



REPUBLIC OF KENYA  
IN THE COURT OF KENYA  
AT NAIROBI  
ENVIRONMENTA & LAND CASE 615 OF 2011

**THE KENYA POWER & LIGHTING CO LTD ..... PLAINTIFF**

**VERSUS**

**KINGS COLLECTION LIMITED ..... DEFENDANT**

**RULING**

The applicant, **KENYA POWER & LIGHTING COMPANY LIMITED**, is a public body whose statutory mandate under the Energy Act 2006 is *inter alia* a provider of electricity and carrying out system reinforcement upgrade programme. On 8<sup>th</sup> November, 2011, the applicant filed a suit against the respondent **M/s KINGS COLLECTION LIMITED**, who is the registered proprietor of **LR NO. 11895/50** (suit premises).

The applicant also filed a notice of motion dated 7<sup>th</sup> November, 2011, seeking for an interim order of injunction to restrain the respondents, its employees, agents, servants or anybody acting on behalf of the respondent from interfering impeding, obstructing or denying the applicants or their employees or agents from carrying out its system reinforcement programme on the suit premises until the hearing and determination of the suit.

This application also seeks for several other orders which are a mere repetition of the prayer for injunction save that the applicant also seeks for an order that the Kenya Power & Lighting Company Limited through the officer commanding police (OCS), Athi River, do assist and ensure enforcement of the court order.

This application is supported by several grounds enumerated in the application and the matters deposed to in the supporting affidavit of John Njehia sworn on 7<sup>th</sup> November, 2011, and a supplementary affidavit sworn on 24<sup>th</sup> November, 2011.

According to the applicant, it enjoys way leave rights over all those sections of the suit premises that are passed over and crossed by the 66 KV Embakasi Athi River electric supply lines since 1956. The applicant awarded **Patronics Services Limited** a contract to reinforce the existing electric supply lines by adding an extra line to the existing ones, that is, within the existing way leave corridors. That an additional 66 KV electric supply line has on one side been erected from Embakasi sub station to the junction of Mombasa Road/Namanga Road but the work stalled at the boundaries of the suit premises due to alleged interference by the respondent.

It is alleged that the respondent's workers, agents or hirelings physically obstructed the applicant's sub contractor from carrying out the exercise along the way leave corridor of the suit premises. This application was filed under certificate of urgency and an interim order of injunction was granted *ex parte*. The application was served upon the respondent.

It was opposed through the matters deposed to in the replying affidavit of Mr. Harish Ranji, a director of the respondent. The respondent denies that the applicant has any proprietary interests in the suit premises. The following are some excerpts from the replying affidavit that was sworn on 17<sup>th</sup> November, 2011, in response to this application:

*“6. That I further state that I was taken by surprise the plaintiff’s action of filing this suit as the defendant has no proprietary interest in the suit property.*

*7. That the plaintiff has no claim founded on laws and facts against the defence.*

*8. That the plaintiff filed this suit without due diligence which makes the whole suit null and of no consequence in law.*

*9. That the defendant is entitled to be compensated by the plaintiff for the incurred costs such as filing fees, advocate fees and other incidentals.”*

The above is the summary of the salient issues raised for and against the application which seeks for an order of injunction. The principle element to determine is whether the applicant has established a *prima facie* case with a probability of success to warrant the granting of an order of injunction. Secondly, irreparable harm which cannot be compensated for in damages and if in doubt, the court is supposed to determine the matter on a balance of probabilities. See the often cited case of **GIELLA V CASSMAN BROWN & COMPANY LIMITED [1973] EA 358.**

The Court of Appeal has further explained what constitutes a *prima facie* case in the case of **MRAO LIMITED V FIRST AMERICAN BANK OF KENYA LIMITED AND OTHERS [2003] KLR 125** where the court held:

*“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

Bringing the above principles to bear, the applicant claims that it enjoys way leave rights over the suit premises or the subdivision of those suit premises. The applicant annexed several documents which look like maps but that is a matter to be determined at the trial.

The applicant states that the work of reinforcing the systems of the supply lines and the work of upgrading and modernization of the Embakasi substation was interrupted by the respondent. The respondent denies this allegation and states that this case was filed by the applicant before they performed due diligence. The respondent has not denied ownership of the suit premises but vehemently denied alleged interference.

In this case, I find the respondent will not be subjected to any prejudice because it denies having interfered with the plaintiffs work. Moreover, on a balance of convenience, the applicant has demonstrated that stopping the programme will cause colossal losses both to the applicant and also to the public who are the consumers of the electricity.

I am satisfied that the applicant has established a *prima facie* case which raises triable issues. If the respondent suffers any damages, as it claims the suit was filed without due diligence, it can be compensated with costs or damages whatever the case.

In the upshot, the applicant’s application is allowed in terms of prayer numbers 9, 10 and 11 of the notice of motion dated 17<sup>th</sup> November, 2011. Costs of this application shall be in the cause.

This injunction is to remain in force only for twelve [12] months.

**Ruling read and signed this 30<sup>th</sup> day of March, 2012.**

**MARTHA KOOME  
JUDGE OF APPEAL**

**Note:**

*This application was heard and concluded on **6<sup>th</sup> December, 2011**, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.*