Nairobi Skyline Properties Limited & another v Kenya Power and Lighting Company; Energy and Petroleum Regulatory Authority (Interested Party) (Civil Case 19 of 2023) [2024] KEHC 1914 (KLR) (Civ) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 19 OF 2023

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

NAIROBI SKYLINE PROPERTIES LIMITED ..... 1ST PLAINTIFF

LEO INVESTMENTS LIMITED ..... 2ND PLAINTIFF

AND

KENYA POWER AND LIGHTING COMPANY ..... DEFENDANT

AND

ENERGY AND PETROLEUM REGULATORY AUTHORITY .... INTERESTED PARTY

RULING

1. Nairobi Skyline Properties Limited and Leo Investments Limited (hereafter the 1st and 2nd Plaintiffs) instituted this suit against Kenya Power and Lighting Company (hereafter the Defendant) by way of the plaint dated 19th September 2023 seeking general, punitive/exemplary and special damages and a permanent injunction. The claim was founded on negligence and breach of contract, arising allegedly from the Defendant's wrongful disconnection of electricity to the Plaintiffs' premises.

2. The plaint was filed simultaneously with a Notice of Motion of even date in which the Plaintiffs sought interlocutory injunctive and conservatory orders against the Defendant.

3. Subsequently, the Defendant filed the notice of preliminary objection dated 13th October 2023 challenging the competence of the suit. The objection was to the following effect :

> " TAKE NOTICE that the defendant shall at the earliest opportune time raise a preliminary objection that this Honourable Court lacks jurisdiction to hear and determine this dispute and suit as against the defendant and together with all consequential orders should be struck out with costs as the same offends the following provisions:
>
> 1. Section 6 of The *Civil Procedure Act*, CAP 21 of The Laws of Kenya.
> 2. Sections 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 25; 36; 40; 42; 159(3); 160(3) and 224(2)(e) of the *Energy Act*, 2019 together with, 3. Regulations 2, 4, 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations, 2012* as read together with,
> 4. Article 159(2)(c) and 169(1)(d) and (2) of the *Constitution* of Kenya, 2010 and,
> 5. Sections 9(2) and (3) of the *Fair Administration Act*, 2015. (sic)

4. The court directed that the preliminary objection be heard first following which the parties filed written submissions.

5. In support of the preliminary objection, counsel for the Defendant anchored his submissions on the decisions in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR and *Kenya Ports Authority v Modern Holdings [E.A] Limited* [2017] eKLR as well as Section 5 of the *Civil Procedure Act* (CPA) regarding the civil jurisdiction of the court.

6. Counsel proceeded to submit that the jurisdiction of the court to entertain the present suit is expressly limited by the *Energy Act* 2019, which Act establishes both the Energy & Petroleum Regulatory Authority (the Authority) and the Energy & Petroleum Tribunal (the Tribunal). That the *Energy Act* as read with the *Energy (Complaints and Disputes Resolution) Regulations, 2012* (the Regulations) confer upon the Authority jurisdiction to hear disputes of the nature now before the court ; while Section 36 of the *Energy Act* bestows upon the Tribunal the jurisdiction to entertain certain disputes pertaining to the energy and petroleum sector as well as appeals against decisions rendered by the Authority.

7. Counsel argued that the dispute herein therefore exclusively falls within the jurisdiction of the Authority and in the alternative, the Tribunal. In addition, counsel for the Defendant citing Section 9(2) and (3) of the *Fair Administrative Action Act*, 2015 submitted that the Plaintiffs ought to have exhausted all alternative dispute resolution mechanisms available first, before moving the court. On those grounds, the court was urged to dismiss the suit with costs.

8. In response, the Plaintiffs' counsel anchored his submissions on the oft cited case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 on the nature of a preliminary objection. He argued that the grounds raised by the Defendant's do not constitute such preliminary objection not being pure points of law. Counsel further relying on the decision in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 regarding the centrality of jurisdiction.

9. In addition, citing the decisions in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* [2017] eKLR and *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR counsel contended that the doctrine of exhaustion of alternative dispute mechanisms does not oust the courts' jurisdiction. Counsel stating that where a constitutional right has been violated, the High Court is

mandated to intervene, notwithstanding the fact that the dispute at hand fell within the purview of the *Energy Act*. Counsel here citing the case of *Alan E Donovan v Kenya Power and Lighting Company* [2019] eKLR in support of the proposition. In summation, counsel submitted that the High Court is clothed with original jurisdiction to entertain the present suit and therefore urged that the preliminary objection be dismissed with costs.

10. The interested party did not participate in the hearing of the preliminary objection.

11. The court has considered the notice of preliminary objection and the rival submissions and authorities cited by the parties. The preliminary objection challenges the jurisdiction of the court to entertain the Plaintiffs' suit.

12. Regarding the nature of a preliminary objection, the definition by court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 is to the effect that:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."

13. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

> " It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."

14. Apart from asserting that the preliminary objection did not raise a pure point of law, the Plaintiff's counsel did not demonstrate the basis of the claim, whereas the plaint speaks for itself concerning the nature of the claim against the defendant. In the court's view, the preliminary objection as presented raises a pure point of law, namely, a challenge to the court's jurisdiction.

15. It is settled principle that jurisdiction is everything and that without it, a court cannot purport to take any action in a matter. This position was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:

> " Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):
>
> > "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it

does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/ a Diani Tour Travel* (2016) eKLR in the following words:-

> "In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.
>
> ...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer." (Emphasis ours)
>
> Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & another v David Mwangi Gichure & another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-
>
> > "When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.
>
> We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing."

16. Some of the stated objects of the *Energy Act* 2019 include provision of a legal framework for the regulation, production, supply, and use of electricity and for connected purposes. Pursuant to the Fourth Schedule of the *Energy Act*, 2019, the functions of the Authority, under Section 9 of the Act include the regulation of transmission, distribution, supply, and use of electrical energy. The Authority's powers under Section 11 of the *Energy Act* 2019 include the power to make and enforce directions to ensure compliance with the Act and with the conditions of licenses issued under the Act; to issue orders in writing requiring acts or things to be performed or done; to prohibit acts or things from being performed or done and to prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled; to issue orders or directions to ensure compliance with the Act; and to impose sanctions and civil fines for non-compliance.

17. Sections 36 and 37 prescribes the jurisdiction of the Tribunal as follows:

> " Section 36:
>
> "1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
>
> (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
>
> (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
>
> (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
>
> (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
>
> (6) The Tribunal shall hear and determine matters referred to it expeditiously.
>
> Section 37:
>
> (1) The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.
>
> (2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a court of law.
>
> (3) Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.
>
> (4) The law applicable to applications for review to the High Court in civil matters shall, with the necessary modifications or other adjustments as the Chief Justice may direct, apply to applications for review from the Tribunal to the High Court.

18. The *Energy (Complaints and Dispute Resolution) Regulations, 2012* (the Regulations) enacted under the *Energy Act* 2006 remained in force pursuant to the provisions of Section 224 (1) (e) of the *Energy Act* 2019. Regulation 2 and 4 of Regulations provide inter alia that: -

> " 2. These regulations shall apply to any person who has a complaint or a dispute regarding any license, permit, contract, code, conduct, practice, or operation of any party of any matter regulated under the Act.
>
> .....
>
> 4. These regulations shall apply to complaints and disputes in the following areas –
>
> (a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures,

metering, new connections and extensions, reconnections, quality of services, quality of supply, tariffs, way leaves, easements, or right-of-ways in relation to the generation, transmission, distribution, supply and use of electrical energy.

(b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

(c) any other activity and or matter regulated under the Act".

19. Having reviewed the pleadings herein, and without going into the merits of the dispute, it is apparent that the Plaintiffs' claim though founded on negligence and breach of contract, arose from alleged wrongful billing, disconnection of power supply and alleged failure on the part of the Defendant to restore power to the Plaintiffs' premises. Hence, pursuant to Sections 11, 23, and 24 of the *Energy Act* 2019 as read with Regulations 2 and 4 of the Regulations and applying the dicta in *Speaker of the National Assembly v Njenga Karume* [1992] 1 KLR 425, it is clear that at the time of the filing of the suit there existed a prescribed procedure for processing a dispute of the kind pleaded by the Plaintiff against the Defendant. Under the *Energy Act* 2019, the initial jurisdiction for entertaining the Respondent's grievance in the first instance lay with the Authority, and if aggrieved with EPRA's decision, to prefer an appeal to the Tribunal and finally to this Court.

20. The foregoing position represents settled jurisprudence to be found in multiple decisions of this court including *Kenya Power & Lighting Co. Ltd v Samuel Mandere Ogeto* [2018] eKLR, *Bernard Nyakundi Osugo v Kenya Power & Lighting Co. Ltd* [2021] eKLR, *Mount Kenya Safari Club Ltd v Kenya Power & Lighting Co. Ltd* [2021] eKLR, *Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd* [2017] eKLR.

21. The rationale behind this line of authorities was spelt out by the Court of Appeal in the case of *Mutanga Tea & Company Ltd v Shikara Limited & another* [2015] eKLR. The Plaintiff therein was aggrieved by decisions made inter alia by a local authority under the *Physical Planning Act*, in connection with a development it was opposed to. Eschewing the mechanism for redress stipulated in Section 29 of the *Physical Planning Act*, the aggrieved party filed an action in the High Court. The action was struck out in limine on account of a jurisdictional challenge raised by the defendants by way of a preliminary objection.

22. The Court of Appeal dismissed the appeal brought by the aggrieved party, observing that the *Physical Planning Act* did not envisage the possibility that some aggrieved parties could sidestep the dispute resolution mechanism under the Act to bring their grievances directly to the High Court. I find it useful to quote in extenso the reasoning of the Court of Appeal in that case:

> "The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the *PPA* and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance.
>
> This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. *Speaker of the National Assembly v Karume* (*supra*), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition

as required by the *Constitution*. In granting the order, the Court made the often-quoted statement that:

> "[W]here there is a clear procedure for the redress of any particular grievances prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed."

(See also *Kones v Republic & another Ex Parte Kimani Wa Nyoike & 4 others* (2008) 3 KLR (ER) 296).

It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the *Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the *Constitution* has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the *Constitution* requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the *Constitution* would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the *Constitution* in a way that will accommodate the alternative dispute resolution mechanisms.

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In *Rich Productions Ltd. v Kenya Pipeline Company & another*, Petition No. 173 of 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> "The reason why the *Constitution* and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not." (Emphasis added).

23. The Supreme Court on its part in *Albert Chaurembo Mumba &7 others v Maurice Munyao & 148 others* [2019] eKLR stated that: -

> "In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction

to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute..

..... To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute."

24. *Black's Law Dictionary* 10th Edition defines the doctrine of exhaustion as follows:

> " ...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.

25. Flowing from the foregoing, it is the court's considered view that although the High Court enjoys unlimited original jurisdiction to handle civil disputes, where a distinct dispute resolution mechanism has been prescribed by the law, such mechanism ought to be exhausted before a party can move the High Court. Consequently, the Plaintiffs ought in the first instance to have availed themselves of the dispute resolution mechanism provided under the *Energy Act* and Regulations made thereunder before approaching the High Court

26. The notice of preliminary objection dated 13th October, 2023 is upheld. Consequently, the Plaintiffs' suit together with the motion dated 19th September 2023 are hereby struck out with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Ms. Amuka h/b for Mr. Manwa

For the Defendant: N/A

C/A: Carol