



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC NO. E28 OF 2021**

**GOODY RUHU AMUNABI.....1<sup>ST</sup> APPELLANT**

**GRACE VINCENT OPONDO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**DOROTHY DEMBA.....RESPONDENT**

**RULING**

**Application**

1. The appellants moved the court through notice of motion dated 22/12/2021 brought under **Rules 13** of the **Practice directions on proceedings in the Environment and Land Court, Section 15 of the Landlord and Tenant (Shops Hotels and establishments) Order 42 rule 6** and **Order 51 rule 1 of the Civil Procedure Rules** seeking the following orders:

**(1) ...spent**

**(2) That pending the hearing and determination of this application, the honourable court be pleased to issue an order compelling the respondent to pay the outstanding electricity bills to enable Kenya Power and Lighting Company to reconnect electricity in the business premises rented to the appellants herein on plot No. Njoro/Ngata/Block 1/307 Nakuru County.**

**(3) That in the alternative to prayer (2) above, the appellants herein be allowed to pay the outstanding electricity bills incurred by the respondent and the same be deducted from the monthly rent paid by the appellants herein.**

**(4) That this honourable court do issue an order compelling the respondent herein to continue making payments of electricity bill as and when they arise pending the hearing and determination of the appeal.**

**(5) That the OCS Menengai Police Station to enforce compliance.**

**(6) That the costs of this application.**

2. The application is supported by the affidavit sworn on 22/12/2021 by Grace Vincent Opondo and on behalf of the 1<sup>st</sup> appellant where she deposed that she is one of the tenants of the respondent in respect of the suit business premises plot No. **Njoro Ngata/Block 1/307**; that from the commencement of the tenancy to date they have been paying their monthly rent and all other utility bills without fail; that on 2/12/2021 the Business Premises Tribunal delivered a ruling evicting them from the suit premise based on an alleged Notice by the Public Health offices due to inadequate sanitary facilities in the suit premises.

3. She went on to depose that despite an order of stay of execution of the said ruling, the respondent has failed to pay electricity bills amounting to **Kshs. 39,954/=** as at 18/12/2021 forcing the Kenya Power and Lighting Company (KPLC) to disconnect the electricity supply in the suit premises thus exposing them to unwarranted financial loss and damage; that the respondent's acts of omission are meant to maliciously force and/or compel them to vacate the business premises without any lawful justification; that they visited the Kenya Power and Lighting Company Ltd and were informed that the meter number to the suit premises had arrears of **Kshs. 39,954** yet they did not have any rent arrears. On the outstanding electricity bills they stated that the same was to be paid directly by the respondent. She finally deposed that they stand to suffer irreparably unless the court intervenes and grants them the orders sought in the instant application as they need to run their businesses to enable them pay rent and employees.

## The Response

4. The respondent filed a replying affidavit dated **12/01/2022** sworn by Dorothy Demba where she deposed that the application was filed on **23/12/2021** while her advocate had closed for the Christmas festivities and her advocates got wind of the direction given on **10/1/2022** upon resuming office only to realize that the matter had been scheduled for mention on the same day; that the application dated **16/12/2021** is premature with unsubstantiated claims and should be dismissed with costs; that the content of **paragraph 2 and 3** of the appellant's supporting affidavit in the instant application is admitted to the extent of the tenancy but the appellant were to pay their portion of the electricity bill as provided by the landlord; that the appellants failed to remit electricity payments for the months of November and December to date.

5. She further deposed that the high electricity bill charged on the respondent is partly due to the failure of the appellants to honour their end of the deal and remit their portion of the bill on time; that the last payment for electricity by the 1<sup>st</sup> appellant was made on **29/11/2021** which payment was for the month of October while the 2<sup>nd</sup> appellant made her last payments on **22/10/2021**; that the contents of **paragraph 4 and 5** of the appellant's supporting affidavit are admitted but have no bearing on the matter at hand; that upon receiving the bill from Kenya Power and Lighting Company she sought to query the bill as it was quite high and she brought it to the appellants attention and sought their contribution to offset the bill; that while awaiting the response from KPLC and for the appellants' to remit their portion of the bill, the power was disconnected on account of the bill.

6. She further deposed that it was incorrect to state that she had refused to pay the bill yet the statement from KPLC shows that she has been consistently paying the bill even where the appellants had failed to remit their portion on time; that the outstanding bill as at **20/12/2021** was an overpayment of **Kshs. 46** and failure to restore the electricity was due to the appellants failure to remit the November and December contribution towards electricity yet they expect normal services.

7. She finally deposed that allowing the present application would compel the respondent to provide free services to undeserving tenants thus denying her the fruits of her investments and urged the court to dismiss the appellants' application.

## Submissions

8. The appellants filed their written submissions on **14/01/2022** while the respondent filed their submissions on **2/2/2022**.

## Determination

9. The issue that arises for determination is whether the reliefs sought by appellants should issue, that is, whether this court should issue an order compelling the respondent to pay the outstanding electricity bills so that power may be reconnected to the premises held by the appellants in which they are conducting their businesses; the alternative prayer is that they be allowed to pay those bills and deduct them from the monthly rent they pay to the respondent.

10. In the instant case, the appellants are seeking an order compelling the respondent to have electricity connection restored to their business premises and that upon such reconnection, power supply remains uninterrupted pending the hearing and determination of their appeal.

11. This is an application for a mandatory temporary injunction. In contrast to a prohibitory injunction, considerations for granting the mandatory order are slightly different. In the case of prohibitory injunction, an applicant must establish *prima facie* case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated for by an award of damages if an injunction is not granted or further still, where the court is in doubt, that the balance of convenience tilts in the applicant's favour. In the case of mandatory injunction, the applicant must in addition establish special circumstances and the standard for its grant is usually higher than that of prohibitory injunctions.

12. The considerations for granting interlocutory mandatory injunctions were well stated in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** where the Court of Appeal said: -

***“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-***

***‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’*****[Emphasis mine]**

13. The Court of Appeal quoted with approval an English decision in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901** where it was stated: -

***“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”***

14. In the more recent case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal stated:-

***“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances [Emphasis mine] ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”***

15. In the present case, the appellants are business people living as tenants in the respondent’s business premises. They argue that the respondent caused disconnection of electricity in the suit premises despite them being up to date on their rent and electricity bills. They further contend that they have no outstanding bills and therefore not indebted to the respondent and that the respondent is using this so as to frustrate the appellants so that they can vacate the suit premises. They submit that the respondent is well aware that their businesses fully rely on electricity to run and thus they have incurred losses.

16. The respondent on the other hand submitted that it is indeed her responsibility to receive and remit payment of the electricity to KPLC and that payment of the bill over time by the appellants has been erratic forcing the respondent to make payments herself and recover the same when the appellants would remit their portion of the payment. She further argued that the disconnection was not in any way related to the eviction orders that were issued on **2/12/2021** and that it was a bad coincidence that it was disconnected on **20/12/2021**. She also submitted she is justified in withholding the service to compel payment of the bills by the appellants.

17. In the instant case, it is not in dispute that the appellants are tenants and the respondent the landlady as evidenced from the tenancy agreement dated **20/4/2015**. It is not in dispute that the appellants are business owners running an *agrovet* shop and salon which require electricity. It is also not in dispute that the appellants’ have been remitting their rent and electricity bills to the respondent as evidenced from the attached mobile money statement of the 2<sup>nd</sup> appellant. The dispute is with regard to the timely payment of the electricity bills by the appellant which in my view that can only be resolved during the appeal.

18. It is a fact that there is also a stay of execution of the ruling by the tribunal pending the hearing and determination of the appeal. It is my view that if the appellants are to be granted the orders sought, they must come with clean hands. They have admitted to making electricity payments to the respondent as evidenced from the MPESA statements. They have also shown from one of their prayers that they are ready to pay the electricity arrears so that the respondent can deduct from the monthly rent paid. It is my view that the respondent acted unreasonably and without justification and therefore I am satisfied that the appellants have met the test of special circumstances and this application warrants the court exercising its discretion in the appellants’ favour.

19. Consequently, the application dated **22/12/2021** is allowed as follows:

**1) A mandatory injunction is hereby granted compelling the respondent to clear the electricity balance of Kshs. 39,954/- to enable KPLC restore electricity power supply to the appellants’ respective premises.**

**2) Upon failure by the respondent to pay the electricity arrears within the next seven (7) days from the date of this ruling, the appellants’ shall be at liberty to pay the electricity arrears and the electricity bills and continue servicing the same until the hearing and determination of the appeal and have the same offset from their rent obligations to the respondent.**

**3) The costs of this application shall abide the result of the appeal.**

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 10<sup>TH</sup> DAY OF MARCH, 2022.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**