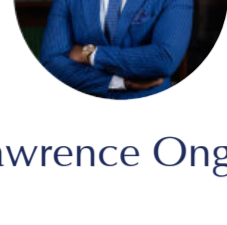


“In dealing with a dispute concerning a consumer, the Court is supposed to take pragmatic view of the rights of the customer as it is the customer who is placed at a disadvantage vis-à-vis the supplier of services or goods.”

Makau J. in Alan E. Donovan v Kenya Power & Lighting Company [2021] eKLR

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A. INTRODUCTION

1. The Energy Act has laid out the necessary guidelines for settling complaints regarding electrical energy consumption. The major energy sector entities established under the Energy Act of 2019 (*hereinafter the 'Act'*) that deal with complaints from electricity consumers are the **Kenya Power and Lighting Company (KPLC); Energy and Petroleum Regulatory Authority (EPRA); and the Energy and Petroleum Tribunal (EPT)**. In relation to the ordinary consumers, these entities deal with disputes ranging from irregular electric charges; illegal or improper use of electrical energy; **alleged defects** in any apparatus or protective devices and the use of unsuitable apparatus.

2. **Section 159** of the Act provides that in instances of defective meters and **more so where dispute arises as to recalculation of electrical energy consumed by a consumer, such dispute shall be referred to EPRA for determination**. However, there exists an in-house complaints mechanism within Kenya Power & Lighting Company (KPLC) as an approved licensee which ought to be exhausted first. This is in light of **Regulation 5** of Energy (Complaints and Disputes Resolution) Regulations, 2012 which stipulates that a **power provider shall establish procedures for handling complaints and which shall be approved by EPRA**.

B. EXHAUSTION OF INTERNAL REMEDIES

3. This doctrine is now of esteemed juridical lineage in Kenya. Our courts are replete with jurisprudence on the doctrine of exhaustion of remedies.

4. In dismissing a premised on exorbitant KPLC bills, the court in *Dhow House Limited v Kenya Power and Lighting Company (Constitutional Petition E058 of 2021), [2022] KEHC 11840 (KLR) (19 August 2022), (Ruling)*, held:

There is nothing to show that the forum established under the enabling statute cannot resolve issues relating to a disputed bill. In fact, the said form is the best suited fora to determine how the bill was arrived at. It has the benefit of the required expertise. The attempt to describe a disputed bill as a constitutional question is to say the least a mockery of the Constitution.

5. To this end, we find that the Courts ought to be a fora of last resort and not the first port of call the moment a storm brews. The courts demand that the inhouse dispute resolution mechanisms should be followed before invoking powers of the courts.

C. KPLC INHOUSE COMPLAINTS MECHANISM

6. The KPLC has formulated a complaint handling mechanism which entails;

- Writing a formal complaint to the Regional Manager highlighting the dispute in finer details.
- The Regional Manager ought to respond to the complaint **within 3 days** of its receipt. (*Pursuant to the KPLC Customer Complaints Handbook*)

7. Suffice to note, if a consumer is not satisfied with the decision made or where a response is not elicited, one can proceed to file a reference at the Energy & Petroleum Regulatory Authority (EPRA). The same is reiterated under Regulation 7 (1) which gives a complainant the leeway to approach the Authority if dissatisfied with the decision of the energy provider.

8. Thereafter, if the decision of the Authority is not satisfactory, one can proceed to lodge an appeal with the Energy Tribunal. In essence, the doctrine of exhaustion of internal remedies should be followed.

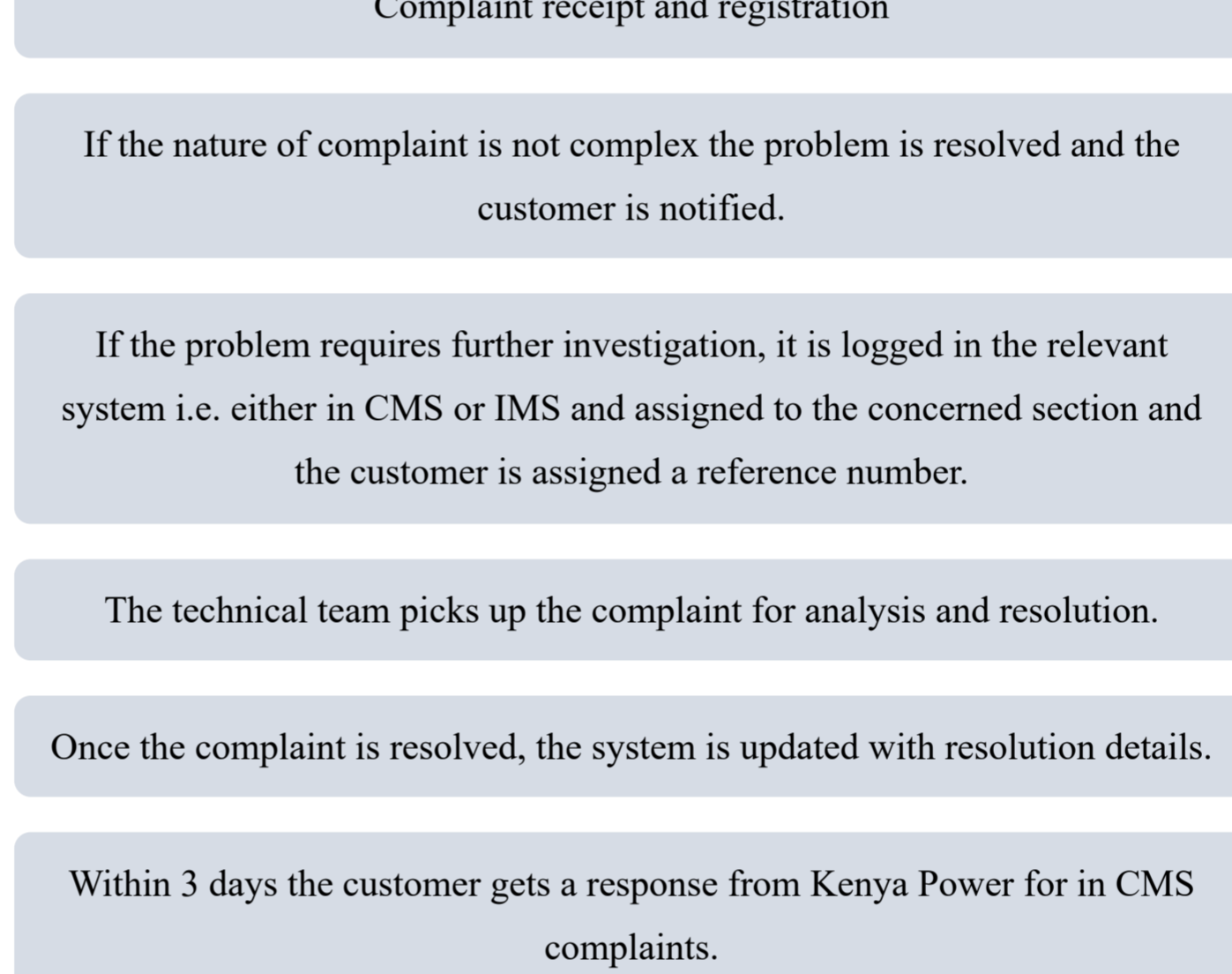
9. Pursuant to Section 160 of The Energy Act 2019, EPRA has the mandate of approving a licensee's complaint handling and dispute resolution procedures. Some disputes such as metering problems that occasion inaccurate or inflated billings can be handled by KPLC's internal dispute resolution mechanisms and do not have to end up at EPRA. This is because power distributors bear the responsibility of ensuring the integrity of the meters.

10. In their Complaints Handling Handbook, KPLC state that whenever customers contact Kenya Power with complaints, they shall either respond to the customer conclusively or provide a reference number for follow-up purposes within the stipulated **resolution timelines**.

11. When the complaint is done in writing, the letters should be addressed to the respective **Regional Manager**. In case there is need for detailed investigations, the handbook states that KPLC will inform the customer **immediately in writing**. Every written complaint will be acknowledged **within two days** of receipt.

D. COMPLAINT HANDLING PROCESS

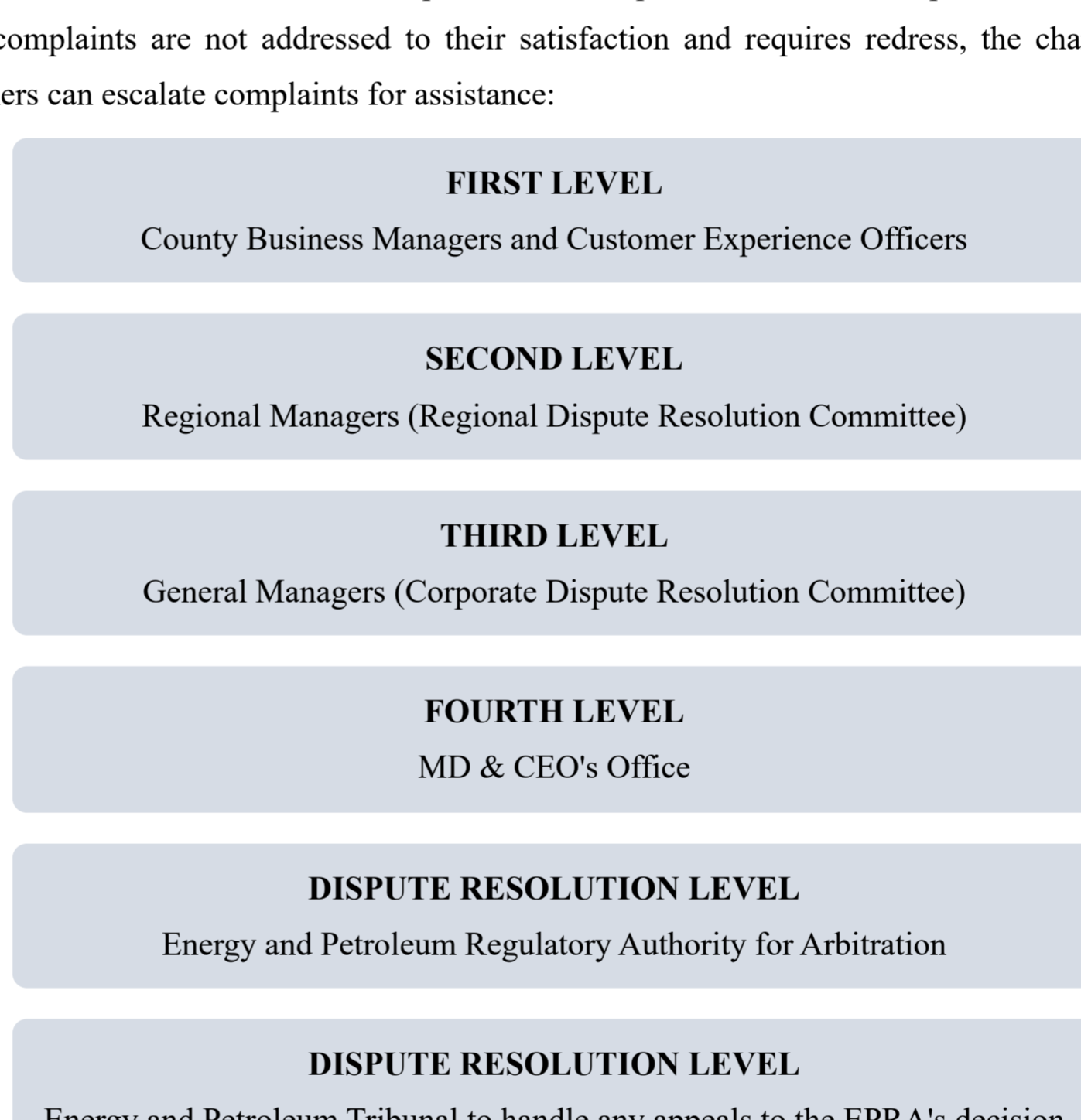
12. The chart below highlights the process KPLC uses to handle complaints from its customers as approved by EPRA.



13. It is KPLC's position that they will be in communication with the customer at every stage of dispute resolution.

E. COMPLAINT HANDLING PROCESS

14. KPLC manual states that each written complaint or correspondence will be responded to **within 3 days**. However, if complaints are not addressed to their satisfaction and requires redress, the chart below shows where customers can escalate complaints for assistance:



F. EPRA COMPLAINT PROCEDURE

15. The Energy and Petroleum Regulatory Authority (EPRA) is a state corporation established under the Energy Act, 2019. The Authority is the energy sector regulatory body responsible for economic and technical regulation of electric power, renewable energy, petroleum and coal subsectors.

16. Section 9 as read with Section 10 of the Energy Act establishes EPRA whose mandate includes, *inter alia*, to;

- Regulate generation, importation, exportation, transmission, **distribution, supply and use of electrical energy** with the exception of licensing of nuclear facilities.*

17. Further, Section 159 of the Act stipulates that if any dispute arises out of recalculation of electrical energy consumed by a consumer due to a defective meter or as to interference with any meter, such dispute shall be referred to the **Authority** for determination.

18. Similarly, Section 160 of the Act provides that where a dispute arises as to charges or billing on meters, such a dispute shall be referred to the Authority.

19. Regulation 7 (2) further stipulates that a complainant shall refer the dispute to the Authority in **Form-S1** in the second schedule. Upon receipt of the dispute, the Authority shall appoint a mediator who will assist the parties to reach a settlement within 30 days.

20. Notably, if the dispute is settled, an agreement indicating the same shall be filed with the Authority within 5 days and shall be final and binding on both parties. However, if the dispute is unsettled, the complainant may appoint an advocate to represent him before the Authority. Suffice, Section 23 of the Act provides that a decision by EPRA ought to be made **in writing within sixty days** of receipt of the request. The decision shall be communicated to the parties within seven (7) days of making the decision.

21. Finally, if a party is not satisfied with the decision of the Authority, such an aggrieved party shall, pursuant to section 24 of the act, proceed to lodge an appeal with the Energy & Petroleum Tribunal **within 30 days** of delivery of the order or decision.

G. ENERGY & PETROLEUM TRIBUNAL

22. EPT has been established under Section 25 of the Energy Act. Its mandate has been espoused under section 36 and which includes, *inter alia*;

- 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 reconsideration.*

- To grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.*

- To hear and determine matters referred to it expeditiously.*

H. APPROACHING THE COURT VIA A CONSTITUTIONAL PETITION

23. The Constitution of Kenya is a safe haven for an energy consumer whose rights and freedoms have been violated by the KPLC. The definition of customer was captured in *Karnataka Power Transmission Corporation v Ashok Iron Works Pvt Ltd (2009) 3 SCC 240*, where the Supreme Court of India arrived at a finding that **“an electricity consumer falls within the definition of a ‘consumer’ and that the supply of electricity is indeed a service, if not provided in time, would constitute a service deficiency.”**

24. Therefore, a constitutional petition can be an alternative route, a riskier one, other than following procedures under EPRA and Energy Tribunal.

25. This procedure has been applied before as evidenced in the following case law such as *Wekesa v Kenya Power and Lighting Company Ltd & another (Constitutional Petition 12 of 2021), [2023] KEHC 2900 (KLR) and Alan E. Donovan V Kenya Power & Lighting Company [2021] Eklr*

I. CONCLUSION

26. Flowing from the foregoing analysis is that disputes in relation to erroneous electrical bill charges, faulty metering and disconnection of electricity will be handled first at the institutional level before being referred to the courts. The licensed electricity distributor is the first go-to entity, in our context; to the monopolistic KPLC, thereafter to EPRA and finally to the EPT. The court will be petitioned as the last resort when a customer can lay out clearly that KPLC and EPRA have failed to adhere to the statutory obligation under the Act of resolving the disputes amicably.

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