



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 156 OF 2010

SAMUEL P.K. MAINA T/A STARO PUB.....APPELLANT

=VERSUS=

**KENYA POWER & LIGHTING COMPANY
LIMITED.....RESPONDENT**

RULING

This Notice of Motion has been brought under **Order XLI Rule 4 of the Civil Procedure Rules, sections 1A, 1B, 3A and 63 of the Civil Procedure Act** and all other enabling provisions of the law. It is by **Samuel P.K. Maina**, the appellant who seeks one main order that the respondent, **Kenya Power & Lighting Company Limited** be restrained by means of an injunction from disconnecting electricity supply to the appellant's business premises located along **Moi Street** in Eldoret on **Plot No. 778 Block 6/56** over a disputed electricity bill of **Kshs 133,241.95** pending the hearing and determination of the appeal filed herein. The application is based on the following grounds:-

- 1). That the appellant has an arguable appeal
- 2). That substantial loss shall attend the appellant unless the injunction is granted
- 3). That the application has been made without undue delay.

The applicant further relies on a replying affidavit sworn on 24/8/2011, by the applicant. In it, it is deponed, *inter alia*, that the appeal is meritorious and unless the injunction is granted, the applicant shall suffer substantial loss since his business relies on electricity supply to the said premises.

The application is opposed and there are grounds of opposition filed by counsel for the respondent. In the said grounds, the respondent contends, among other things, that the appellant's grievances can be resolved by the Energy Regulatory Commission and that the Court does not have jurisdiction to handle the matter.

The application was canvassed before me on 18th January 2011 when counsel reiterated the stand-points taken by their clients in their respective papers.

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions of counsel. Having done so, I take the following view of the matter. The grounds upon which an application for injunction can succeed are well known. The locus classicus remains **Giella –vs- Cassman Brown and Company Limited [1973] EA 358**. Counsel for the respondent submitted that as there is no suit, an injunction cannot issue. With all due respect to counsel, the provisions of order **XLI Rule 4 (6)** must have escaped his mind. Under that subrule, the High Court has power to grant a temporary injunction in exercise of its appellate jurisdiction provided that the procedure for instituting an appeal has been complied with.

In the matter at hand, the appeal has already been lodged. So, the prerequisite for seeking an injunction has been demonstrated. The appellant's case was dismissed by the lower court on a preliminary objection. The court declined jurisdiction. Whether that is the correct interpretation of the Act is the gist of the Appeal. I cannot, at this stage, express any concluded view on the matter which the Judge who will consider the appeal will have to deal with. But I cannot say that the appellant's appeal is not arguable.

I have also considered whether the appeal in the event it were to succeed would be rendered nugatory unless the injunction is issued. I think it would. I say so, because, the focus of the suit in the lower court is a dispute of the sum due for electricity consumed by the appellant, and until it is resolved in the appeal, none of the parties can anticipate the outcome. Yet, the appellant is in business and his business relies on a regular flow of electricity. It is therefore obvious that unless the injunction sought is granted, the appellant will be driven out of business. I believe it is on that basis that the lower court was initially satisfied that an injunction should issue.

In those premises, the appellant has demonstrated the prerequisite for the grant of a temporary injunction pending the hearing and determination of his appeal. Accordingly, the application is allowed in terms of paragraph 3 thereof.

The injunction is granted on condition that the appellant files an undertaking, under oath, as to damages within the next five (5) days from the date hereof. The appellant should also pay to the respondent **Kshs 2,200/=** per month towards electricity consumed on his business premises for the period he has enjoyed the order of injunction in the lower court and in this court and subsequently every month until the appeal is determined or until further orders of this court. In default, this application shall stand dismissed with costs. Otherwise the costs of this application shall abide the results of the appeal.

Orders accordingly.

DATED AT ELDORET THIS 8TH DAY OF FEBRUARY 2011.

F. AZANGALALA

JUDGE

Read in the absence of the parties and their advocates.

F. AZANGALALA

JUDGE

