



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GICHERU, LAKHA & O'KUBASU, J.J.A.)**

**CIVIL APPEAL NO. 54 OF 2001**

**BETWEEN**

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

**AND**

**KARURI HOTELS LIMITED .....1STRESPONDENT**

**THE ELECTRICITY REGULATORY BOARD ..... 2NDRESPONDENT**

**(Appeal from the Ruling and Orders of the High Court of Kenya at Mombasa (Commissioner of Assize, Mrs. Khaminwa) dated 30th January, 2001**

**in**

**H.C.C.C. NO. 584 OF 2000)**

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**JUDGMENT OF THE COURT**

This is an appeal (with leave) by the first defendant from a decision of the superior court (Mrs. Khaminwa, a Commissioner of Assize) given on **30 January, 2001**.

By a plaint dated **27 November, 2000**, the plaintiff sued the first defendant, **Kenya Power & Lighting Company Limited** and the second defendant, **Electricity Regulatory Board** seeking declarations concerning the supply of electricity to the plaintiff and various consumers of electricity in Mombasa.

The plaintiff also filed an application on the same day to file the suit as a representative suit.

This application was granted on the same day and so was an injunction. No notice of appeal was given on behalf of the appellant but by a notice of preliminary point dated **5 December** and filed on **6 December**, the first defendant contended that the Court had no jurisdiction, that the orders sought were not available and the levies and decisions made by the first defendant cannot be challenged. The preliminary point was heard. No submissions were made on behalf of the appellant with regard to the suit being representative.

Accordingly, it was not decided or dealt with in the ruling of the learned Commissioner dated and delivered on **30 January** from which ruling this appeal has been preferred.

It is therefore a little unkind and unjustified for this point to be taken from the ruling which is the subject

of the appeal when the point was not argued before the superior court. The appellant entered an appearance on 6 December when it knew or ought to have known that the order in respect of the suit being a representative one had already been made on 27 November . No notice of appeal was filed against the decision of 27 November while the notice of appeal that was actually filed was against the decision given on 30 January. This was done on 1 February . As stated earlier, the decision of **30 January** from which the present appeal is brought does not deal with the question of the representative order.

On the hearing of the appeal, it was sought to argue that the superior court erred in allowing the plaintiffs to sue in a representative suit. But this was not part of the decision of 30 January which is the subject of the appeal; no appeal having been preferred from the decision of the superior court of 27 November which made the order for a representative suit. No other points were raised or canvassed before us.

That being so, the appeal directed against a representative order having been made on 27 November was not addressed and any attempt to do so would be incompetent. For the reasons above stated, this appeal fails and is dismissed with costs.

***Dated and delivered at Nairobi this 22nd day of February, 2002.***

***J.E. GICHERU***

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***JUDGE OF APPEAL***

***A.A. LAKHA***

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***JUDGE OF APPEAL***

***E. O'KUBASU***

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***JUDGE OF APPEAL***