



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 9 of 2010

UNITED PAINT
APPLICANT

VERSUS

THE KENYA POWER & LIGHTING COMPANY LIMITED
RESPONDENT

RULING

1. The plaintiff filed a suit on 13th January 2010 against the defendant seeking for a declaration that the defendant is not entitled to disconnect the plaintiff's power supply at Nairobi Plot No.388/KARIOBANGI NORTH/ NAIROBI. Simultaneously with the filing of the suit, the plaintiff filed a notice of motion under **Section III and III a of the Civil Procedure Rules** in which he is seeking for a mandatory order of injunction to compel the defendant to unconditionally reconnect electrical energy supply to the suit premises.
2. This application is premised on the grounds that sometimes in the month of January 2010, the defendant wrongfully disconnected the power supply to the plaintiff's premises and removed meter No.5000911. Later on 14th January 2009 the defendant installed another meter No. 50001370 with reversed reading and unilaterally readjusted the plaintiff's meter which recalculated the bill dating it from September 2004 – September 2008. It is contended that the defendant while relying on the defective meter readings demanded an exorbitant sum of 5.8 million allegedly for the electricity consumed by the plaintiff.
3. The plaintiff tried to seek an explanation but instead their electricity was disconnected on 8th

January 2010 before issuing any notice or referring the matter regarding the dispute over the bill before the energy regulating commission for determination. The plaintiff who runs a small scale enterprise on the premises has been inconvenienced because the defendant enjoys the monopoly of the electricity supply in the country. The operations of the plaintiff have been grounded and in the suit the plaintiff is also claiming damages for the loss.

4. This application was opposed by the respondent. They relied on the replying affidavit sworn by **Bellman Ondiek** sworn on the 25th January 2010. The deponent works with the defendant's Revenue Protection Unit. He averred that he had in the course of his work come to know of the plaintiff's account and upon inspection, he found the meter had been interfered with and proceeded to fix it. He therefore installed along side the meter a check meter to check the accuracy of the usage which was allowed to run for 30 days. When he went to check on the check meter he found the seal had also been interfered with so the defendant had to bill the plaintiff using the installation average consumption.
5. The check meter which was installed was also reported burned shortly afterwards and the respondent installed another check meter which similarly got burned. This systemic burning of the meters just before the respondent could obtain the readings under mysterious circumstances forced the defendant to install a poll mounted check meter which also got burned, that is why they decided to disconnect the power supply on 16th January 2010 in accordance with the provisions of **Section 61 of the Energy Act** on account of non payment of energy consumed. According to the respondent the plaintiff had not paid for the energy consumed and therefore cannot be entitled to a mandatory order of injunction.
6. Both parties filed written submissions in support of their respective positions. Counsel for the applicant urged the court to grant the order because the plaintiff's case is clear. It is the respondent who unilaterally disconnected the plaintiff's power after interfering with the meter, thus the plaintiff has established a prima facie case with a probability of success.
7. Counsel for the respondent filed lengthy submissions and quoted the Energy Act extensively especially section 58 which provides for the methods of ascertaining the quantity of electricity energy to be supplied and the manner of doing so. It is specifically provided that a licensee cannot

connect or disconnect any meter and the respondent is allowed to adjust any meter in order to ascertain the amount of energy and if there is any dispute regarding the charges the dispute should be referred according to the provisions of section 61 (3) to Electricity Regulation Commission.

8. Moreover the principles for granting an interlocutory mandatory order of injunction are well established in the case of **Loc bail International Finance Ltd vs. Agroexport and Others (1986) LL ER 901 at page 906 paragraph d, the Court of Appeal of England** laid out the test as hereunder:-

“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 decide at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff . . . a mandatory injunction will be granted on an interlocutory application.”

Counsel thus urged the court to disallow the application for reasons that the plaintiff cannot be allowed to benefit from their own failure to pay the electricity bill.

9. The above is the summary of the salient issues brought out in the pleadings and the rival submissions. Firstly, the competence of this application is challenged because under the provisions of section 61 of the Energy Act, any dispute arising over the electricity charges, any illegal or improper use of electrical energy or any allegation of defects in the apparatus should be referred to the Commission. The second issue to determine is whether the plaintiff has established a clear case with exceptional circumstances to warrant the granting of a mandatory order of injunction.

10. It is trite that a mandatory order of injunction is final in nature and should be granted in very clear cases as was held in the case of **Kenya Breweries Limited versus Okeyo EA LR 2002 1EA page 110** in which the Court of Appeal held as follows:

“A mandatory injunction ought not be granted on an interlocutory application in the absence of 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 match on the plaintiff. Moreover before granting a mandatory injunction, the Court had to feel a high degree of assurance that

at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction

11. Bearing the above principles in mind the plaintiff's application and the supporting affidavit are all vague on whether the plaintiff has paid the power bill for the electricity consumed. Another matter to bring to bear is the provisions of the Energy Act which provides that a dispute over the charges should be filed before the Energy Regulatory Commission which is established under section 4 of the Energy Act of 2006. The plaintiff is complaining of a breach of contract and he is also seeking for damages for the unlawful disconnection of his electricity. In this regard damages for the alleged breach of contract if proved can be a suitable remedy.
12. As regards a mandatory order of injunction the plaintiff has not demonstrated clear and exceptional circumstances to warrant the court to exercise its inherent discretion which must be exercised judiciously based on law and evidence. Accordingly the plaintiff should approach the Energy Regulatory Commission to deal with the dispute over the electricity bill thereafter the court can deal with the claim for general damages.
13. The notice of motion lacks merits and it is hereby dismissed with costs to the respondent.

RULING READ AND SINGED ON 26th MARCH 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**