



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL CASE NO. 10 OF 2012

DOROSH LIMITED

T/A MAKUTI VILLAS KILIFI PLAINTIFF

VERSUS.

KENYA POWER & LIGHTNING CO. LTDDEFENDANT

RULING

By way of a Notice of Motion application dated 8th May, 2012 and expressed to be brought under order 40 rules 1 and 2 of the Civil Procedure Rules 2010 and Section 1A, 1B, 3A and 63 of the Civil Procedures Act the applicant seeks;

1. The Defendant to be restrained from disconnecting power supply on account of the rebilled sum pending the hearing and determination of the suit.

The grounds are that the Defendant had threatened to disconnect power supply to the plaintiff's premises which actions are without basis and are unlawful.

That the plaintiff has settled all electric power bills that were lawfully due from the Defendant.

The application is supported by the affidavit of Fernando Della Pioggia a Director of the plaintiff company who depones inter alia that the Defendant provides electric power to the plaintiff's premises pursuant to account No. 0445014-02 which was opened by Dhows-Inn annex one of the entities that previously occupied the premises.

Sometimes in the month of July, 2012 the Defendant undertook a rebilling on the account and demanded a sum of Ksh. 2,604,338 from the plaintiff being alleged unpaid bills.

Vide a letter dated 20th July, 2011 the plaintiff protested the rebilling and vide its letter dated 20th February, 2012 the Defendant revised the amount to Ksh. 1,887,854.44.

Thereafter the Defendant threatened to disconnect the plaintiff's power supply which would occasion irreparable damage to the plaintiff.

It is the contention by the plaintiff.

That the Defendant's reason for rebilling is that the plaintiff allegedly tampered with the meter.

There is no evidence of proof of tampering when, where and how?

That the Defendants initial rebilling period covered August, 2007 to July 2011, a period of close to four (4) years.

The revised rebilling period covered January, 2008 to May, 2011 which is a period of three (3) years and four (4) months. The issue is why did it take that long for the Defendant meter readers to detect the tampering if any.

It is further contended that if tampering was discovered on 24th May, 2011 what was the basis of rebilling for a period of over three (3) years?

Were seals broken. Was anybody charged with breaking the seals. These are the questions posed by the plaintiff.

It is also contended that Section 59(1) of the Energy Act No. 12 of 2006 permits rebilling or recalculation for a maximum period of six months and in consultation with the customer.

The plaintiff relies on the authority of **Kenya Local Government Superannuation Fund –Vs- Kenya Power & Lightning Company (2005) eKLR** where the Court granted an injunction in a situation similar to the present.

In its replying affidavit of Harrison Macharia the Deputy Customer Service Engineer it is deponed that at the point of taking over the business the plaintiff did not apply for a new supply contract or inform the Defendant company of the New details of the customer so as to enable it effect any new changes to the supply contract. It is the contention by the Deponent that upon inspection of the plaintiff meter sometimes in May, 2011 it was found that they had been tampered with and a report was made to that effect.

All phases had been by passed sub main connected at the cut out and meter units not showing and photographs were taken to that effect.

That the plaintiff did concede vide its letter dated 15th July, 2011 that there existed some suspect connection by their electrician which same indicates that it tampered with the electricity meter and it has not come to Court with clean hands.

It is not in dispute that the plaintiff started operating business at plot No. 20252/40 Kilifi since the year 2008 prior to that year there were other entities who had carried on business and consumed electric power.

It has not been established at what time the tampering was done though the plaintiffs electrician had signed a document after the inspection acknowledging that all phases had been by passed and the connection was direct.

On the issue of rebilling the Defendant maintains that it was reflected in the monthly bill of July, 2011 which in essence reflected the average difference in consumption of electricity by the plaintiff since the time it began tampering with the meter readings.

Section 59(1) provides for defective meters, where the defect is through no fault of the licensee or the consumer, that there should be consultation in dermining the reasonable quantity of electrical energy supplied on the period should be for a maximum of six months.

Section 59(2) where the defect to the meter is through interference by the consumer the licensee may determine the reasonable quantity of electrical energy supplied and recalculate charges from the date the licensee determines the meter to have been interfered with.

3. where a dispute arises as to recalculation such dispute should be referred to the commission for determination.

In the present case it has not been properly established when the tampering was done and whether it could be properly attributed to the plaintiff.

Section 59(3) of the Act provides for dispute like the present one to be taken before the commission instead of a disconnection.

In the cited case of **Kenya Local Government Superannuation Fund –Vs- Kenya Power Azangalala**, Judge granted an injunction in a case similar with this one.

In the case of **Palale Dry cleaners Ltd. & Anor. -Vs- Kenya Power & Lightning Co. Ltd. Nairobi Hccc No. 837 of 2000** it was held that,

“There should be no disconnection and the dispute should be referred to the Electricity Regulatory Board”.

The same position was held in the case of **John D Skoda -Vs- Kenya Power & Lightning Co. Ltd. Nairobi Hccc 886 of 2003.**

I am satisfied that the applicant has shown a prima facie case with a probability of success at the trial. The act of disconnection of power is a drastic act more so when the Defendant exercises near monopoly on the supply of power. I find that the application has merit. The Defendant is accordingly restrained from disconnecting power supply on account of the rebilled sum pending the hearing and determination of this suit.

Costs in the cause.

Ruling delivered dated and signed this **22nd** day of **November, 2013.**

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M. MUYA

JUDGE

22ND NOVEMBER, 2013

In the presence of:-

Learned Counsel for Mutiso holding brief Plaintiff/Applicant

Learned Counsel for Defendant Mrs. Umara

Court clerk Musundi