REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 2 OF 2016

FORTIS TOWER MANAGEMENT LTD.....IST APPELLANT

KIRAGU & MWANGI LIMITED .....2ND APPELLANT

VERSUS

TRENDMARK COMPUTERS LIMITED.....RESPONDENT

JUDGMENT

1. The Respondent is a Limited Liability Company. It is located at Fortis Tower Building situate in Westlands, Woodvale Groove in Nairobi County.

2. The Respondent bought the premises from the developer and signed an agreement regarding the management of the entire building. The 1st Appellant is the management company that manages the building on behalf of all the owners of office space in the building including the Respondent. In turn, the 1st Appellant has appointed the 2nd Appellant to be its duly recognized agents in the management of the building.

3. On 11/02/2016, the Respondent approached the Kiambu Chief Magistrate's Court vide a Plaint. The gist of the complaint was that the two Appellants had disconnected electricity to its offices and hence rendered it impossible to carry out its business operations. The Respondent claimed that it had duly paid all its electricity bills and that, therefore, the act of disconnecting the electricity was without any colour of right.

4. In its Plaint, the Respondent plainly admits to be in arrears of service charges but argues that electricity charges and service charges are separate and that the Appellants had no right to disconnect electricity in a bid to force him to pay the service charges that were in arrears. The Respondent does not disclose how much service charges were in arrears.

5. The Respondent sought three prayers:

> a. That "the [Appellants] be ordered to reconnect electricity supply to the Plaintiff's office being unit (1) one, 3rd Floor at Fortis Towers, Woodvale Groove in Westlands."
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> b. That "a declaration that the [Appellants'] actions to disconnect electricity supply to the Plaintiff's offices which had been fully paid for was illegal, null and void."
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> c. That "the [Appellants] be ordered to pay for the costs of the suit."

6. Simultaneously with the Plaint, the Respondent filed a Notice of Motion under Certificate of Urgency

seeking the following three substantive prayers:

> a. That "pending [the] hearing of this Application inter partes, there be an interim order directing the [Appellants] , their agents and/or any other person acting on their instructions, directives and/or orders to reconnect electricity supply to the [Respondent's] offices being unit 1 (one) on 3rd Floor at Fortis Towers, Woodvale Groove."
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> b. That "the Court makes a finding that the [Appellant's] actions to disconnect electricity supply from the [Respondent's] office was illegal and unlawful as all electricity bills had been fully paid for."
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> c. That "the OCS, Parklands Police Station be directed to supervise enforcement of the orders given herein to ensure peace and tranquillity."

7. The Application was supported by a Supporting Affidavit by Geoffrey Muriuki Manene, a director of the Respondent Company. The Affidavit, in essence, gave the narrative above and included some documentation to substantiate it including some letters received from the 2nd Appellant.

8. The Appellants entered appearance through their advocates and filed a Replying Affidavit sworn by James Kiragu, a director of the 2nd Appellant opposing the Application. They also filed a Statement of Defence.

9. The Application was first placed before the Learned Honourable S. Arome on 11/02/2016 and upon hearing from Mr. Manene in person, granted interim orders ex parte and fixed the Application for inter partes hearing on 25/02/2016. The effect of the interim orders was, of course, to compel the Appellants to re-connect the electricity to the Respondent Company.

10. The interim orders were extended on 25/02/2016 and again on 24/03/2016 when the Court directed that the Application be canvassed by way of Written Submissions.

11. The parties duly filed their Written Submissions and the Court delivered a ruling dated 19/05/2016 in which the Court allowed the Application in its entirety.

12. The Appellants are aggrieved by that ruling and have filed the present Appeal. They have listed eleven (11) grounds of appeal as follows:

13. I directed that the Appeal be canvassed by way of Written Submissions. Both parties have duly filed their submissions.

14. The Appellants arguments, which are a reprise of their submissions before the Learned Trial Magistrate are as follows:

> a. First, the Appellants argue that the Court had no jurisdiction to hear and determine the matter. This is because, they argue, the subject matter of the suit is land which is located in Westlands at the heart of Nairobi County. Furthermore, the Appellants argue, the Appellants carry out their business in Nairobi and the sublease between the Respondent, the Lessor and the 1st Appellant was drawn and executed in Nairobi.
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> Additionally, the Respondent also carries its business in Nairobi from the suit premises.
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> The Appellants argue that section 15 of the Civil Procedure Act is clear about the local geographical limits of a Magistrate's Court – and this, the Appellants argue, denies the Kiambu Chief Magistrate's Court jurisdiction in the current case.
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> The Appellants argue that the Respondent was forum shopping by filing the case in Kiambu instead of Nairobi – and that this amounts to an abuse of the process of the Court.

b. Second, the Appellants argue that the Respondent Company did not establish a prima facie case to merit the orders it got. The Appellants argue that the relationship between the Respondent, the Lessor and the 1st Appellant is governed by a sublease dated 27/05/2013 which was exhibited before the Trial Court by the Appellants.

The Appellants point out that "service charge" is described in the 8th Schedule of that sub-lease as a percentage of the periodical expenditure, the electricity and water charges. Furthermore, the Appellants argue, part two of the 8th Schedule clearly provides that the Management Company may withhold, add to, extend, vary or make any alteration in the rendering of services or any of them from time to time provided that the same complies with the principle of good estate management and is reasonable in all circumstances.

The Appellant cite Clause 2.6 of the sublease which provides that if a Lessee does not pay the charges in full in accordance with the terms of the sub-lease, the Management Company may, in its sole discretion, withhold the provision of all or any of its services. Given these provisions, and given the Respondent's own admission that it was in arrears in payment of the service charges, the Appellants argue that there is nothing irregular or illegal in the disconnection of electricity power supply as it was one of the terms agreed in the sub-lease.

c. The Appellants further argue that the Respondent was guilty of material non-disclosure and hence was disentitled from any equitable relief by the Court. The material non-disclosure the Appellants charge the Respondent with is that it did not disclose that it owed more than Kshs. 1,803,060/- in service charges by the time it went to Court. The Appellants relied on ***John Terer & Others v John Mbaraka & Others [2009] eKLR*** in support of this argument.

d. Fourthly, the Appellants argue that the Respondent approached the Court with "unclean" hands. This is because, argue the Appellants, the Respondent claimed falsely that it had offered to pay Kshs. 100,000/- together with a cheque of Kshs. 500,000/- to the Appellants and that the Appellants had refused to take them. The Appellants say that no such offers were made – and if true, the Respondent should have deposited the money in Court as a sign of good faith.

e. Fifthly, the Appellants argue that the conditions for the issuance of a mandatory injunction were not met in this case. Mandatory injunctions, the Appellants argue should only be issued in the clearest and strongest of cases where a Defendant cannot possibly have a defence. This condition was not met here.

f. Lastly, the Appellants complain that the Learned Trial Magistrate effectively determined the entire case at the interlocutory stage.

15. The Respondent's response on jurisdiction is that section 3(2) of the Magistrate's Court Act provides that "the Resident Magistrate's Courts shall have jurisdiction throughout Kenya" and that this gives the Kiambu Chief Magistrate's Court jurisdiction over the matter. The Respondent scoffs at the Appellants' over-reliance on sections 12 and 15 of the Civil Procedure Act which it sees as procedural laws which cannot oust the jurisdiction of the Courts given under the substantive law. The Respondent has relied on ***Atta (Kenya) Limited v Nesfood Industries Limited [2012] eKLR; Ruth Gathigia Kamunya & Another v George Kimani [2015] eKLR; and Ndungu Boro v Peter Njuguna & Another [2002] eKLR***.

16. The Respondent argues that it had clearly established a prima facie case in the Lower Court entitling it to an injunction. The Respondent argues that the Appellants was only entitled under the sub-lease to deny them services which fall under service charge and not electricity supply which is billed separately by a different entity.

17. On whether there was material non-disclosure, the Respondent argues that through its pleadings it disclosed to the Court that there was an existing lease between the parties and acknowledged to being in arrears. The Respondent therefore argues that the argument about it coming to Court with

"unclean" hands does not arise.

18. Lastly, the Respondent insists that all the conditions for mandatory injunction have been fulfilled here. This is because, the Respondent argues, the circumstances surrounding this case were very special in nature: although the Respondent had paid its electricity bills, the Appellants chose to disconnect electricity due to their own hidden agenda – and even prevented the Respondent from running a generator to keep its time-sensitive business going.

19. All these arguments were made before the Learned Trial Magistrate who made two consequential findings before allowing the Application in its entirety. In the first place, he held that he had jurisdiction to hear and determine the case and overruled the Appellants' objections as to place of filing. In the second place, the Learned Trial Magistrate held that under the Energy Act (Chapter 314 of the Laws of Kenya), it is an offence for any person to disconnect electricity without licence. As such, the Learned Magistrate concluded that it was illegal and criminal for the Appellants to disconnect electricity. Based on this, he allowed the Application in its entirety.

20. I will first deal with the question of jurisdiction. Suffice to say that I dealt with this question in detail in ***Esther Muregi v Penta Tancom Limited [2016] eKLR***. I have noted that even though the case before the Lower Court was argued in March, 2016 long after the new Magistrates' Court Act, 2015 came into force both the parties and the Lower Court relied on the provisions of the previous Magistrates' Court Act, 1967. This was an obvious error. The 1967 Act was replaced in October, 2015 with the new Act. That is the appropriate statute the parties should have addressed.

21. If the parties had based their arguments on the correct statute, they would have realized that the new statute does not contain a clause similar to section 3(2) of the Magistrates' Court Act, 1967. Section 3(2) is, of course, the pivot of the Respondent's case that magistrates' courts have jurisdiction throughout Kenya.

22. However, in the ***Esther Muregi Case***, I dealt with this question of the absence of a clause similar to the former section 3(2) and still held that Parliament likely intended that magistrates' courts would have jurisdiction throughout Kenya as a substantive matter. This is what I stated:

> *I am not sure I would go as far as holding that the High Court can transfer a suit which was filed in a court which had no jurisdiction in the first instance. However, I would agree that the liberating light of the provisions of Article 159(2) of the Constitution interpreted liberally and generously would inform our interpretation of sections 14, 15 and 18 of the Civil Procedure Act. To my mind, freeing the interpretation from the constraints of technicality and eager to do substantive justice would lead to a conclusion that sections 14 and 15 are procedural sections aimed at guiding parties on the appropriate place for suing. Suing in the "wrong" court as far as geographical location is concerned does not, however, necessarily make the suit a "nullity." Such a suit may be a suitable candidate for transfer under section 18 of the Civil Procedure Act to the appropriate Court. It is important to point out, however, even under this liberal interpretation not all suits will be automatically transferred. Among other things, in my view, the High Court will consider the reasons for filing the suit in the*
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> *"wrong" court in the first place. Where there is evidence of bad faith or improper motives, for example, the Court may refuse to transfer such a suit and leaving it to endure objections under section 16 of the Civil Procedure Act.*

23. This paragraph is important because it introduces another aspect of jurisdiction: a court may have technical or substantive jurisdiction but still refuse to take up a matter out of legitimate prudential or administrative concerns. This is one reason Courts have judicially created the doctrine of *forum non conveniens*. A Court may have the substantive jurisdiction to take up a matter but refuse to do so because the matter would be most conveniently and fairly be adjudicated elsewhere.

24. I believe the local filing limits in sections 14, 15 and 16 of the Civil Procedure Act are an expression

of this prudential doctrine. If the subject matter is located in one county at the far end of the country and the parties reside there, it is plainly ridiculous to bring suit at the other end of the country just because the magistrates' courts have jurisdiction throughout Kenya. It works the same way for the High Court which, by the terms of the Constitution, has unlimited geographical jurisdiction throughout the country. The Judiciary has come up with administrative directives on where matters should be filed.

25. One way to state this is to say that where there is evidence that a party has filed suit in a Court in bad faith or in a manner that signals forum shopping, the prudential doctrine counsels that the Court should decline to take jurisdiction and should, instead request the High Court to transfer the case to the most appropriate Court where the case should be heard. In cases where the court in which the case was filed is a seriously inappropriate forum, and the filing smirks of bad faith, the Court should even dismiss the suit outright.

26. I believe such was the case here. There is simply no logical reason other than forum shopping why this suit was filed at the Kiambu Chief Magistrate's Court. The subject matter of the suit is situated in the heart of Nairobi County which boasts the biggest and only specialised Commercial Court in the country. The parties are located in Nairobi. The contract was executed in Nairobi. No attempt whatsoever was made to explain why the suit was filed in Kiambu. In my view, the Learned Trial Magistrate should have been more circumspect about the motive of the Respondent in filing the case in that forum and should have declined to exercise jurisdiction in the circumstances. All factors pointed to this Court being a seriously inappropriate Court while there is an alternative convenient Court where the suit should have been filed.

27. Turning to the merits of the case, I would still agree with the Appellants that the Respondent did not meet the test for the grant of the orders sought. I say so for three reasons.

28. First, I readily agree with the Appellants that it was inappropriate for the Learned Trial Magistrate to grant prayer 3 of the Application at the interlocutory stage. That prayer reads as follows:

> *That the Court makes a finding that the Defendant's actions to disconnect electricity supply from the Plaintiff's office was illegal and unlawful as all electricity bills had been fully paid for.*

29. It is plain that the relief this prayer is asking for is a permanent one and not interlocutory and is, therefore, inappropriate at the interlocutory stage. Once the Court granted that prayer, there was really nothing left for the Court to determine. The Court had already rendered, at the interlocutory stage, a final determination of the case.

30. Indeed, I would venture to suggest that the entire Application as framed and argued was incompetent. The only other substantive prayer was framed as asking for reconnection of electricity pending the hearing of the Application *inter partes*. There was no prayer asking for the relief pending the hearing and determination of the substantive suit. It is not clear whether the framing of the declaratory relief in a permanent fashion and the framing of the reconnection relief only pending the *inter partes* hearing was strategic on the part of the Respondent. However, the outcome of the Court allowing the Application in its entirety is bizarre: it has the court making a finding that the disconnection was illegal and unlawful while the prayer for interim reconnection lapsed with the hearing *inter partes*.

31. Beyond these serious procedural deficiencies, the Learned Trial Magistrate's reason for allowing the Application – based on his reading of Section 64 of the Energy Act – was, with respect, erroneous.

32. Section 64 of the Energy Act is entitled "unauthorised, fraudulent or improper supply or use of electrical energy." It is aimed at criminalizing the unlawful "tapping" or "short-circuiting" of electricity supply or the fraudulent use of electricity supply for example where one applies for electricity for residential use but ends up using it for industrial purposes. The specific section cited by the Learned Trial Magistrate – which was not raised by either parties in their pleadings or Written Submissions – creates an offence for any person who disconnects, or permits to be disconnected, any conductor or apparatus from any electric supply line belonging to a licencee, without the consent of the licencee."

33. A licencee is defined in the Act a holder of a licence which, in turn, is defined to mean "any document or instrument in writing granted under this Act, to any person authorizing the importation, exportation, refining, storage and sale of petroleum or authorizing the importation, exportation, generation, transmission, distribution and supply of electrical energy, in the manner described in such document or instrument."

34. It is obvious that this section had no application to the situation at hand. The sub-section cited by the Learned Trial Magistrate is aimed at criminalizing behaviour that victimizes persons who are involved in the generation or transmission of electricity or petroleum to be used for purposes of generating electricity. It has nothing to do with the situation at hand where a lessor decides to disconnect the electricity of a Lessee for alleged violation of the sub-lease agreement. Yet, the Learned Trial Magistrate reasoned that since the Appellants are not involved in the business of "importation, exportation, refining, storage and sale of petroleum or authorizing the importation, exportation, generation, transmission, distribution and supply of electrical energy", it follows that they had no authority to disconnect electricity!

35. I can do no more than point out that this is a serious mis-reading and mis-application of the law. The very purpose and objects of the Act of Parliament should have given a clue to the Learned Trial Magistrate that he was probably in the wrong zone. The Energy Act describes itself as an "Act of Parliament to amend and consolidate the law relating to energy, to provide for the establishment, powers and functions of the Energy Regulatory Commission and the Rural Electrification Authority, and for connected purposes." I need not say more on this.

36. The dispute that the Learned Trial Magistrate faced was a simple one between a Lessee and the Management Company appointed in the sub-lease to be in-charge of the day-to-day operations of the building. The only question was whether the terms of the sub-lease agreement permitted the Appellants to disconnect electricity as penalty for the admitted non-payment of service charges by the Respondent. To be more precise, the question before the Learned Trial Magistrate should have been whether the Respondent had established on the more exacting standard required for the grant of mandatory injunction, that the Appellants had acted illegally in disconnecting electricity and that the Respondent stood a good chance to persuade the Court at the conclusion of the case that the Appellants' actions were unlawful. Further, the Respondent needed to persuade the Court that it would suffer irreparable injury if the relief sought was not granted.

37. The Respondent argues that the electricity charges are separate from the service charges and that therefore as long as it has paid electricity charges, the Appellants are disentitled from enforcing payment of service charges by disconnecting electricity.

38. The Appellants point out, the description of Service charge in part 1 of the Eighth Schedule of the Sub-lease defines it "the Service Charge Percentage of the Periodical Expenditure the Electricity Charges and the Water Charges." The Appellant takes this to mean that electricity charges are included as part of Service Charge hence permitting the Appellants to disconnect electricity as a method of collecting the Service Charge. They point to Part 2.6 of the Eighth Schedule of the Sub-lease which provides that:

> *For avoidance of doubt, if the Lessee does not pay the Charges in full in accordance with the terms of this Sub-lease, the Management Company may (in its sole discretion) withhold the provision of all or any of the Services.*

39. I must point out that it does not appear that what was contemplated by this part of the Sub-lease included disconnection of electricity. Instead, what was contemplated are the services described in Part Three of the Eighth Schedule as the "The Services" the Management Company covenanted to provide to the lessees. Provision of electricity or its facilitation is not included as one such service. From a reading of this Part of the Sub-lease, it is therefore doubtful whether it gives the Management Company that right.

40. Instead, I would think failure by the Respondent to pay Service Charges would trigger the rights of the Management Company under Clause 7 of the Sub-lease agreement. That clause permits the Lessor to re-enter the premises (in addition to any other rights to recover the charges) subject to an appropriate

Court order. Clause 7.1.2 further provides that any unpaid charges shall be recoverable in the same way as rents.

It is unclear to me that this would include the right to resort to disconnecting electricity.

41. Even then, I would still not, in the circumstances of this case have issued a mandatory injunction. This is because this relief is a discretionary and equitable one. A party that seeks it must demonstrate to the Court that it has acted equitably or is prepared to so act. Here, the Respondent made no such demonstration to bring them to the zone of equity. Courts are generally disinclined from using their equitable authority to reward a party that has brazenly breached its own duties or obligations and then approaches the Court for equitable relief when the other party responds to the breaches. Here, it has emerged, and it is undisputed that the Respondent was in arrears of service charges since 2013. Instead of paying the Service Charges or entering into an arrangement for so paying with the Appellants, the Respondent chose to pay only electricity charges as a stratagem to keep its business in operation and then rushed to Court to have electricity re-connected. That is not equitable conduct. I believe ***John Terer & Others v John Mbaraka & Others [2009] eKLR*** is in accord and is a particular application of this general rule.

42. Secondly, as I observed above in my analysis on jurisdiction, the fact that the Respondent came to a seriously inappropriate forum smirks of bad faith which disentitles it of any equitable relief.

43. For this reasons, I would allow this appeal. The Court disposes of the appeal as follows:

a. The ruling and order of the Lower Court dated 19/05/2016 is hereby set aside.

b. Instead, a decision dismissing the Respondent's Application dated 11/02/2016 with costs is entered.

c. In addition, in view of my findings on jurisdiction, I hereby direct that this file shall be transferred from Kiambu Chief Magistrate's Court to Milimani Commercial Court which is a more appropriate forum for the hearing and determination of the suit.

d. The Respondent shall be condemned to pay the costs of this appeal.

44. Orders accordingly.

Dated and delivered at Kiambu this 29th day of January, 2018.

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JOEL NGUGI

JUDGE