



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**CIVIL CASE NO. 289 OF 2009**

VELOS ENTERPRISES LTD.....PLAINTIFF/  
RESPONDENT

VERSUS

PARAGON ELECTRONICS LTD.....DEFENDANT/  
APPLICANT

**RULING**

By an application by Chamber Summons dated 12<sup>th</sup> May, 2010, and taken out under Section 3A of the Civil Procedure Act and Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, the Applicant seeks orders, *inter alia*, that pending the hearing and determination of this suit –

- (1) This Honourable court be pleased to grant an interim injunction restraining the Plaintiff, its agent, assigns, representatives, employees/or otherwise howsoever from interfering with the Defendant's peaceful and quiet enjoyment of all that property known as LR No 209/16027 (hereinafter the suit property); and
- (2) That pending the hearing and determination of this suit, this Honourable court be pleased to grant a mandatory injunction compelling the Plaintiff to restore the supply of water and electricity for the Defendant's use at the suit property.
- (3) The costs of this application be borne by the Plaintiff.

On 1<sup>st</sup> December, 2010, the Plaintiff/Respondent filed a Notice of Preliminary Objection which read as follows –

**“TAKE NOTICE** that the Plaintiff, Velos Enterprises Ltd herein, will at first hearing of the Defendant's application dated 12<sup>th</sup> May, 2010, raise the following points of law for adjudication by

**this Honourable court prior to the said hearing of the application -**

**(a) The application is incompetent.**

**(b) The application flies in the face of Section 6 of the Civil Procedure Act; there is pending for determination before the Hon. Justice Muga Apondi the Plaintiff's application dated 7<sup>th</sup> September, 2009 for judgment which was fully defended and argued and the issues therein are substantially in issue with the issues brought forth by the Defendant in its application.**

**(c) This Honourable Court lacks jurisdiction to entertain the application.**

**(d) The application is not borne out of a suit or proceedings as set out under Order 39 of the Civil Procedure Rules or Section 7 of the Arbitration Act 1995."**

When this matter came for hearing, Mr Liko appeared for the Plaintiff/Respondent while Mr Mogere appeared for the Defendant/Applicant. Mr Mogere sought an injunction in terms of the prayers set out in the application and argued that the Respondent had cut off water and electricity, which facts, he said, were not contested. He referred to the Preliminary Objection which he said was served on him in court that morning, and that the implication of that objection was that the Respondents admitted the facts. He argued that the court had jurisdiction under Section 63 (e) of the Civil Procedure Act which empowered the court to give temporary injunctions to ensure that the interests of justice were not defeated. On the facts of this case, he sought the court's intervention because electricity and water were essential amenities and the Respondent had no cause whatsoever for disconnecting them.

In his response, Mr Liko for the Respondent submitted that the powers of the court were prescribed in Order XXXIX of the Civil Procedure Rules and that Section 63 should not be looked at in isolation. He submitted that under the said Order there has to be a suit, and that the remedies under Order XXXIX were available only pending the hearing and determination of the suit. In the absence of a suit or a counterclaim, no relief can be granted under Order XXXIX. He referred to Section 2 of the Civil Procedure Act which defines "suit" and said that in addition to this matter, the defendant had also filed HCCC No 285 of 2010 and that in the said suit, no mention of electricity and water was made. It therefore cast a doubt as to the veracity of the allegation especially as there was no counterclaim. He submitted that the Plaintiff was litigating peace meal otherwise if the electricity had been disconnected, why didn't the Applicants include the allegation **in HCCC NO 285 of 2010** which was filed in May 2010. He urged the court to dismiss the application with costs.

In his reply, Mr Mogere submitted that all the incidents complained of had taken place after the arguments in **HCCC 285 of 2010** had been concluded and therefore could not have been incorporated in that suit.

Having considered the pleadings and submissions of both counsel, and other issues aside, I note that Order XXXIX of the Civil Procedure Rules deals with temporary injunctions and interlocutory orders. Rule 1 thereof states that "**where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by an party to the suit... the court may by order grant a temporary injunction to restrain such act...**" Rule 2 in turn states that "**in any suit for restraining the Defendant from committing a breach of contract or other injury of**

**any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit... apply to the court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of ...”**

It is clear from these extracts that applications for temporary injunctions and interlocutory orders ought to be made contemporaneously with/or after the institution of a suit. In the instant case, there is no suit in which the application is embedded. All we have is an application and the suit in which the application is rooted is non-existent. Therefore there is no basis upon which the application can stand as it cannot stand by itself but has to be built within a suit. It is for that reason that in such applications, Orders are sought pending the hearing of the suit. In the instant case, the application is for orders pending the hearing of a suit which is non-existent. In the result, the application before the court is not well founded and lacks a basis upon which it can stand. It is not properly before the court and it is accordingly hereby struck out with costs to the Respondents.

Orders accordingly.

**DATED and DELIVERED at NAIROBI** this 18<sup>th</sup> day of February, 2011

**L NJAGI**

**JUDGE**