



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 60 OF 2016

(An appeal from the Ruling of the Principal Magistrate, Embu in CMCC No. 257 of 2012 dated 19/10/2016)

MBUNI DRY CLEANERS LIMITED.....APPELLANT/APPLICANT

V E R S U S

KENYA POWER & LIGHTING LIMITED.....RESPONDENT

R U L I N G

1. The applicant/appellant in his application dated 3/02/2017 and brought under certificate of urgency obtained interim orders for reconnection of electricity in its premises on 03/02/2017. The respondent upon being served with the application and the orders filed its own application also under certificate of urgency dated 17/02/2017 seeking for orders for setting aside the orders issued in favour of the applicant on 6/02/2017.
2. The court gave directions with the consent of the parties that the two applications which were founded on same facts be heard together. The parties argued the applications by way of written submissions which were highlighted by the respective counsels.
3. In its application dated 3rd February 2017 the applicant prays for the following orders:-
 - (a) That the Honourable court be pleased to grant an order to restrain the Respondent from disconnecting power supply to the Appellant/Applicant's premises pending hearing and determination of this applicant.
 - (b) That the Honourable court be pleased to grant an order to restrain the Respondent by itself or servants or agents or contractors or employees from disconnecting power supply to the Appellant/Applicant's premises pending hearing and determination of the appeal.
4. Prayer No. 2 sought for reconnection of power supply to the applicant's premises which was allowed on 6/02/2017 rendering the prayer spent.
5. The grounds in support of the application are that the lower court on 19/10/2016 struck off the applicants suit CMCC No. 257 of 2012 for lack of jurisdiction. The applicant filed this appeal on 2/11/2016. This was followed by the respondent disconnecting power supply from the applicant's premises over a disputed power bill. The applicant contents that the parties had an agreement when the re-connection was done on 17/02/2015 through meter No. 020343828 pending resolution of the dispute.
6. The applicant cites Section 60 of the Energy Act that the respondent is required to give notice before disconnecting power supply and that in this case, it failed to do so.
7. The applicant argues that the disconnection is a violation of the appellants consumer rights and denial of the right to fair administrative action. It is also argued that the appeal is arguable and has a high probability of success.
8. The respondent opposes the application in the affidavit of its county Business Manager one Richard Muindi. It is deposed that there exists a contractual relationship between the parties whereas the respondents gives power supply and the respondent is supposed to pay its bills as and when they fall due.
9. The power bill has now accumulated to Kshs.589,114.96 from as far back as 2012 and has refused/or neglected to settle the said bill. Although the applicant continues to pay the monthly bills, the principal amount of Sh.589,114.96 is still outstanding.
10. The respondent argues further that the orders sought should not be granted for the applicant is guilty of non-disclosure of the amount it owes the respondent which is quite substantial. The appeal was filed on 2/11/2016 but the applicant did not serve the respondent. The applicant has not come to court with clean hands and should not be granted the orders sought.

11. I noted from the respondent's submissions that he has somehow attempted to argue the appeal and to indirectly introduce a preliminary objection based on lack of jurisdiction instead of arguing the application for injunction. Similarly, the applicant's arguments are focused on the contentious bill.
12. This court will confine itself on the application seeking injunctive orders against the respondent and the applicable law.
13. It is important to note that the applicant has cited several provisions of the constitution relating to discrimination, access to justice and right to fair hearing whose relevance has not been explained in this application.
14. Order 42(6) of the Civil Procedure Rules deals with stay pending appeals which may be granted on the applicant satisfying certain conditions.
15. This appeal challenges the ruling of the Embu Chief Magistrate's court which dismissed the applicant's case against the respondent. The injunctive prayers sought by the applicant are indeed aimed at preserving the rights of the applicants to power supply pending hearing and determination of the appeal. The respondent refers to the application as one for stay pending appeal and presents his arguments on the issue. I do not think the applicant also argues on similar basis. Both parties have cited authorities in support of their arguments.
16. The decree in the lower court is negative and not capable of being stayed. However, the orders if granted will have the effect of restraining the respondent from denying the applicant its rights to power supply whose rights of course depend on the applicant fulfilling some obligation on its part.
17. It is my considered opinion that the applicant has the burden to satisfy this court on whether:-
- (a) Whether the application has been brought without undue delay;
 - (b) It has sufficient cause for this court to exercise its discretion in its favour;
 - (c) Whether the respondent will suffer any prejudice in the event that the orders are issued.
18. The case before the magistrate court CMCC No. 257 of 2012 was dismissed on 19/10/2016 following a successful preliminary objection challenging the court's jurisdiction. The applicant filed this appeal on 1/11/2016 which was about two weeks later. There was therefore no delay in this regard.
19. It was on 1/02/2017 that the respondent disconnected the power supply to the applicant's premises prompting the filing of this application. The respondent argues that the application took four (4) months to be lodged after the dismissal of the suit thus rendering undue delay on part of the applicant.
20. The explanation of the applicant is that there was no need to file the application since there was an agreement between the parties to re-connection power pending the resolution of the dispute.
21. It is my considered opinion that although there was no written agreement, the parties must have reached an oral agreement to re-connect the power on 1/02/2017 based on some conditions. This state of affairs seemed to have re-assured the applicant of enjoyment of the power supply pending the dispute resolution. For this reason, it would be misleading to describe the applicant's failure to file the application as undue delay.
22. The applicant pleads that he has established sufficient cause based on his constitutional right to power supply. The applicant is running a dry-cleaning business as its name suggests. Power is an essential tool in the running of the said business. In its absence, losses may be incurred or the business would have to close.
23. Having filed an appeal, the applicant has the constitutional right to be heard so long as it shows that the appeal is arguable. The respondent continues receiving payment for the monthly bill and will therefore not suffer any prejudice in the event that this court grants the order sought.
24. I am satisfied that the applicant has shown sufficient cause.
25. It is not in dispute that the applicant owes the respondent quite a substantial amount of electricity bill running over several years. The only contentious issue is the amount owed to the respondent. In this regard, the respondent's interest in the amount owing requires to also be protected to a reasonable extent pending the hearing of the appeal. The applicant, no doubt, has a legal obligation to pay its power bills and this cannot be wished away.
26. The applicant has been accused of obtaining orders in the previous suit and thereafter losing interest to prosecute its case for reasons known to him. This allegation was not denied and it is highly probable that it is true. The respondent also requires to be accorded protection of delay in this appeal in the event that this application is successful.
27. For the foregoing reasons, I allow the applicant's application on the following terms:-

(a) That the respondent shall continue supplying electricity to the applicant's premises until this appeal is heard and determined.

(b) That the applicant shall continue to pay its monthly power bills as and when they fall due.

(c) That the applicant is hereby ordered to deposit Kshs.300,000/= being approximately half the amount owing to the respondent pending the hearing and determination of this appeal.

(d) That the appellant is hereby directed to fast-track the admission and the hearing of this appeal to avoid delay.

(e) That failure to comply with conditions (b), (c) and (d) by the applicant will lead to automatic vacation of the orders made herein.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JULY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Shambuya for Sigei for Defendant