) dated and delivered on 30th day of November, 2004
in

H.C.C.C. NO. 122 OF 2004)
****

JUDGMENT OF THE COURT

By its plaint filed in the High Court at Eldoret, on *12th October, 2004*, the appellant, **Eldoret White Castle Motel Limited,** impleaded, the **Kenya Power and Lightning Company Limited**, the respondent, for a permanent injunction restraining it from disconnecting the electricity supply to its premises situated along **Uganda Road** within Eldoret town. Filed with the plaint was a chamber summons expressed to be brought under **O.XXXIX rules 1 and 2** of the Civil Procedure Rules for an interlocutory injunction to the same effect as prayed in the plaint.

The interlocutory application was heard by *Gacheche J.*, who agreed with *Mr. Kibichiy*, counsel for the respondent as defendant in that suit that on the basis of the provisions of **section 87** of the Electric Power Act, Act No. 11 of 1997, the court lacked original jurisdiction to entertain the suit and the application and dismissed the application with costs. This appeal is against that dismissal. Two grounds have been put forward in support thereof, namely:

> "(1) The learned judge erred in law and fact in holding that the High Court of Kenya does not have original jurisdiction to entertain the appellant's application for an injunction against the respondent by virtue of the provisions of the Electric Power At, No. 11 of 1997.
>
> (2) The learned judge erred in law and fact in failing to find as a fact that the appellant did not owe the respondent any charge which could possibly give rise to a dispute under contract No. 740052/2 that could be referred to the Electricity Regulatory Board."

By contract No. 740052/2 made on 27th July 2004, the respondent agreed to supply the appellant with electric power at its aforesaid premises. The respondent indeed honoured its part of the bargain upon payment of the requisite fee, connected the supply line and commenced supply. On or about *26th August 2004*, the respondent furnished the appellant with the first bill totaling Kshs.180,072.80, which

the appellant paid. On or about *2nd October*, 2004 the respondent sent another bill, but this time seeking Kshs.4,137,072.80 which the appellant disputed contending that it was not a lawful bill. The respondent threatened to disconnect the supply unless the total bill was settled within a specified period. Following that threat the appellant filed the suit and the dismissed application.

Section 87(1) of the Electric Power Act, No. 11 of 1997 which has since been repealed and replaced by Act No. 12 of 2006, provided as follows:

> " 87(1) If any dispute arises between any consumer and the licensee as to whether any meter whereby the value of the supply is ascertained (whether belonging to the consumer or to the licensee), 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 metre, that difference shall be determined upon the application of either party by the Board, and the Board shall also order by which of the parties the costs of and incidental to the proceedings before it shall be paid, and the decision of the Board shall be final and binding on all parties; and in determining the said costs the Board may take into account any fee paid under **section 80."**

Paragraph 9 of the Schedule to the Electric Power Act, provides thus:

> "9 (1) Any person aggrieved by decision of the Board may appeal within thirty days to the Minister and an appeal against the Minister's decision shall be to the High Court.
>
> (2) In cases where the Government is the appellant, the appeal shall be made to the High Court."

It was on the basis of the foregoing provisions that Gacheche J. ruled that the High Court did not have original jurisdiction to entertain the appellant's cause.

This is an interlocutory appeal. The appellant's suit is still pending before the superior court. That being so, care has to be taken to avoid expressing a concluded view on issues which have yet to be determined in the suit.

The only issue before us is one of jurisdiction. Gacheche J. appears, in our view, to have come to the conclusion that all disputes between the respondent as supplier of electricity to various consumers, have first to be handled by the Board. 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 the capacity to handle all disputes arising from the supply of electricity by the respondent.

Besides, a careful reading of **section 121** which sets out the functions of the Electricity Regulatory Board, does suggest that **section 87** has to be read along with it in order to make out whether the disputes referred to under **section 87**, above, include even those arising from complaints by small domestic consumers.

Moreover, the wording of **section 87**, does suggest that it is only concerned with the accuracy or otherwise of metres for ascertaining the amount of electricity consumed by a given customer. The section, as material, reads thus:

> "87(1) If any dispute arises… as to whether <u>any meter</u>… is or as to whether that value has been correctly registered in any case by any metre …"

The focus is on the meter. It may be argued that a complaint about the amount of a given bill is referable to the accuracy of the meter. That may be so, but the plaint did not allege that there was anything wrong with the meter. An earlier bill showed an amount of money which the appellant accepted and settled. The next bill was abnormal, and the appellant did not think it was a lawful bill. 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 wrong computation which would not be an issue regarding the accuracy or otherwise of the meter. Indeed, in a

replying affidavit, sworn by Sarah Wepukhulu on *26th October, 2004* in opposition to the appellant's application, aforesaid, she deponed that the bill complained of was based on certain calculations which were later revised. In annexture SW. 4 to her affidavit, she sets out a calculation which gave a total bill of Kshs.1,456,533.12. This figure was revised later and by her letter dated *30th September*, 2004 (annexture 5) the figure was upped to Kshs.3,941,388.33, which is the amount of money the respondent billed the appellant.

In view of the foregoing, it cannot categorically be said that the appellant's complaint fell within the ambit of section 87, above. Paragrahs 7 and 8 of its plaint spelt out its complaint, as follows:

> "7. That the plaintiff states categorically that the only previous bill lawfully raised against it was for Kshs.180,042/= which was fully paid on or about 15th September, 2004.
>
> 8. That the bill of Kshs.3,941,388.30 raised against the plaintiff is unlawful and totally unwarranted."

There is nothing in those paragraphs to suggest that the appellant's complaint was with regard to the accuracy or otherwise of the meter. Besides, from the respondent's replying affidavit it is clear that the respondent is complaining that the appellant had tampered with connection of supply to its premises, and such an issue is not within the ambit of **section 87**, above.

All in all, it is our view that the High Court had jurisdiction to entertain the appellant's suit and the superior court was in error when it allowed the preliminary objection which was raised on behalf of the respondent. Accordingly, we set aside the order dated *30th November, 2004*, upholding that objection and direct that the appellant's suit and application dated *7th October, 2004*, be heard on the merits. The costs of this appeal shall abide the outcome of the suit in the High Court. It is so ordered.

Dated and delivered at Eldoret this 12th day of November 2010.

S.E.O. BOSIRE
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JUDGE OF APPEAL

E.M. GITHINJI
…….……
JUDGE OF APPEAL

P.N. WAKI
…….……

JUDGE OF APPEAL
I certify that this is a true copy of the original.

DEPUTY REGISTRAR