



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 189 OF 2018

CELINA ATIENO OGUTU.....1ST PETITIONER

MUSA ONYANGO.....2ND PETITIONER

-VERSUS-

KENYA POWER.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT

KIBERA LAW COURT.....4TH RESPONDENT

RULING

BACKGROUND

1. On 18th May 2018, the 1st and 2nd petitioners herein, who describe themselves as adults of sound minds and the owner and caretaker respectively of properties situate on LR No. DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885 (hereinafter “the suit premises”) sued the respondents herein seeking orders that:

a) An order of Judicial Review by way of certiorari be and is hereby issued to bring into this court and quash the entire decision made by the 1st respondent on 16th April, 2018 disconnecting electricity from the 1st petitioner’s premises on properties DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885.

b) A declaration do issue that the entire decision made by the 1st respondent on 16th April, 2018 disconnecting electricity from the 1st petitioner’s premises on properties DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885, Nairobi is malicious, irrational, unreasonable, unlawful and unconstitutional as it violates the 1st petitioner’s right to fair administrative action, in contravention of Article 47 of the Constitution.

c) An order of Judicial Review by way of mandamus be and is hereby issued to the 1st respondent to reconnect electricity to the 1st petitioner’s premises on properties DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885.

d) An order of Judicial Review by way of prohibition prohibiting the respondents from demanding any purported unpaid electricity pursuant to the alleged unlawful consumption of electricity the subject matter of Kibera Criminal No. 544 of 2018, Republic –vs- Celina Atieno Ogutu and Another.

e) A declaration do issue that the 1st petitioner’s right to protection of her economic interest has been violated in contravention of Article 46(1) (c) of the Constitution.

f) The 1st respondent be and is hereby restrained by an order of permanent injunction from disconnecting the electricity from the 1st petitioner's premises on properties DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885 on the basis of the installation Inspection Report of 16th April 2018.

g) A declaration do issue that the 1st and 2nd petitioners' right to be presumed innocent until proven guilty has been violated in contravention of Article 50(2) (a) of the Constitution.

h) An order of Judicial Review by way of certiorari be and is hereby issued to bring into this court and quash the entire proceedings in Kibera Criminal No. 544 of 2018 Republic –vs- Celina Atieno Ogutu and Another.

i) A declaration that each petitioner be compensated a sum of twenty five million Kenya shillings (Kshs 25,000,000.00) or any other amount that the court deems sufficient for violating the petitioners' constitutional rights.

j) Special damages for:-

I. Purchase of padlock & cables - kshs 21,330

II. Repair or replacement of motor- kshs 1,333,431

III. Expenses for purchase of fuel- kshs 82,000

IV. Loss of income when motor was blown – kshs 672,000

V. Loss of income after reduction of rent kshs- 3,388,800

VI. Loss of income after leaving of 42 tenants – kshs 4,719,400

VII. Loss of income after reconnection – kshs 99,400

VIII. Expenses for buying water – kshs 1,008,000

TOTAL = Kshs 11,996,361

k) Specific damages from 14th May, 2018 up to the date of reconnection of electricity.

l) General damages

m) Exemplary damages

n) Punitive damages

o) Interest on prayers (i), (j), (k), (l), (m), (n) at market rate.

p) Or such other order(s) as this Honourable court shall deem fit.

q) Costs of the petition.

2. Concurrently with the petition, the petitioners also filed an application seeking orders that:-

1. Spent

2. That an interlocutory mandatory injunction be and is hereby issued compelling the 1st respondent to restore electricity power supply to the 1st petitioner's premises on properties DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885, pending the hearing and determination of this application.

3. That an interlocutory mandatory injunction be and is hereby issued compelling the 1st respondent to restore electricity power supply to the 1st petitioner's premises on properties DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885, pending the hearing and determination of the petition filed herewith.

4. That a conservatory order be and is hereby granted restraining the 1st respondent through their agents and/or any person claiming through them from harassing, intimidating, questioning or further investigating the petitioners with regard to purported charges of unlawful consumption of electricity pending the hearing and determination of this application.

5. That a conservatory order be and is hereby granted restraining the 1st respondent through their agents and/or any person

claiming through them from harassing, intimidating, questioning or further investigating the petitioners with regard to purported charges of unlawful consumption of electricity pending the hearing and determination of the petition filed herewith.

6. That a conservatory order be and is hereby granted restraining the 1st respondent through their agents and/or any person claiming through them from assessing, computing or determining any unpaid electricity bills in respect of the premises pending the hearing and determination of this application.

7. That a conservatory order be and is hereby granted restraining the 1st respondent through their agents and/or any person claiming through them from assessing, computing or determining any unpaid electricity bills in respect of the premises pending the hearing and determination of the petition filed herewith.

8. That a conservatory order be and is issued against the 3rd respondent, either by themselves, agents and/or any person claiming through them from further prosecuting the petitioners in Kibera Criminal 544 of 2018, Republic –vs- Celina Atieno Ogotu and Another pending the hearing and determination of this application.

9. That a conservatory order be and is issued against the 3rd respondent, either by themselves, agents and/or any person claiming through them from further prosecuting the petitioners in Kibera Criminal 544 of 2018, Republic –vs- Celina Atieno Ogotu and Another pending the hearing and determination of the petition filed herewith.

10. That the costs of this application be provided for.

3. The petitioners' case was that on 16th April 2018, the 1st respondent disconnected electricity supply from the 1st petitioners said suit premises without any prior notice thereby exposing her to untold suffering and financial losses in violation of the rights under Article 46 and 47 of the Constitution. Following the said disconnection of electricity supply, the petitioners were charged before Kibera Chief Magistrate's court in Criminal Case No. 544 of 2018 with the offence of fraudulent consumption of electricity.

4. Upon service with the pleadings, the 1st respondent attempted to reach a consent with the petitioners on the reconnection of electricity supply to the suit premises which agreement did not materialize and on 10th July 2018, this court, upon considering the rival presentations of the petitioners and the 1st respondent, ordered that an interlocutory mandatory injunction do issue compelling the 1st respondent to restore power supply to the suit premises pending the hearing and determination of the application dated 15th May 2018.

5. The petitioners' claim that the 1st respondent did not comply with the order of 10th July 2018 thereby prompting them to file an application dated 24th July 2018 that is the subject of this ruling.

Application

6. The application dated 24th July 2018 is expressed to have been brought under Article 10, 47, 48, 159 and 165 of the Constitution, Sections 1A, 1B, 3A, of the Civil Procedure Act, Sections 4(1) (a) , 5(b), 7(1), 27(b), 28, 29 and 30 of the Contempt of Court Act No. 46 of 2016. In the said application the applicants seek the following orders:-

1. Spent

2. That the Honourable court does find that the 1st respondent's acting Chief Executive Officer, JARED OMONDI, acting Customer Service General Manager AGGREY MACHASIO and Principal Customer Service officer, FRANCIS MEMIA are in contempt of court for disobedience of the orders of this court issued on 10th July 2018.

3. That upon grant of prayers 1 and 2 above, the honourable court do impose a fine and or a penalty of kshs 5,000,000.00 (Kenya shillings five million) against each contemnor and in default of payment of such fine all movable and immovable assets of each contemnor including land and buildings be attached and sold in execution of this order to satisfy the penalty for contempt.

4. That upon grant of prayers 1 and 2 above, the court does issue an order that the above mentioned JARED OMONDI, AGGREY MACHASIO, FRANCIS MEMIA be committed to civil jail for a period of 6 months.

5. That the costs of this application be provided for.

7. The application is supported by the 1st applicant's affidavit and is further premised on the grounds that on 16th April 2018, the 1st respondent disconnected electricity from the 1st petitioner's rental apartments situate on LR No. **DAGORETTI/RIRUTA/4884 and DAGORETTI/RIRUTA/4885**(hereinafter "the suit premises" without any prior notice or opportunity to be heard before the adverse action is taken.

8. It is the petitioners' case that many tenants vacated the suit premises citing unavailability of electricity and that the disconnection forced the applicant to adjust the rent downwards so to stop the tenants from leaving the said suit premises as the 1st petitioner secured a huge bank loan to put up the suit premises which she has to service at a monthly rate of kshs 873,760.30 which amount is substantially financed by the income generated from the suit premises.

9. The applicants' case is that on 10th July 2018, this court issued a conservatory order compelling the 1st respondent to restore electricity

power supply to the premises pending the hearing of an application which order was duly extracted and served upon the 1st respondent's legal office and the advocates.

10. It is the applicants contention that on 23rd July 2018, the 1st respondent sent technicians to the suit premises, albeit in the absence of the 1st applicant, but that electricity could not be reconnected since critical appliances had earlier been carried away by the 1st respondent on 6th April 2018 in the series of events that precipitated the filing of the instant petition thereby turning the respondents agents visit to the suit premises a mere public relations exercise and a brazen mockery of the court order.

11. The applicants further state that in a bid to scuttle the impugned court order of 10th July 2018, the 1st respondent arbitrarily debited the 1st petitioners main prepaid meter No.14170149687 with the sum of kshs 4,119,354.62 and that following the said debit attempts to purchase power tokens were unsuccessful.

12. The applicants assert that it follows that disobedience of court orders places the courts at the risk being rendered impotent and amounts to a mockery of the judicial authority.

1st respondent's response

13. In opposition to the application dated 24th July 2018, the 1st respondent on 19th September 2018 filed the replying affidavit of its legal officer **Irene Walala Adhiambo** who avers that pursuant to this court's orders issued on 10th July 2018, compelling the 1st respondent to restore electricity to the suit premises, the 1st respondent on 23rd July 2018 dispatched a team of technicians and customer care agent to the applicant's premises but that the electricity supply could not be reconnected immediately because some critical equipment needed for such reconnection had earlier been confiscated, upon disconnection, and are to be used as exhibits in an ongoing criminal case against the petitioners.

14. She further avers that electricity supply was disconnected from the suit premises on account of poor wiring, tampered meters and unlawful electricity consumption and that at the time of such disconnection, the 1st petitioners main prepaid meter No. 14170149687 had an accumulated debt of kshs 4,107,094.62 as shown in a billing report attached to the replying affidavit as annexure "IWI".

15. She further states that in the company of the 1st respondents advocates on record and colleagues from the customer care department, she on 30th July 2018, visited the suit premises and established that:-

a) The main single line from the transformer heading directly to the petitioners' premises had been duly reconnected.

b) The 3 phase line in the building had been reconnected as well, however the water pump could not be used because of the pending electricity bills.

16. She also avers that the 1st respondent has since suspended the kshs 4,107,094.62/- electricity bill accrued from the petitioners pre-paid meter number 14170149687 until the hearing and determination of the Notice of Motion application dated 15th May 2018, which suspension she contends is a show of good faith and a demonstration that the 1st respondent takes court orders seriously.

Applicant's rejoinder to the response

17. The response to the 1st respondent's replying affidavit, the 1st applicant filed a supplementary affidavit dated 21st September 2018 in which she avers that the 1st respondent has not fully complied with the courts orders of 10th July 2018 as the single phase line that was alleged to have been illegal was not reconnected following the confiscation of its cables that are the subject of a criminal case against the petitioners being criminal case No. 544 of 2018 **Republic –vs Celina Atieno Ogutu & Musa Onyango.**

18. The 1st applicant however concedes that the 1st respondents' technicians reconnected the units previously on the single phase line to the 3 phase line directly but that the connection left several fuses exposed without fuse carriers thereby forcing the applicant to procure new fuses at an extra cost. She states that critical equipment such as single phase cable and fuse carriers are still in the custody of the police investigating the criminal case No. 544 of 2018 following their confiscation and that it was the responsibility of the 1st respondent, having seconded the police to the suit premises, to facilitate the return of the said equipment, as the equipment are not necessary in the criminal case.

19. She states that failure or unwillingness to return the confiscated equipment to the suit premises amounts to blatant disobedience of the court order, an act which should not be countenanced by the court.

20. At the hearing of the application, Mr. Onyango Oriri, learned counsel for the applicants submitted that the 1st respondent and its counsel were on 12th July 2017 duly served with the court order issued on 10th July 2018 but despite the urgency of the matter, it was only until 23rd July 2018 that the 1st respondent sent some technicians to the suit premises which technicians did not have critical equipment to restore electricity to the said premises as the said equipments had earlier been confiscated thereby forcing the petitioner to buy new equipment at kshs. 64,000/-.

21. Counsel further submitted that reconnection of power was thwarted by the 1st respondent when it slammed the applicants with an electricity bill of 4 million. Counsel relied on the decision in the case of **Brian Muthee Mwangi –vs- Jubiza Investments Limited [2018] e KLR** for the argument that the court cannot countenance partial compliance with its orders for as long as they have not either been discharged, varied or set aside.

22. Counsel further submitted that the 1st respondent tried to scuffle the court order by connecting the single phase to the 3rd phase and for failing to return the critical equipment that was necessary for the reconnection of power.

23. It was the applicant's case that the imposition of the kshs 4 million electricity bill on them by the 1st respondent without notice was also an act of contempt of court and an attempt to evade a court order through ingenuity. For this argument, counsel cited the case of **Republic – vs- Attorney General Ltd & another [2016] eKLR** wherein it was held:-

“...Court orders, it must be appreciated are serious matters that ought not to be evaded by legal ingenuity or innovations. Deliberately interpreting court orders with a view of evading or avoiding their implementation can only be deemed to be contemptuous of the court. Where a party is for some reason unable to properly understand the court order or has difficulty in complying therewith one ought to come back to court for interpretation or clarification or to explain the difficulties faced by the need to comply with the same.”

Analysis and Determination

24. I have carefully considered the instant application, the 1st respondent's response and the parties' submissions together with the authorities that were cited. I consider the main issue for determination to be whether the 1st respondent disobeyed the court's orders issued on 10th July 2018.

25. In considering whether or not the 1st respondent is in contempt of the court, I find that it will be necessary to consider the genesis of this case and the sequence of events that led to the issuance of the impugned orders of 10th July 2018. In doing so, it is worth noting that the said orders were issued on an interim basis and at the interlocutory stage pending the hearing of the application dated 15th May 2018. In effect, the said orders were not conclusive in nature as the court had not heard the matter on its own merits.

26. Be that as it may, the main issue in contention is whether the 1st respondent disobeyed the impugned orders. It was not in dispute that the orders were served upon the 1st respondent and that the 1st respondent acted upon the said orders.

27. The applicant contention is that the respondent did not 'fully' obey the said orders. According to the applicant, the failure by the 1st respondent to return the equipment that was confiscated at the time that the electricity power supply was disconnected amounted to disobedience of the impugned order of 10th July 2018. This claim is evident at paragraphs 24 and 25 of the applicants supplementary affidavit dated 21st September 2018 where the deponent states:-

“That it would be incredible that Mr. Rugut was violently chased away from the premises in which he allegedly found defective installations, only to resurface one year later ‘on routine inspection’.

That the issue of violence is being brought at this juncture to cloud the real issues for determination, muddle the facts and strangle the court with red herrings in order to mislead the court into believing that the 1st respondent was not in a position to comply with the constitutional requirements for Fair Administrative Action under Article 47, because of the hostility of either myself, my employees or my tenants towards the 1st respondents technicians.”

28. Having noted that the impugned order was issued as a stop gap measure to alleviate the petitioner's suffering following the disconnection of electricity supply to her premises the critical question that this court needs to concern itself with is whether electricity supply was restored back to the suit premises in compliance with the said order.

29. A perusal of the 1st respondents replying affidavit to the instant application shows that the 1st respondent acted, albeit 12 days after the issuance of the impugned order, and restored electricity supply to the suit premises. I find that the applicant does not deny that power supply was restored to her premises. In the circumstances, I am unable to find that there was any disobedience of the impugned court order.

30. In **Peter K. Yego & Others vs Pauline Nekesa Kode Nakuru HCC No. 194 of 2004** the court, in recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. [See G. V. Odunga J in Misc App No 268 of 2014 \(J.R.\)](#)

31. My take is that it could be that the power supply was not restored on time or that certain equipment, which were confiscated as exhibits in the criminal case were not returned, however, this does not take away the fact that electricity supply was restored to the suit premises.

32. In my humble view, the issue of confiscated equipment of the extra expenses incurred by the applicant in ensuring that the confiscated cables, fuses and or equipment are replaced are issues that can be raised in the main petition should the need arise. It is instructive to note that there was no order issued directing the 1st respondent to return any equipment.

33. Similarly, the claim that the applicant was slammed with a huge electricity bill of kshs million was dispelled by the 1st respondent when at paragraph 15 and 16 of their replying affidavit sworn in 17th September 2018, their deponent categorically states that the said electricity bill has been suspended, as a show of good faith, pending the hearing and determination of the application dated 15th May 2018.

34. My above findings on the issue of contempt of the court's orders notwithstanding, it is also worthy to note that the Contempt of Court Act (No. 46 of 2016), upon which the jurisdiction of this court to punish the respondents for contempt of court has been invoked, was on 9th

November 2018 invalidated in its entirety, by the decision of this court (differently constituted) in the case of **Kenya Human Rights Commission vs Attorney General & Another** [2018] eKLR.

35. Be that as it may and having regard to the fact that it has not been disputed that electricity power supply has been reconnected to the applicants suit premises, I reiterate that I am unable to find that there is disobedience of the court order issued on 10th July 2018 and I therefore decline to grant the orders sought in the instant application. I order that costs of this application do abide the outcome of the main petition.

36. I also direct that in the interest of saving judicial time the parties do shelve the hearing of the application dated 15th May 2018 and set down the main petition for hearing in which case, the orders issued on 10th July 2018 shall remain in force pending the hearing and determination of the main petition.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2019.

W. A. OKWANY

JUDGE

In the presence of:

In the absence of the parties

Court Assistant - Fred