



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 60 of 2006

JASON KATHURIMA RUKARIA APPLICANT

- Versus -

KENYA POWER & LIGHTING CO. LTD. RESPONDENT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Ms. Mango for Applicant

Mr. Kariuki for Respondent

RULING

The applicant herein moves the court for a temporary injunction restraining the Respondent from disconnecting electric power in respect of Account Number 2098898-02 until the appellant's appeal to this Honourable Court from the Resident Magistrate's decision of 28th March, 2006 is heard and determined. The application is brought by a Notice of Motion dated 10th April, 2006, and made under Order XLI rules 4(1), (2) and (6) of the Civil Procedure Rules; sections 3A and 63(e) of the Civil Procedure Act; and all the enabling provisions of the law.

The application is supported by the annexed affidavit of Jason Kathurima Rukaria sworn on 11th April, 2006. It is based on some seven stated grounds of which the following are relevant –

- (a) THAT if the temporary injunction pending appeal is not granted before the appellant has exercised his right of appeal, the appellant will suffer substantial loss.
- (b) THAT unless the application is granted, the respondent will disconnect power to the appellant's premises occasioning the applicant monumental loss.
- (c) THAT the applicant is willing, ready and able to furnish any security as the court may deem just and expedient.
- (d) THAT this application has been made without unreasonable delay.

The application is opposed by way of an affidavit sworn by one Julius Mutahi, the Respondent's Customer Engineer, on 23rd May, 2006. Ms. Mango for the applicant relied on the grounds on which the

application is based on the face of the application. She argued that the applicant runs a shop and restaurant business and if the power is disconnected he stands to suffer substantial loss. She further argued that the application was made without delay and that the applicant was ready to provide security. She therefore urged the court to grant the restraining order as prayed.

Opposing the application for the respondent, Mr. Kiarie Kariuki relied on the replying affidavit sworn by Julius Mutahi. He argued that the applicants had sought in the lower court a mandatory injunction which was initially granted *ex parte* but after hearing *inter partes* the court discharged the injunction and dismissed the application. There must be special reasons for the grant of a mandatory injunction, but all the reasons advanced by the applicants were found wanting, and the court determined that damages were an adequate remedy. Mr. Kariuki therefore submitted that the applicants did not deserve the injunction and the orders prayed for should not be granted since failure to grant them will not render the appeal nugatory. He however said that if the court was minded to grant the application, then the applicants should be ordered to pay the disputed money in court.

I have considered the pleadings and the submissions of counsel. The only issue for determination is whether the applicant deserves a temporary injunction pending the hearing of his appeal. The court's power to grant such an injunction is spelt out in Order XLI rule 4 (6) which states as follows –

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court ... has been complied with.”

The conditions upon which interlocutory injunctions may be granted are articulated in *GIELLA v. CASSMAN BROWN & Co. LTD.* [1973] EA 358. In that case, Spry, V.P., said at page 360 –

“The conditions for the grant of an interlocutory injunction are now ... well settled in East Africa. First an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which could not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

The first condition to be satisfied is that the applicant must show a *prima facie* case with a probability of success. The matter currently pending in court being an appeal, it would be inopportune for this court to pronounce, at this stage, the probability or otherwise of success of the appeal in terms of the first condition.

With regard to the second condition, the applicant is a businessman running a shop and restaurant. Disconnection of electric power from the business premises would no doubt result to substantial financial loss. Whether such loss can adequately be compensated by an award of damages is dependent upon several variables, especially seasonal fluctuations, some of which may be extremely rewarding. Generally, it is possible that such a person may be compensated by an award of damages, but whether the damages awarded would be adequate to the last shilling may not be easy to say.

In those circumstances, the equation tilts in favour of applying the balance of convenience. In the current situation that balance favours continuity of the applicant's business, which in turn requires a continuity of power supply until the appeal is heard and disposed off. Out of these considerations, I therefore make the following orders –

1. A temporary injunction is hereby granted in terms of prayer 2 of the notice of motion dated 10th April, 2006.
2. The applicant to deposit in court the sum of Kshs. 300,818/80 within 10 days of the date thereof.
3. The said deposit to be refunded to the applicant upon the termination of the appeal.

4. costs in the cause.

Dated and delivered at Mombasa this. 19th day of ...March2008.

L. NJAGI

JUDGE