



**LG Kamweti Advocate v Kenya Power & Lighting Company Limited & another (Tribunal Appeal EPA/E005 of 2022) [2022] KEET 788 (KLR) (Civ) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEET 788 (KLR)

**REPUBLIC OF KENYA  
IN THE ENERGY & PETROLEUM TRIBUNAL  
CIVIL**

**TRIBUNAL APPEAL EPA/E005 OF 2022**

**D.K MWIRIGI, VICE CHAIR, B.H WASIOYA, F. M KAVITA, SAMUEL  
MAINA KARANJA, D JEMATOR & F.S IBRAHIM, MEMBERS**

**OCTOBER 5, 2022**

**BETWEEN**

**LG KAMWETI ADVOCATE ..... APPELLANT**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF ENERGY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. This appeal arises from an application made on May 28, 2014 by the Appellant, Mr. Leonard Gethoi Kamweti, to the First Respondent, Kenya Power and Lighting Company (KPLC), for electricity supply to his property in Ongata Rongai comprising 48No. 2 bedroom residential apartments.
2. In response to the said application, the 1st Respondent, *vide* their letter dated 6th June 2014, offered to provide an 8 kVA three phase connection subject to payment of KShs. 79,511. Following payment by the Appellant, the 1st Respondent installed a three-phase service and two single phase meters. The Appellant expressed dissatisfaction for installation of two single phase meters and not the expected three phase meter.
3. Following several failed attempts to obtain a three-phase meter from the 1st Respondent, the Appellant sought recourse from the Second Respondent being the Energy and Petroleum Regulatory Authority (EPRA) on November 11, 2020.
4. Despite several interventions by the 2nd Respondent, the matter remained unresolved, prompting the Appellant to file this Appeal on May 13, 2022.



## **Appellant's Memorandum of Appeal**

5. On May 28, 2014 the Appellant applied to the 1st Respondent for electricity supply to his property in Ongata Rongai, Land Reference Number Ngong/Ngong/89223, on which he was developing 48No. 2 bedroom residential apartments.
6. Vide a letter dated June 6, 2014, the Respondent advised the Appellant that a three phase 8 kVA service line would be installed at the subject property upon payment of KShs. 79,511.
7. The Appellant paid the required amount on January 9, 2015 after which the 1st Respondent tapped three phase power supply from a nearby pre-existing three phase line, installed two single phase energy meter instead of the required, agreed and paid for three phase meter, with the installation technicians claiming that the three phase units were not in stock.
8. When the Appellant asked the 1st Respondent to complete the agreed exercise by supplying and installing the accompanying three phase meter, the 1st Respondent declined to do so and instead sent the Appellant a further "bill" of KShs. 797,947/=, pursuant to new application under Ref. No A21562021010005, as a condition for supply and installation of the missing three phase meter.
9. The Appellant made several attempts to get the 1st Respondent to review what he considered excessive "billing" of KShs. 797,947/= to enable provision of the three-phase meter and address what the Appellant viewed as unfair treatment of his issue, all to no avail.
10. Consequently, the Appellant referred the matter to the 2nd Respondent on October 14, 2021 vide a detailed Memorandum of Complaint dated October 12, 2021. The matter was logged in EPRA's system as Complaint Ref. No 21653630 of 2021.
11. The 2nd Respondent wrote three emails on 15th October, 29th November and December 15, 2021 instructing the 1st Respondent to address the Appellant's complaint, which emails yielded no response.
12. The Appellant avers that the 2nd Respondent erred by delaying and or failing to make a determination on the complaint or any issue arising in the discharge of its mandate, contrary to Section 7 (2) (j) of the Fair Administration of Justice Act No. 4 2015, Regulation 9 of the [\*Energy \(Complaints and Disputes Resolution Regulations, 2012\*](#).
13. The Appellant therefore prays that the Tribunal:
  - a. Reviews the 2nd Respondent's failure to exercise its powers as mandated by the [\*Energy Act 1 of 2019\*](#).
  - b. Orders the 1st Respondent to install the required three phase post-paid meter on the Appellant's property as initially agreed without calling for unjustified, inexplicable exorbitant and oppressive revised "bills".
  - c. Makes such other orders that it deems fit to deter such further conduct by the Respondents.

## **First Respondent's Reply**

14. The 1st Respondent avers that it is charged with monopoly in its duty as a distribution licensee of supplying consistent and steady electricity to millions of Kenyan consumers in their homes.



15. The 1st Respondent avers that the application by the Appellant on May 28, 2014 declared the load at the time to be 5 kVA and that details provided at the application stage did not include any three phase appliances. Further that the appliances captured were bulb, socket outlet, cooker and water heater.
16. The 1st Respondent avers that based on that application by the Appellant, they proceeded to issue a quotation of KShs. 79,511 to cover the 5 kVA load.
17. The 1st Respondent admits that they installed two single phase meters at the Appellant's premises and closed the scheme.
18. The 1st Respondent contends that the Appellant having constructed an apartment at Plot No. 624/8 in Ongata Rongai, he applied for an additional 3 phase-meter through reference A21562021010005, the captured load being 89 kVA.
19. The 1st Respondent contends that the applied load was beyond the capacity of the existing transformer and thus issued a quotation for the extra capacity as per the 1st Respondent's connection policy. The 1st Respondent further contends that there was need to uprate transformer from 200 kVA to 315 kVA as well as the three phase service line from a 25 square millimetre (sq. mm) to 70 sq. mm cable.
20. The 1st Respondent avers that for those reasons they issued a quotation of KShs. 797,947/- on February 8, 2021.
21. The 1st Respondent avers that they have powers under the *Energy Act, 2019* to issue the terms and conditions which may include payments of whatever nature to be complied with before supply is availed.
22. In response to the prayers sought by the appellant, the 1st Respondent avers that the same are untenable and will only amount to engaging the Tribunal in an academic exercise.
23. The 1st Respondent categorically maintains that the Appellant's suit is ambiguous, unclear and/or wanting in material particulars and hereby seeks of the Appellant further and better particulars of the cause of action.
24. The 1st Respondent avers that the appellant is not an expert in the energy sector and has not produced any expert report on his allegations therefore the same amount to mere allegations meant to paint the 1st respondent in bad light.

### **Second Respondent's Reply**

25. The 2nd Respondent avers that the Appellant lodged a complaint with the Authority on October 14, 2021 seeking installation of a three-phase electrical energy meter.
26. The 2nd Respondent wrote to the 1st Respondent on October 15, 2021 via email to address the Complaint raised by the Appellant.
27. Further, on 29th November and December 15, 2021, the 2nd Respondent sent emails to the 1st Respondent asking them to provide responses to the said complaint, both to no avail.
28. The 2nd Respondent contends that the Appellant, being dissatisfied with the handling of his complaint at the Authority, filed the appeal on grounds which contain material misrepresentation of facts, material non-disclosure of facts and bare allegations which cannot provide a basis for grant of the prayers sought.
29. The 2nd Respondent contends that Regulation 7 (1) of the *Energy (Complaints and Disputes Resolution) Regulations, 2012* provide that if any complaint is not resolved to the satisfaction of the



complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.

30. Further, the 2nd Respondent contends that Regulation 9 (1) of the [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#) states that a person who wishes to refer a dispute to the Commission ("the plaintiff") shall—
  - a. inform the respondent in writing of his intention to refer the dispute; and
  - b. furnish the respondent with copies of all supporting documents that are to be filed with the Commission.
31. The 2nd Respondent avers that any direction to award the orders prayed by the Appellant or anything done or intended to be done to the 2nd Respondent would be prejudicial since the 2nd Respondent was not granted an opportunity to mediate the dispute between the Appellant and the 1st Respondent.
32. The 2nd Respondent avers that the Appellant has no valid grounds in the Memorandum and Grounds of Appeal to warrant the prayers sought as the Appellant has not fully complied with the provisions of the [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#), before invoking the jurisdiction of the Tribunal.

#### **Appellant's rejoinder to Respondents' Replies**

33. The Appellant contends that the 1st Respondent through its submissions dated August 26, 2022 opened two new false charges against the Appellant:
  - a. The power supply contract of 6-6-2014 should be set aside for alleged late payment of the electricity connection fee by the Appellant.
  - b. The power supply contract of 6-6-2014 should be set aside for alleged late construction of the apartment by the Appellant.
34. The Appellant stated that he had received four demands to pay connection fees by the 1st Respondent:
  - a. The first connection demand printed on November 25, 1998 attached as LGK-1 was for connection of a three phase 7 kVA service line to supply 8 x 3 bedroom apartments. It was sent as an un-enveloped open "Z" folded un-dated, unstamped slip of paper signed by J. N Mwaiya (Mrs) and was received by the Appellant on March 3, 1999, five months after the date of printing. It was paid for and the power was installed 4 months after payment.
  - b. The second new connection demand was printed on October 25, 2002 and attached as LGK-2. It was open "Z" folded un-enveloped, undated, unstamped misaddressed slip of paper signed by J. K. Biwott. It circulated as undelivered in the post office and was eventually received by the Appellant on May 15, 2002, six months after the date of printing. It was paid for and the power was installed 4 months after payment.
  - c. The third new connection was printed on February 25, 2011 and attached as LGK-3. It was for a three phase 7 kVA service line, to serve 8 x 3 bedroom and 20 x 2 bedroom apartments. It was an open "Z" folded unenveloped, undated, unstamped and misaddressed slip of paper signed by J. K. Maritim. It was received by the Appellant on 7th June 2011, four months after the date of printing. It was paid for and the power was installed 5 months after payment.
  - d. The fourth new connection demand, being the one for the instant and present matter in contention, was printed on June 6, 2014 attached as LGK-4. It was for a three phase 8 kVA



service line. It was to serve 30 x 2 bedroom apartments. It was send as an open “Z” folded, undated, unstamped slip of paper signed by D Maore. It was received by the Appellant on December 11, 2014, five months after the date of printing. It was paid for on January 9, 2015, immediately after the Christmas and New Year festivities. The power was installed 6 months later on May 9, 2015 but the paid for agreed 3 phase meter was not installed.

35. The Appellant contends that no notice of breach relating to late payment was ever hinted to as this is an unsustainable afterthought argument.
36. The Appellant denies the 1st Respondent’s averment that construction of the Appellant’s property was done late leading to cancellation of the supply contract, and states that a complete meter box had been fixed on the structure and that he took photos of agents of the 1st Respondent on May 9, 2015 installing an electric pole next to the property.

### **Appellant’s Submissions**

37. The Appellant submits that the 2nd Respondent’s powers are statutory. EPRA owes their existence and the limitations on exercise of their powers are set out in an Act of Parliament. The 2nd Respondent can only do those things permitted and cannot do those things that are not provided for as that would be ultra vires.
38. The Appellant relied on Section 2 of the Fair Administrative Action Act, and submitted that “failure to decide” includes “refusing to decide”. The result of which has deprived the Appellant of the appropriate electric power needed for the developments and consequently needlessly endangered the Appellant’s economic rights protected by Article 46 (1) (c) of *the Constitution* of Kenya, 2010.
39. The Appellant submits that the 1st Respondent alleges that there is no mention of 3 phase equipment. He further submits that the purpose of a robust 3 phase meter is to enable installation of 30 single phase sub-meters for the apartments under the KPLC main meter. This would enable the developer to even and balance out power in the block with each floor getting power from a separate phase.
40. The Appellant further submits that the attempt by 1st Respondent to hike its cost by 1,000% was totally lacking in transparency, violating Article 10 of *the Constitution*, the provisions of the *Energy Act* No. 1 of 2019 which requires fair, transparent and equitable billing and provisions of Section 6 of the *Consumer Protection Act* that declares void any variation of charges by a supplier in excess of 10%.
41. The Appellant submits that the 1st Respondent is bound by its own documents, contracts, word and deeds. He further submits that the 1st Respondent are estopped from imposing additional excessive charges. Therefore the 1st Respondent on the basis of KShs 79,511/- in the letter dated 6-6-2014 and fully paid, be ordered by way of specific performance to complete installing the missing appropriate three phase meter.

### **1st Respondent’s Submissions**

42. The 1st Respondent submitted on whether there was contract between the Appellant and the 1st Respondent and on whether there was breach of the supply contract by the 1st Respondent.
43. The 1st Respondent relied on *Black’s Law Dictionary* on what a contract as: An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.
44. The 1st Respondent also submitted essential components of a contract and relied on the case of *Garvey V Richards* {2011} JMCA 16 and *RTS Flexible Systems Ltd vs Moikerei Alois Muller GMBH & Co K. G.* {2010} UKSC 14.



45. The 1st Respondent submitted that from the Appellant's letter dated May 28, 2014, there is 5/14 evidence of willingness/intention to enter into a contractual/legal relationship with the 1st Respondent for supply of electrical energy. Further, the 1st Respondent issued the Appellant with a quotation which the Appellant paid on January 9, 2015. The 1st Respondent installed two single phase meters to the premises and closed the scheme.
46. The 1st Respondent submits that granting of the equitable remedy of specific performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an alternative. They relied on *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR.
47. Having established that there was a supply contract, the picture that emerges from the present case is on whether there was breach of the supply contract. The Appellant submits that the 1st Respondent breached their supply contract by failing to provide him with a three phase meter.
48. The 1st Respondent submits that it is clear from its letter of offer referenced as quoted on June 6, 2014 that an 8 kVA three phase service line was to be installed within the property of the appellant Plot No. 624/8.
49. The 1st Respondent further submits that a three phase service line does not necessarily imply requirement of a three phase meter. It is merely an indication of the customer's cumulative load requirement and load type. Single phase service line can only handle up to 3 kVA. Any load beyond 3 kVA requires a three phase service line.
50. The 1st Respondent also submits that the type of meter required is captured and specified on the supply enquiry form which the Appellant has failed to provide to indicate that indeed he was to be provided with a three phase meter.
51. Further, the 1st Respondent submits that the installation was subject to payment of KShs. 79,511/-. That consideration was eventually paid by the Appellant on January 9, 2015, being 6 months later after the quotation. The quotation letter had specifically stated that "if payment is not received within 90 days from the date of the quotation, then the terms may be revised". The upshot of the foregoing analysis is that the Appellant was the first to breach the contract and having done so was subject to pay extra for supply of electricity.
52. The foregoing notwithstanding, the 1st Respondent submits that they moved to the premises to effectively undertake the installation being two single phase meters as quoted for.
53. The 1st Respondent continues to submit that on or about February 8, 2021, the Appellant, having constructed an apartment at Plot No. 624/8 in Ngong RD/Ongata Rongai, applied for an additional 3 phase meter through Reference A21562021010005, the captured load being 89 kVA. It is important to note that the additional load application is independent of the initial application. The appellant requires additional load of 82 kVA for his apartment.
54. The 1st Respondent concludes their submissions by urging the Tribunal to find that there was no breach of contract on the part of the 1st Respondent and proceed to dismiss the claim with costs to the 1st Respondent.

## **2nd Respondent's Submissions**

- 55 The 2nd Respondent submits that the Appellant has not exhausted all the alternative dispute resolution (ADR) mechanisms provided by law before filing the case at the Tribunal.



56. The 2nd Respondent further submits that the issue before this Tribunal is a billing dispute between the Appellant and the 1st Respondent. They relied on Section 160 (3) of the [Energy Act](#), 2019.
57. Further, the 2nd Respondent submits that the Authority had original jurisdiction on this matter and relied on Sections 9 and 11 of the [Energy Act](#), 2019. They further relied on the case of Nanyuki HCCC No. E001 of 2021- [Mount Kenya Safari Club Limited vs Kenya Power and Lighting Company](#) (eKLR) and [Bernard Nyakundi Osuugo vs Kenya Power Limited](#), Nyamira HCCA No. E004 of 2020, eKLR.
58. The 2nd Respondent submits that before a dispute is heard by the Authority, licensees or permit holders (1st Respondent) are expected to have handled the complaint according to their internal dispute handling procedures before the dispute is heard by the 2nd Respondent. The 2nd Respondent relied on Regulations 5 (1), 7(1) and 9 (1) of the [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#).

### Issues for Determination

59. From the pleadings and submissions these are the issues that arise for our determination:
- a. Whether the Tribunal has jurisdiction to hear this appeal.
  - b. Whether the 2nd Respondent failed to exercise its powers as set out in the [Energy Act](#) No. 1 of 2019.
  - c. Whether the quotation of KShs. 797,949/- by the 1st Respondent was justified.
  - d. Whether the reliefs sought by the Appellant should be granted.

### Analysis and Determination

#### Whether the Tribunal has Jurisdiction and whether the 2nd Respondent failed to exercise its powers as mandated by the [Energy Act](#)

60. The 2nd Respondent raised an objection on the jurisdiction of this Tribunal stating that the Tribunal did not have jurisdiction to hear the Appeal as the Appellant had not exhausted all the dispute resolution mechanisms available before appealing to this Honorable Tribunal.
61. Jurisdiction is what legitimizes this Tribunal's adjudicatory powers over any energy and petroleum dispute before it. It is what breathes life, not just into the disputes before the Tribunal turning them into justiciable claims, but also validates the orders issued by the Tribunal in the final determination of the rights and interests of the parties to the dispute before the Tribunal. Accordingly, we must first satisfy ourselves that we have the jurisdiction to hear this appeal or we would be bound to down our tools. See [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1.
62. Section 36 (4) of the [Energy Act](#) 1 of 2019 as read together with Section 40 of the [Energy Act](#) 1 of 2019 has vested this Tribunal with jurisdiction to handle matters of energy and petroleum under the [Energy Act](#), 2019 or any other Act. It provides:
36. Jurisdiction of the Tribunal
- (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.
40. Appeals from decisions of the Authority



Where under this Act the provision is made for appeals from the decisions of the Authority or any licensing authority, all such appeals shall be made to the Tribunal, in accordance with the provisions of this Act.

63. The matter before us is a dispute between the Appellant and the 1st Respondent regarding failure of the 1st Respondent to install a three phase meter at the Appellant's premises and the revised quotation of KShs. 797,947/- sent by the 1st Respondent on February 8, 2021 as a condition precedent to installation of the three phase meter or 48 single phase meters.
64. It is not denied by either party that a complaint was lodged by the Appellant to the 2nd Respondent against the 1st Respondent's failure to install a three phase meter and that the Appellant was vehemently opposed to the 1st Respondent's second quotation of KShs. 797,947/-.
65. First, we have to establish if the complaints before the 2nd Respondent, were rightly placed before it. Regulation 4 of the *Energy (Complaints and Disputes Resolution) Regulations, 2012* provides that:  
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 service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
66. From the reference of the complaint to the 2nd Respondent on October 14, 2021, the following facts are clearly evident:
  - a. The Appellant is a consumer of the Respondent on a property in Ongata Rongai known as Ngong/Ngong/89223 (former 62418) for which there are two single phase accounts namely 14244161080 and 142444161205.
  - b. The annexed Enquiry for Supply of Electricity form dated May 25, 2014 provides details of the Appellant's application for a three phase power connection to supply 250 x 15W lighting points, 10 x 1kW fridges, 48 x 0.5 kW water pumps, 40 x 15 W TVs and 20 x 1kW cookers.
  - c. In response to the Appellant's application, the 1st Respondent in their letter dated 6th June 2014 advised that a three phase 8 kVA service line would be installed upon payment of KShs. 79,511/=.
  - d. The Appellant paid the required amount on January 9, 2015 after which the 1st Respondent's staff visited the property and asked the Appellant to purchase and install a 50 mm underground conduit pipe to be laid from the base of the pole to the meter box, which he did.
  - e. The 1st Respondent's staff left the service cable at the site and asked the Appellant to procure labour at the site to lay the cable from the pole to the meter board and they would then return to finalize the connection. Accordingly, the Appellant used his labour and drew the three phase cable through the conduit all the way to the meter board.
  - f. The 1st Respondent's staff visited the site again and finalized the connections but did not install the three phase post-paid meter which the Appellant expected.
  - g. Upon Appellant's visit to the 1st Respondent's office at Masai Mall to procure installation of the three phase meter, he was advised to make a fresh application, which he did by filling another Enquiry for the supply of electricity form dated November 11, 2020. The 1st Respondent's reference number for the new application was A21562020110022.





- h. After 6 months, the Appellant was informed that Application Ref. No. A21562020110022 had been cancelled and that he would have to make a fresh application again, this time for 48 meters.
  - i. The Appellant protested the 1st Respondent's requirement for 48 meters, preferring instead one three phase post-paid meter then he would install single phase sub-meters from local electrical suppliers. This was due to the averment by the Appellant that it was a matter in the public domain that the 1st Respondent was having tremendous problems supplying pre-paid meters to ordinary consumers.
  - j. Be that as it may, the Appellant proceeded to fill yet again another Enquiry for Supply of Electricity form dated February 8, 2021 (Application Ref. No. A21 562021010005). on the basis of the fresh application, the 1st Respondent gave a quotation of KShs 797,947/= vide letter dated March 17, 2021.
  - k. The Appellant objected to the new quotation vide his letter to the 1st Respondent dated March 19, 2021. All attempts by the Appellant to negotiate with the 1st Respondent for a more realistic amount bore no fruits, hence reference of the matter to the 2nd Respondent, which also yielded nothing.
67. The complaint by the Appellant refers to installation of a three phase post-paid meter and the quotation of KShs. 797,947/= which are provided for in Sections 154 and 142 of the *Energy Act*, respectively. Resolution of complaints and disputes arising therefrom fall under Regulation 4 of the *Energy (Complaints and Disputes Resolution) Regulations 2012*. It is clear that the complaint was rightly before the 2nd Respondent.
68. The 2nd Respondent submits that the Appellant was not rightfully placed before this Tribunal as he did not exhaust the ADR mechanisms before the 2nd Respondent.
69. The 2nd Respondent argues that the Appellant filed a complaint and not a dispute between the Appellant and the 1st Respondent before the 2nd Respondent.
70. It is important we clear the air on what is a dispute and a complaint before the 2nd Respondent.
71. B A Garner's *Black's Law Dictionary* (1999) defines a "dispute" to mean "a conflict or controversy especially one that has given rise to a particular lawsuit". Similarly, in the *Mavrommatis Palestine Concessions Case (Greece v Britain)* 1924 PCIJ (Ser. A) No 2 at 11, the Permanent Court of International Justice circumscribed the term "dispute" as denoting "a disagreement on a point of view of law or fact, a conflict of legal views or of interests between two persons".
72. Regulation 3 (1) of the Energy (Complaints and Disputes Resolution) Regulations 2012 defines a complaint as:
- "complaint" includes a dissatisfaction with the service rendered by, or a practice of, any person carrying out any undertaking pursuant to a licence, permit or registration issued or granted by the Commission, under the Act.



73. Regulation 3 (1) of the Energy (Complaints and Disputes Resolution) Regulations 2012 defines a dispute as:

“TdhisepJuutdei”cmiaeryanosf aKednisyaagreement that exists, the parties acting in good faith have failed to reach an amicable resolution of a complaint after all due efforts have been made to resolve it.

74. The 2nd Respondent submitted that the decision referred to in Section 40 of the Energy Act 1 of 2019 related to appeals from decisions made by the Authority.

75. The issue at hand is that the Appellant filled a complaint with the 2nd Respondent on 14th October 2021. The 2nd Respondent forwarded the complaint to the 1st Respondent who never responded. The 2nd Respondent sent two follow up emails on 29th November and 15th December 2021 to the 1st Respondent who again neglected to act as directed. The issue that arises would be if the 2nd Respondent followed the right procedure in handling the complaint.

76. Third, the Appellant submitted and relied on Section 2 of the Fair Administrative Action Act, “failure to decide” is defined and the Appellant submits that it includes “refusing to decide”.

77. This Tribunal relies on Section 23 of the Energy Act No. 1 Of 2009 which provides that:

#### Decisions of the Authority

1. The Authority shall within sixty days from the date of receipt of a request by an applicant, make its decision on any matter before it.
2. A decision of the Authority shall be in writing and any order given and reasons thereof shall be served upon all parties to the proceedings, and may be published in the Gazette as prescribed by regulations.
3. The Authority shall, within seven days of making a decision, communicate such decision to the parties involved.
4. All orders of the Authority shall become effective on the date of entry thereof, and shall be complied with within the time prescribed therein.
5. Where the Authority does not make a decision as provided in subsection (1) the appellant may appeal to the Tribunal within seven days of the expiry of the prescribed period.

78. We associate ourselves with the submissions of the Appellant that the 2nd Respondent failed to make a decision on the complaint raised by the Appellant against the 1st Respondent.

79. Additionally, Schedule 1 of the Energy (Complaints and Disputes Resolution) Regulations 2012 prescribes how complaints are to be handled. It provides:

#### Guidelines for Complaints Handling Procedures

1. Procedures for dealing with complaints relating to any undertaking or activity performed pursuant to a licence or permit under the Act shall explain —
  - a. how other persons can gain access to the procedures;
  - b. how the procedures work;
  - c. the timeframes within which the procedures may be carried out;



- d. the complainant's right to access the Commission if dissatisfied with the respondent's decision or the way 'it has been reached; and
  - e. any other matter of relevant importance.
2. Every person carrying out any undertaking or activity pursuant to a licence or permit under the Act shall —
    - a. promptly, fully, and fairly deal with every complaint with the objective of ensuring satisfaction of the complainant, and
    - b. ensure that their staff, representatives, agents, sales people or independent contractors are aware of the approved procedures and their obligations under them.
  3. In the event that any complaint is not resolved to the complainant's satisfaction, person carrying out any undertaking or activity pursuant to a licence or permit shall inform the complainant of their right to have their complaint referred to the Commission as a dispute between the two parties.
  4. In preparing the procedures contemplated in paragraph 1, the guiding principles are that those procedures shall to the extent possible—
    - a. be simple, quick and inexpensive;
    - b. preserve or enhance the relationship between the parties;
    - c. take account of the skills and knowledge that are required for the relevant procedures;
    - (d) observe the rules of natural justice;
    - e. place emphasis on conflict avoidance; and
    - e. encourage resolution of complaints without formal legal representation or reliance on legal procedures.
80. The 2nd Respondent in our view failed to observe Schedule 1 of the Regulations. Mere forwarding of emails to follow up on the complaint was not enough. The 2nd Respondent has also failed to show other steps they took in ensuring the complaint made by the Appellant was resolved.
81. Further, in taking to account rules of natural justice, the last email sent by the 2nd Respondent was in December 2021, the Appeal made before this Tribunal was in May 2022. There is a five- month gap where the 2nd Respondent should have acted on the complaint lodged in October, 2020. In light of these events, it is clear that the delay by the 2nd Respondent in acting on the complaint made by the Appellant for more than 6 months amounted to a delay in justice, seriously breaching Section 23 (1) of the *Energy Act* which states that The Authority shall within sixty days from the date of receipt of a request by an applicant, make its decision on any matter before it.
82. Fourth, the 2nd Respondent submitted that it was not a mandatory requirement that if any party is not satisfied with the decision of the Authority, either party can move to the Authority to file a Dispute under Schedule 2 of the Regulations.
83. The 2nd Respondent relied on Regulation 7 of the Regulations that provide:
7.
    - (1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to



regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.

- (2) A party to a dispute may refer the dispute to the Commission in form S-2 as set out in the Second Schedule.

84. We do note that the wordings used in Regulation 7 of the Regulation is 'may'. On the interpretation of statutes where the words "may" and "shall" have been used, the Court of Appeal in the case of [Peter Muturi Njuguna vs Kenya Wildlife Service](#) [2017] eKLR, the Court of Appeal held that:

“It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision. Whether the words “shall”

or “may” convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters.”

In the Australian case of *Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council* (1948) 77 CLR 544 at 568, Williams, J stated:

““May’, unlike ‘shall’, is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as ‘shall’ which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears.”

85. We therefore hold that it was not a mandatory requirement that parties move to the Authority to file a Dispute under Schedule 2 of the Regulations after a complaint is filed and a party is not satisfied with the decision.

86. From the above reasons, we hold that:

- a. The Tribunal has jurisdiction to hear and determine this Appeal.
- b. The 2nd Respondent failed to exercise its powers as mandated by the [Energy Act, 2019](#) and continues to rely on subsidiary legislation that is inconsistent with the [Energy Act, 2019](#).
- c. Given the manner in which the 1st Respondent handled the Appellant’s complaint, it is apparent that if indeed KPLC has Complaints Handling Procedures approved by the 2nd Respondent as required by Regulation 5 and the First Schedule of the [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#), those procedures are either ineffective or they are not adhered to.

#### **Whether the quotation of KShs. 797,949/- by the 1st Respondent was justified**

87. Paragraph 66 hereof sets out what transpired from application for connection of electricity supply by the Appellant up to filing of this appeal.

88. The 1st Respondent submitted that their quotation issued on 6th June 2014 was based on the Appellant’s declared load of 5 kVA, but did not include any three phase appliances. This submission is false because in his application, the Appellant gave a list of appliances including 250 x 15W lighting points, 10 x 1kW fridges, 48 x 0.5 kW water pumps, 40 x 15 W TVs and 20 x 1kW cookers.



89. It was the duty of the 1st Respondent to compute the Appellant's load, what is referred to as After Diversity Maximum Demand (ADMD), and thereafter plan and construct the requisite electric supply lines to enable the applicant receive the required electricity supply sufficient for all the declared appliances as set out in Section 142 (1) of the *Energy Act*, 2019.
90. The 1st Respondent made a determination that the ADMD for the Appellant's property was 8 kVA and proceeded to issue the quotation dated 6th June 2014 which stated, in part, that:
- We thank you for your application dated May 28, 2014 for supply of electricity to the above plot. We are pleased to advise you that a three phase 8 kVA service line can be installed as requested. The supply will be omfeKteerneyda and charged in accordance with our tariff structure 2008.
91. The 1st Respondent went ahead and installed a three-phase electric supply line and two single phase meters instead of the three phase meter, in contravention of their letter of June 6, 2014.
92. When the Appellant complained about non-installation of the three phase meter, the 1st Respondent informed him that following installation of the two single phase meters, the matter was closed and the only way out was for him to make a fresh application. The 1st Respondent went on to submit that the fact that they provided a three phase service line did not imply that they were required to install a three phase meter, but was informed by the fact that single phase service lines can only handle a maximum of 3 kVA, which submission is false.
93. Had the 1st Respondent been a little more diligent and not just looking for excuses to cover their wrong determination of the Appellant's ADMD, they would have noted the error of computation of the Appellant's load, leading to the complaint and would have proposed a more reasonable solution to the problem.
94. The 2nd Respondent did not even understand the nature of the Appellant's complaint when it was referred to them. EPRA submitted that the complaint regarding the quotation of KShs 797,947/= was about billing (Section 160 of the Act), which it obviously was not; rather it is about network extensions to persons requiring electricity supply (Section 142 of the Act).
95. All that the 2nd Respondent did was to issue directions to the 1st Respondent to resolve the complaint. Those directions were not complied with and the 2nd Respondent did nothing, contrary to, among others, Section 11 (e), (f) and (g) of the *Energy Act*, 2019.
96. From the above reasons, we hold that the understatement of the Appellant's load was the 1st Respondent's mistake whose consequences he should not be allowed to transfer to the Appellant. The quotation of KShs. 797,949/- by the 1st Respondent was not justified.

### **Whether the reliefs sought by the Appellant should be granted**

97. Section 36 (5) of the *Energy Act*, 2019 provides for the powers of the Tribunal, and states that:
- (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

### **Disposition**

98. In the end therefore, having given due consideration to the pleadings, submissions and the law and taking into account the circumstances of this case, we are satisfied that the Memorandum and Ground of Appeal dated May 10, 2022 is merited
99. The Tribunal therefore makes the following orders:



- a. The Memorandum and Grounds of Appeal dated May 11, 2022 filed by the Appellant is allowed.
- b. The 1st Respondent to unconditionally install a three phase service line and standard Three (3) phase post-paid meter capable of supplying the Appellant's appliances as listed in the Enquiry for Supply of Electricity form dated May 25, 2014.
- c. The 2nd Respondent to ensure revision of the [Energy \(Complaints and Disputes Resolution\) Regulations 2012](#) so as to make them consistent with the [Energy Act](#), 2019.
- d. The 2nd Respondent to ensure that each electricity distribution and supply licensee has effective Complaints Handling Procedures, and that the same are adhered to.
- e. Parties to bear their own costs.

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2022.**

In the Presence of:

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**Ms. Doris Kinya Mwirigi Vice Chairperson**

.....

**Eng. Buge Hatibu Wasioya Member**

.....

**Eng. Fidelis Muli Kavita Member**

.....

**Mr. Samuel Maina Karanja Member**

.....

**Ms. Dorothy Jemator Member**

.....

**Mr. Feisal Shariff Ibrahim Member**

SIGNED BY: DORIS KINYA MWIRIGI

THE JUDICIARY OF KENYA. ENERGY AND PETROLEUM TRIBUNAL ENERGY AND PETROLEUM TRIBUNAL DATE: 2022-10-05 21:21:45+03

