



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 311 OF 2016**

**HON. KENNEDY ODHIAMBO NYAKUNDI ..... PLAINTIFF**

**V E R S U S –**

**KENYA POWER AND LIGHTING CO. LTD .....DEFENDANT**

**RULING**

1) Kennedy Odhiambo Nyakundi, the plaintiff/applicant, took out the motion dated 28.11.2016 in which he the following orders, inter alia:

*a. This application be certified as urgent and requiring to be placed before the duty judge for urgent ex parte orders.*

*b. This honourable court be pleased to grant an order of mandatory injunction compelling the defendant /respondent to restore electricity to the plaintiff/applicant's farm pending the hearing and determination of this application.*

*c. This honourable court be pleased to grant an order compelling the defendant forthwith to release to the plaintiff/applicant the following documents in the defendant's possession:-*

*i. A copy of the applicant's application for supply of electricity the applicant's farm.*

*ii. A copy of the quotation for electricity supply pursuant to the application above.*

*iii. A copy of the receipt acknowledging the receipt of the installation and or connection fees.*

*iv. A copy of the duly executed electricity supply contract between the plaintiff and the defendant.*

*v. A written report of the findings of the defendant's investigators AND/OR loss adjustors following investigations conducted by the defendant arising from the plaintiff's several complaints herein.*

*d. That upon hearing inter partes, the orders in prayer (b) above be granted pending the hearing and determination of this suit.*

*e. Costs of this application be provided for.*

2) The aforesaid motion was placed before this court to certify the same as urgent and to consider whether

or not ex parte orders should be granted. Upon reading the motion ex parte on 28.11.2016, this court certified the same urgent and proceeded to further issue an ex parte order of mandatory injunction to compel Kenya Power & Lighting Co. Ltd the defendant/respondent, to restore electricity to the plaintiff/applicant's farm. The motion was then fixed for inter partes hearing on 8.12.2016. On the aforesaid date Mr. Fraser, learned advocate for the defendant, successfully applied for the adjournment of the inter partes hearing of the motion to enable him file a response.

3) Mr. Aduda, learned advocate for the plaintiff/applicant complained to this court that the defendant had blatantly disobeyed the court order compelling it to restore power to the plaintiff's farm despite having been served with the court order. In response, Mr. Fraser informed this court that he had been instructed by the defendant to inform this court that power had been restored to the plaintiff's farm in compliance with the court order. The motion was then adjourned to 14<sup>th</sup> December 2016 for purposes of ascertaining whether or not the court order was obeyed. Unfortunately the matter did not appear on the cause list of 14.12.2016. The plaintiff was thus prompted to approach the Deputy Registrar of this court to have the file placed before this court to fix another date for inter partes hearing and to extend the interim order. This court consequently issued orders fixing the motion for 20<sup>th</sup> December 2016 for purposes of receiving arguments to establish whether or not the court order was complied with.

4) Mr. Aduda urged this court to find that the defendant has disobeyed the order compelling it to restore power to the plaintiff's farm. The learned advocate urged this court to thereafter proceed and punish the defendant. He argued that Mr. Thomas Kiptoo Sambu, the person who swore the affidavit claiming that power had been restored had no qualifications nor expertise to determine what sort of power was re-connected to the plaintiff's farm. Mr. Aduda was of the view the affidavit of Mr. Thomas Kiptoo Sambu was meant to mislead this court into believing that power had been reconnected as ordered by the court. He also pointed out that the power alleged to have been restored was measuring 242 volts which is transmitted through single phase yet the plaintiff required the supply of power through three phase which measures 415 volts.

5) Mr. Fraser, on the other hand was of the view that the defendant has fully complied with the court order by supplying the plaintiff with power measuring 242 volts. The learned advocate pointed out that the court had issued an order directing the defendant to supply power to the plaintiff's farm but the plaintiff has now shifted goal posts by raising questions regarding the sufficiency of the power supplied. Mr. Fraser further beseeched this court to order for an independent expert to visit the plaintiff's farm to ascertain whether or not power has been reconnected to the plaintiff's farm. Mr. Aduda was reluctant to take up this invitation arguing that there was sufficient material supplied to the court to show that the defendant had blatantly breached the court order.

6) I have carefully considered the material placed before this court and the rival oral submissions of learned counsels from both sides. The key question which this court wanted to ascertain is whether or not power supply has been connected to the plaintiff's farm in compliance with the court order issued on 24.11.2016 and subsequently extended on 14<sup>th</sup> December 2016. The defendant has filed the affidavit of Thomas Kiptoo Sambu claiming that power had been supplied in compliance with the court order measuring 242 volts. The plaintiff has sworn a replying affidavit to dispute the defendant's assertion. The plaintiff argued that the deponent did not have the requisite expertise to ascertain the question of the connection and measurement of power supplied. The plaintiff further argued that his farm required the supply of power through a three phase and not a single phase as stated by the defendant. After a careful consideration of the arguments from both sides, I am of the view that both sides have given plausible submissions in support of their positions. The plaintiff is emphatic that power has not been supplied, and if supplied, the same is not sufficient in terms of the agreement for power supply. The defendant has also filed averments of its regional manager showing that it has supplied power. It is difficult at this stage to make a finding on whether or not power has been supplied as ordered by this court. I am persuaded to accept the request by Mr. Fraser to make an order which I hereby do directing the parties jointly or separately to appoint an independent electrical engineer to visit the plaintiff's farm to ascertain whether or not electricity has been supplied to the plaintiff's farm.

7) For the avoidance of doubt I hereby make the following orders

**i. The parties to this suit to jointly or separately approach either the Kenya Bureau of standards or the Kenya Energy Regulatory Commission to appoint an independent electrical engineer to visit the plaintiff's farm to ascertain whether or not electricity has been connected to the aforesaid farm and the actual measurement of the supply within 14 days from the date hereof.**

**ii. The report envisaged from (i) herein above, should be filed in court within 14 days from the date of appointment.**

**iii. Parties to share equally costs anticipated to arise from the appointment of the electrical engineer envisaged in (i) above.**

**iv. The motion dated 28.11.2016 is stood over to 24.1.2017 for further orders and directions before any judge in the Civil Division.**

**v. Interim order extend to subsist until then.**

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of December, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant