



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

HIGH COURT CIVIL CASE NO E001 OF 2021

MOUNT KENYA SAFARI CLUB LIMITED.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY PLC.....DEFENDANT

R U L I N G

1. The Plaintiff instituted this suit by plaint dated 21st and filed on 26th January, 2021. That plaint discloses a dispute over billing of electricity supply charges and threats of discontinuation of supply between the Defendant (an electricity distributor) and the Plaintiff (an electricity consumer). The dispute involves the very substantial amount of over KShs 38 million. Various equitable and other reliefs are sought. Together with the plaint was filed an application for temporary equitable relief pending disposal of the suit.

2. The Defendant entered appearance on 10/02/2021 and also filed a notice of preliminary objection to the suit. The pure point of law taken is that this court has no jurisdiction to hear and determine the suit in view of various provisions of the **Energy Act, 2019** (hereinafter called the Act). The Defendant’s position is that jurisdiction to hear and determine the dispute in this suit is specifically conferred by statute to the **Energy Regulatory and Petroleum Authority** (hereinafter called the Authority) and the **Energy and Petroleum Tribunal** (the **Tribunal**), both established under the aforesaid Act; and that in the circumstances, the **High Court** is specifically prohibited by **section 9(2) and (3)** of the **Fair Administration Act, 2015** from assuming jurisdiction in the dispute.

3. The Plaintiff’s position on the other hand is that the Authority has no jurisdiction at all to deal with the dispute herein. The Plaintiff however concedes that the Tribunal indeed has the jurisdiction to deal with the dispute, except that it is not currently fully constituted as it is without a chair, and that therefore it cannot sit and hear the dispute. It is the Plaintiff’s further position that in the circumstances it was entitled to invoke this court’s unlimited original civil jurisdiction under **Article 165 (3) (a)** of the **Constitution of Kenya, 2010**.

4. The preliminary objection was canvassed by way of written submissions. Those of the Defendant were filed on 10/02/2021. The Plaintiff’s submissions were filed on 22/02/2021. I have considered those able submissions (including the cases cited).

5. The Authority is established under section 9(1) of the Act. Its **functions** are set out in **section 10** of the Act. Resolution of billing disputes between an electricity distributor and consumer is not listed among those functions.

6. The **powers** of the Authority are set out under **section 11** of the Act. The Authority may investigate and determine complaints or disputes between parties under paragraph (i) of that section

“...over any matter relating to licences and licence conditions under the Act.”

This court does not believe that the billing dispute between the parties herein relates to any license or license conditions between them; no such license between the parties has been brought to the notice of the court.

7. That notwithstanding, **section 160** of the Act provides specifically for **“when supply of electrical energy may be refused or discontinued”** by a licensee (power supply company) to a consumer. **Subsection (3)** of that section provides –

“(3) If any dispute arises as to –

a) any charges;

b) the application of any deposit;

c)

d)

e)

it shall be referred to the Authority.”

8. As already seen, the dispute between the parties herein is over charges that have been billed to the Plaintiff by the Defendant, and threats to discontinue the electricity supply. It is a dispute that therefore ought to have been referred to the Authority under this specific section of the Act. The Authority thus has jurisdiction to deal with the dispute.

9. The Tribunal is established under **section 25** of the Act. Its jurisdiction is set out in **section 36** of the Act. Under **subsection (3)** of that section the Tribunal has original civil jurisdiction on any dispute between a licensee (electricity supplier) and a third party (consumer) or between licensees.

10. The Tribunal also has power under **subsection (5)** to grant equitable reliefs (including injunctions, penalties, damages and specific performance).

11. The Tribunal also has appellate jurisdiction over decisions of the Authority. This is under **subsection (4)** of section 36. Thus, any dispute that can be dealt with by the Authority ought to be taken first to the Authority and go to the Tribunal on appeal.

12. It is also to be noted that the decisions of the Tribunal are appealable to the High Court under **section 37(3)** of the Act.

13. **Section 9** of the *Fair Administration Act, 2015* provides as follows –

“(1) Subject to subsection (2), a person who is aggrieved by an administrative action, may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

14. The Plaintiff has not formally sought exemption under subsection (4) of section 9. If it had so sought, it would have had to show by more than a mere statement from the bar that the Tribunal is not yet fully constituted and sitting, in view of the Defendant’s assertion that it indeed is.

15. The upshot of all that is stated above is that the initial jurisdiction to deal with the dispute between the Plaintiff and the Defendant lies with the Authority and/or the Tribunal. Let the Plaintiff first exhaust the dispute resolution mechanisms provided for in the Energy Act, 2015 before coming to this court. At this point the court has no jurisdiction to deal with the dispute.

16. This suit is therefore struck out with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 14TH DAY OF APRIL 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 15TH DAY OF APRIL 2021