



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 18 OF 2016

JOSECK OSEKO t/a BONDS HOTEL.....PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING CO. LIMITED DEFENDANT

RULING

1. The claim by the plaintiff, **Joseck Oseko t/a Bonds Hotel**, against the defendant, **Kenya Power & Lighting Company**, is for a mandatory injunction order to compel the defendant to restore power on A/C No. 2541904-01 and a permanent injunction order to restrain the defendant from disconnecting power supply on the said account on the basis of the bill under dispute.

The claim also seeks general and exemplary damages for loss of business and goodwill as well as costs of the suit.

2. The Plaint dated 15th November 2016, was filed contemporaneously with a Notice of Motion also dated 15th November 2016, seeking a temporary injunction order compelling the defendant to connect electricity supply to the plaintiff's business premises on A/C No. 2541904-01 pending the hearing and determination of the suit. The application is premised on the grounds in the body of the Notice of Motion and the plaintiff's supporting affidavit dated 15th November 2016.

3. In brief, the plaintiff states that he is a consumer of power supplied by the defendant on A/C No. 2541904-01 and has been paying his bills regularly and promptly. However, in the month of October 2016, the power supply to his business premises was disconnected by the defendant on allegations that his power-supply line was punctured. A further inspection of the line revealed that there was no interference in any manner with the line. Nonetheless, the defendant disconnected power supply and raised a bill of Ksh. 549,999/40cts against the plaintiff who had no outstanding bill at the time and had no capacity to puncture the material power line from the main supply line.

4. As a result of the disconnection, the plaintiff has been subjected to unnecessary loses thereby prompting him to lodge a complaint with the Energy Commission. He therefore urges this court to issue an order of injunction against the defendant pending the hearing of the dispute filed before the Energy Commission.

The respondent despite being served with the application did not file any replying affidavit and/or grounds of objection. Nonetheless, the obligation by the plaintiff to cogently establish that he is entitled to a temporary order of injunction against the defendant was not displaced and more so, where the order

sought was for a mandatory injunction. The plaintiff is thus seeking a temporary mandatory injunction order to compel the defendant to re-connect the power supply to his premises pending the hearing and final disposal of this suit or the dispute before the Energy Commission as indicated in paragraph 12 of the supporting affidavit.

5. The granting of an interim or interlocutory or temporary injunction is an exercise of judicial discretion but the court must always take into account that its primary duty is to give a full scale impartial hearing of the dispute at hand before arriving at a final decision. The court must also be careful in considering an application for a temporary injunction of whatever nature bearing in mind that it is not unusual for such an injunction to finally dispose of the suit and settle the rights between the parties. At such a stage, the court is not required to determine the very issues which will be canvassed at the trial with finality. All that is required is a determination on whether the applicant is entitled to an injunction order on the basis of the criteria set out in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973)EA 358**.

6. The criteria is firstly, an applicant must show a prima-facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately, be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

In the present case, a mandatory interlocutory injunction is sought with a view of interfering with a contractual relationship existing between an individual person and a company with a monopoly to supply electric power to all and sundry. The plaintiff/applicant thus seeks an order to compel the defendant to connect or re-connect supply of electric power to the applicant's premises on the basic ground that his A/C No. 2541904-01 has no outstanding bill and that the bill of Ksh. 549,999/40cts raised against him was unjustified.

7. Clearly, this is a dispute over the bill and it led the defendant to disconnect power supply to the plaintiff's premises. Whether or not the plaintiff owes that amount is a matter which cannot be determined by means of an interlocutory application considering that sufficient evidence would be required to prove that the defendant was not entitled to disconnect the supply of power for non-payment of outstanding electricity bills, a right which it has on the basis of the relevant agreement with the consumer.

The applicant alluded to the respondent having accused him of puncturing a power supply line and interfering with the meter connection as the main reason which led to the issuance of the disputed bill. He therefore implied that the defendant acted in bad faith in disconnecting power supply to his premises.

8. There was herein no evidence of such bad faith or evidence to demonstrate that the defendant's action was unlawful.

The account statements annexed to the applicant's supporting affidavit and marked 'JO-01' indicate that the applicant's account has an outstanding balance of over Ksh. 550,000/= for the period or years 2014 to 2016.

The letter from the defendant dated 17th October 2016, annexed to the supporting affidavit and marked 'JO-03' gives a glimpse of what transpired before the power supply to the plaintiff's premises was disconnected. It actually shows that the defendant may have acted within the terms of the existing contract with the plaintiff and hence, lawfully.

9. Even though the respondent did not file a response in this application, the averments by the applicant in his supporting affidavit and the annexures provided therein create a situation which is not entirely in his favour and does not show a prima-facie case with a probability of success. It does however, show that in the end result the respondent is held liable for unlawfully and/or unjustifiably disconnecting power supply to the applicant's premises, compensation in monetary terms would be adequate remedy for the injury suffered. In any event, one of the prayers in the plaint is general and exemplary damages for loss of business and goodwill.

10. Besides, this dispute arises from a contractual agreement for supply of electric power between the applicant and the respondent. A breach of such contracts by either party is compensable by an award of damages.

In the case of **Wilson K. Ndungu Vs. Kenya Shell Ltd Nakuru HCCC No. 58 of 2008**, the court stated that it is now well established beyond peradventure that except in special cases where the court may be called upon to specifically enforce a contract, the usual remedy for breach of contract is to award the innocent party damages which is compensation intended to place him in monetary terms, in the same position that he would have been if the contract had been performed.

11. All in all, this is not a suitable case for granting of an interlocutory mandatory injunction which would normally be granted sparingly and only in exceptional circumstances such as where the applicant's case was very strong and straight forward. The standard of proof required in such mandatory injunction is much higher than that expected in prohibitive or restraining injunctions. There are no exceptional circumstances in this case to warrant the grant of an interlocutory mandatory injunction against the respondent (see, **Snowind Industries Ltd Vs. Guardian Bank Ltd 7 Another (2002)1EA 284**).

This application is wanting in merit and is hereby dismissed with no orders as to costs.

[Read and signed this 8th day of December 2016].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Ondieki holding brief Nyambati for applicant

Njoroge/Saitoti CC