Kahare v Kenya Power & Lighting Company Ltd (Civil Appeal E030 of 2022) [2024] KEHC 3175 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E030 OF 2022

DKN MAGARE, J

MARCH 15, 2024

BETWEEN

ARTHUR KAMAU KAHARE ..... APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LTD ..... RESPONDENT

(Being an appeal against the Ruling of Hon. E. M. Gaithuma delivered on 9th June, 2022 in Nyeri SCC COMM. No. E040 of 2022)

JUDGMENT

1. The appeal is a straight forward one. The appeal arose from the decision of Hon. E. M. Gaithuma given on 9/6/2022 from Nyeri SCC. COMM. E040 of 2022. It relates to the decision of the lower court declining jurisdiction. The Appellant appealed against the entire ruling on the following grounds;

    a. That the learned trial magistrate erred in law and in fact in failing to appreciate that there was no privity of contract between the appellant and the respondent and as such the matter was not one that could be referred to the Energy & Petroleum Tribunal.

    b. That learned trial magistrate erred in law and in fact in holding that she lacked jurisdiction to handle the matter as this is a matter on a simple debt recovery which is right within her jurisdiction.

    c. That the learned trial magistrate erred in law and in fact in failing to appreciate that there is nothing constitutional in a case of a simple debt recovery.

    d. That the learned trial magistrate erred in law and in fact in failing to appreciate that the issues raised did not meet the threshold of a preliminary objection as the issues raised required factual aspects calling for proof during a full trial evidencing that the matter is rightfully within her jurisdiction.

e. The learned trial magistrate erred in law and in fact in holding that the issues raised fell within the jurisdiction of the energy tribunal yet the claimant correctly prayed for a simple debt recovery/refund which is not within the powers of the energy tribunal.

2. The respondent raised a preliminary objection that;

a. This Honourable Court lacks jurisdiction to hear and determine this suit and should be struck out with costs as the same offends the provisions of sections 3, 10; 11(e), (f), (i), (k) & (l); 23; 36; 40; 42; 159(3); 160(3) and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2)(c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010 and sections 9(2) and (3) Fair Administration Act, 2015.

Analysis

3. The parties filed submissions which I shall subsume in the analysis in view of their repetitive nature.

4. This appeal is unique in that the very grounds of Appeal will decide the matter in a rather profound way. The issue was whether the court had jurisdiction to hear the matter in the Small Claims Court.

5. In short the admitted facts were that the Appellant was a landlord to Esther Njeri Thairu on land parcel number Aguthi/Gatitu/2163. She left arrears which apparently the landlord settled. He is now claiming the said amount.

6. It is important to note that jurisdiction is everything. When a court has no jurisdiction, it cannot handle the matter.

7. The Court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuses issues. This improper practice should stop".

8. In a Tanzanian case of Hammers Incorporation Co. Ltd –Vs- The Board of Trustees of the Cashewnut Industry Development Trust Fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case (Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others –V- The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

9. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> ....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
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> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

10. A Tanzania Court of Appeal sitting in Dar es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010),(Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

11. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro v Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

12. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

13. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, where the Supreme Court stated as doth: -

> "(68) A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

14. The court decided on an understanding that where there is a procedure provided then, that procedure should be followed. In the case of the Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling) where the Court of Appeal stated as doth: -

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions."

15. The respondent must have had in mind the decision of James Kibugi Githinji v Kenya Power & Lighting Company Limited [2016] eKLR, where justice A. Mbogholi Msagha, as then he was stated as doth: -

> "The dispute between the parties herein is related to charges. Going by paragraph 6 of the plaint cited above, the offending action by the defendant which the plaintiff has complained of was before the plaintiff came to court. By then it had not been referred to the Commission. It follows therefore that by the provisions of sub section (4) above, this court is divested of jurisdiction which is clearly conferred upon the Commission."

16. The decision above is not in all fours with the case herein. There are no charges nor are there issues of disconnection. The same applies to the case Royal Reserve Management Company Ltd v Kenya Power & Lighting Company Ltd [2017] eKLR, where the court stated as doth: -

> "
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> " 19. Parliament in its wisdom set up the ERC to divest mainstream courts of some of the cases it would hear relating to the provisions of the *Energy Act*. The preliminary objection raised is grounded on the provisions of section 61(3) of the *Energy Act*, 2006. The said section provides as follows:-
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> "If any dispute arises as to –
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> (a) any charges; or
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> (b) The application of any deposit; or
>
> (c) any illegal or improper use of electrical energy; or
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> (d) any alleged defects in any apparatus or protective devices; or
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> (e) any unsuitable apparatus or protective devices;
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> it shall be referred to the commission." (emphasis added).
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> 20. Section 61(4) thereof provides that:-
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> "Where any dispute referred to in sub section (3) has been referred to the Commission, or has otherwise been taken to court before a notice of disconnection has been given by the licencee, the licencee shall not exercise any of the powers conferred by this section until final determination of the dispute ..." (emphasis added).
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> 21. Section 6 of the *Energy Act* provides that the powers of the Commission include inter alia, investigating complaints or disputes between parties with grievances over any matter required under the *Energy Act*."

17. The most recent thinking of the Supreme Court court is as set out in the case of Modern Holdings (EA) Limited v Kenya Ports Authority [2020] eKLR where the held as doth:-

> " 57. In concluding on this issue, it is trite that the question of jurisdiction can be raised at any stage of the proceedings but we have shown that in the instant case, the Court of Appeal fell into error when it closed its eyes to an express constitutional jurisdiction and relied on another, conferred by a statute (as read with a general constitutional provision) to dismiss the appeal before it. Neither Article 159(2)(c), on which Section 62 is anchored nor Article 165(3)(a) should be read so as to supersede the other and we have shown why. They are to be read together and understood to confer concurrent jurisdiction. To that extent, we agree with the appellant on the application of Article 165(3)(a) to this case while also agreeing with the respondent that Section 62 is not unconstitutional."

18. It is my understanding that jurisdiction is everything. The court is bound to take jurisdiction where it has and down its tools where it does not have jurisdiction. My senior brother Nyarangi JA, as then

he was, immortalised these words, in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR as follows: -

> " 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

19. The appellant filed an 8-paragraph memorandum of appeal. It is repetitive and long winded. It should be concise. Under order 42 rule 1 of the Civil Procedure Rules, a memorandum of appeal should not be argumentative. The said provision states as doth: -

> " Form of appeal
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> (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

20. The court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

21. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

22. The memorandum of appeal raises only one issue, that is,

> " The court erred in finding that it had no jurisdiction to hear and determine the case before it."

23. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

24. Judicial authority is vested in the court. Article 1(3) of *the Constitution* states as doth: -

> "(3). Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution;
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> a. Parliament and the legislative assemblies in the county governments;
>
> b. the national executive and the executive structures in the county governments; and
>
> c. the Judiciary and independent tribunals."

25. The *Judicature Act* and the Magistrates Court Act give the lower court jurisdiction over civil matters. However, there are clawbacks in certain other Acts. Section 9 of the *Energy Act* 2019 establishes the Energy and Petroleum Regulatory Authority.

26. The long title of the *Energy Act* 2019 is "an Act of Parliament to consolidate the laws relating to energy, to provide for National and County Government functions about energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and

downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes."

27. Dispute resolution related to debt is not among the disputes the Energy and Petroleum Regulatory Authority is vested with. The right to appear in court is an inalienable right. It cannot be taken away by inference. Any act prohibiting the court from doing a certain act shall say so expressly. Article 24(1) is more explicit in that respect. It provides as doth: -

> " 1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;
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> a. the nature of the right or fundamental freedom;
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> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation;
>
> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

28. From the nature of dispute, the parties involved in Energy and Petroleum Regulatory Authority are the entities in that field. It is a highly specialized field. Individual consumers are protected as a group. The Respondent, under the new act is the user of energy. It is supplied with energy to connect its customers. This is not even the dispute between parties. It is the land lord suing the respondent over infractions of the tenant to circumvent section 12 of the *Small Claims Court Act*.

29. The Act does not envisage the end of the food chain, where small retailers are to be before the tribunal. The tribunal has no capacity to handle disputes of the nature that arise on a day to day.

30. The courts including the Court of Appeal have dealt with the issue, even during the regime of the Electric Power Act, 1997 (No. 11 of 1997. This was repealed by the *Energy Act* 2006. The latter was repealed by the *Energy Act*, 2019. The Energy and Petroleum Authority is not a tribunal envisaged under Article 1(3) of *the Constitution*. It has no judicial function.

31. It cannot purport to hear disputes on Refund of amounts lawfully paid to the respondent. That is within the purview of the Magistrates court Act. subrogation and the negligence dispute. The act deals with the energy entities that have the means and wherewithal to travel to Nairobi to deal with the upstream and middle stream energy issues including down stream issues. Peripheral issues including positioning of poles, removal of poles, loses due to adulterated fuel, faulty power lines and such minor issues shall remain within the province of this court and the magistrate's court.

32. In the case of Robai Kadili Agufa & another v Kenya Power & Lighting Co Ltd [2015] eKLR, the court, E.C. Mwita stated as doth: -

> "On the question of jurisdiction, counsel cited a decision of the Court of Appeal in the case of Kenya Power and Lighting Company Ltd vs Kiprino Kosgei Civil Appeal No.333 of 2005 (Eldoret), to show that the court has the necessary jurisdiction to deal with the dispute before it. He further submitted that the applicants are ready and willing to pay for

electricity on pre-paid or postpaid basis during the pendency of this appeal from the date of re-connection.

33. In James Mwaura Ndung'u v Kenya Power and Lighting Co. Ltd [2016] eKLR, the court was of the view that the disputes related to certain disputes should be referred to the commission (now authority). The court, Justice Dr. Sergon stated as doth: -

> " 6. It was also argued that the Electric Power Act stood repealed as of 7th July 2007, therefore the suit which was dismissed was filed under the regime of the *Energy Act* Cap 314 and not the repealed Electric Power Act no. 11 of 1997. Section 61(3), states that when supply of electrical energy may be refused or discontinued: if any dispute arises as to
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> a. Any charges or
>
> b. The application of and deposit,
>
> c. Any illegal improper use of electrical energy or
>
> d. Any illegal defects in any apparatus or protective devices or
>
> e. Any unsuitable apparatus or protective devices, it shall be referred to the commission.

34. That case turned on its own decision. The law which is binding on this court and the court below is set of in Kenya Power and Lighting Company Ltd vs Joseph Kiprono Kosgei Civil Appeal No.333 of 2005, where the court stated as doth: -

> " ..., 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:
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> "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."
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> 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:
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> "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:
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> "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..."

35. The nature of the case filed by the plaintiff does not deal with metering, disconnection or supply. It is a dispute of refund of money paid by the landlord on behalf of the defaulting tenant.

36. In Eldoret White Castle Motel Limited v Kenya Power And Lighting Company Ltd [2010] eKLR, the Court of Appeal was of the view that matters outside the metering are outside the remit of the tribunal. The court of Appeal stated as follows: -

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

37. The reading of both the repealed act and the *Energy Act*, 2019, I am certain that the court below erred in disregarding binding Court of Appeal decisions. To that extent the court erred. However, the court disregarded another crucial aspect- there was no claim before it.

38. The Appellant paid power to the Respondent. If he was paying for himself or on behalf of someone else, it is purely a dispute between the landlord and that tenant. The Respondent has no role in it. It is thus not necessary to reinstate the matter for hearing.

39. I am aware of the postualtions by Hon. Justices C.B. Madan, C.H.E Miller And K.D Potter, JJA in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR had this to postulate: -

> " Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.
>
> "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219."

40. There is nothing useful to go to trial. The debt paid was for the tenant. Under section 12 of the Small Claims Act disputes with tenants cannot be escalated to the small claims court. The same cannot be circumvented by suing Kenya Power. There was simply no suit capable of being heard.

41. It is not that the dispute ought to be dealt with at the Authority but there is no dispute between the parties herein. It is a waste of judicial time to send it back for striking out.

42. Consequently, I find there is no merit in this appeal and dismiss the same in limine.

Determination

43. The upshot of the foregoing is that I make the following orders:-

a. I find that the Appeal lacks merit and is accordingly dismissed with costs to the Respondent.

b. By admission that there was no privity of contract, the suit in the Small Claims Court is accordingly dismissed with costs.

c. Costs of 65,000/= to the Respondent.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF MARCH,2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Ms. Thaithi