REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 107 of 2007

WAX & POLYPACK LTD……..……. APPLICANT

VERSUS

KENYA POWER & LIGHTING CO. LTD…....…....RESPONDENT

RULING

The application before me is a chamber summons dated 27th February, 2007 brought under Order XXXIX Rule 1,2,2A(1)(2),3(1),(2) and (3) of Civil Procedure Rules and Section 53A and 63(c) and (e) of Civil Procedure Act. Prayers 1, 2 and 3 are proof. In prayers 4, 5 and 6 the Applicant seeks orders:-

4. THAT the Defendants, his servants, a**gents, officers or any other person or authority be restrained from interfering and or disconnecting the Plaintiff's power supply pending the hearing and determination of this suit.**

5. THAT in the alternative a temporary injunction do issue against the Defendant restraining it, it's agents, servants, employees and or any other person or entity whatsoever from interfering and or disconnecting the Plaintiff's power supply pending the hearing of this suit.

6. THAT the Defendant be compelled to supply accounts appearing in account number 530688/2

The Plaintiff contends that it engaged the services of the Defendant, Kenya Power and Lighting Company, to supply it with electricity on an agreement and that the latter issued it with an account No. 530688/2. The Plaintiff contends that the electricity supply was to the Plaintiff Company's head office, and to five other companies related to the Plaintiff, which it contends, the Defendant was fully aware. The Plaintiff contends that there was no problem in the supply and that it consumed approximately 78,335 units of electricity per month. The Plaintiff contends further that it has continued to pay electricity bills promptly and has observed all the terms of the contract. It also annexed copies of paid bills marked **PMI** as proof, in the supporting affidavit sworn by its Administration Manager. The Plaintiff contends further that the Defendant, on 20th May 2004, during routine check, alleged that there was an anomaly in the consumption of electricity by the Plaintiff and the Defendant consequently changed the CTS (current transformers) from double to single CT per phase, on 15th September 2004, as indicated in the Defendant's letter of 14th October 2004, marked TM2. The Plaintiff contends that despite the change in CTS, the electricity consumption remained the same until January 2005 when the bill unusually doubled leading to power surchage.

The Plaintiff contends that due to technical advice from internal technical analysis, it installed automatic power factor correction plant in July, 2006 within the Defendants knowledge. That consequent to the installation, the surchage was reduced to zero. The bill marked **TM4** is proof of same. The Plaintiff contends that suddenly in November 2006, the Defendant debited its bill with a power factor surchage to the tune of Kshs.108,589.05. **TM5** is proof of the surchage debit. The Plaintiff depones that it paid the bill to avoid disconnection but wrote to the Respondent to explain the sudden increase in power surchage. The letter is marked **TM6**. The Plaintiff avers further that on receipt of their letter, the Defendant visited the Plaintiff's premises, and, upon inspection of power meters, stated that there was a mistake of reading error. Despite that admission, the Plaintiff was not given any credit as expected in the bills of December and January 2006-2007 respectively, as shown in **TM7**. Instead the Defendant debited the Plaintiff's December 2006, bill with Kshs.63,930.232.09/= exclusive of VAT, terming it a debit after rebilling. The Defendant indicated in the said bill that the balance brought forward from the previous bill, that the November 2006 one was Kshs.74,519.330.06/= which was untrue as the figure did not appear in the November 2006 bill or any other before then.

The Plaintiff depones that on 23rd February 2007, without just cause, the Respondent disconnected cited the Plaintiff's power supply on the basis the Plaintiff owed it a sum of Kshs.74,519.330.06/=. That despite written requests for an explanation of how the amount rose to the alleged figure, no explanation has been forthcoming. The Plaintiff's letters to the Defendant are marked **TM8.** The Plaintiff depones further that since the defendant is the sole supplier of electricity in the country, it has resorted to generators which have proved expensive to run and maintain, and which has resulted in reduction of production. The Plaintiff submits further that this has in turn led to massive loss and reduction of staff. Mr. Nyakundi for the Applicant submitted in conclusion that the Defendants acts are malicious, as pleaded in the plaint. That malafide is further proved by failure of the Defendant to give an explanation as requested by the Plaintiff. Counsel relies on two authorities **GIELLA VS CASSMAN BROWN 1973 EA 358, MOHAMMED M. M. CHARANIA VS PROSPERITY HEALTH LTD MILIMANI HCCC NO. 13 OF 2005**. In the latter case**, Njagi J** relied on Halsbury's Laws of England, Vol 24, 4th Edition paragraph 948 which reads as follows:

"***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 decided at once, or if the act done is a 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."***

The Hon. Judge also quoted with approval **MUSTILL LJ IN LOCABIL INTERNATIONAL FINANCE LTD VS AGROEXPORT & OTHERS [1986] ALL ER 901** as follows:-

Moreover, before granting a mandatory interlocutory 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 a different and higher standard than was required for a prohibitory injunction."

The learned **Njagi J**, also quoted **LORD UPJOHN in REDLAND BRICKS LTD VS MORRIS [1969]2 ALL ER. 557** at Page **579** as follows:-

"***A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future…it is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly."***

I believe that the cases cited in **MOHAMMED CHARANIA CASE,** supra, provide a very good guide to a court determining an application for a mandatory injunction and I am well guided.

The Defendant's have challenged this application and have filed both grounds of opposition and a replying affidavit. The grounds of opposition cites five grounds in which it generally challenges the existence of a prima facie case to justify the injunction sought, and contends that there is no loss the Applicant may suffer which is not computable and compensatable by way of damages and that even on a

balance of convenience the Applicant does not deserve the orders. The only point of law raised in the grounds of opposition is that the Applicant has admitted breaches of law and the Electricity power supply contract.

The replying affidavit is lengthy. It is sworn by a Senior Technician with the Defendant Company. In paragraph 8, 9 and 10, while explaining that the Defendant company fitted CTS device current of 5 amperes (5A) against every 1000 amperes consumed by the Applicant, the Technician depones that the Applicant unilaterally, in May 2004, removed the 1000/5A CTS installed by the Respondent and replaced them with 3000/5A CTS, without the Defendant's knowledge. As a consequence of the Applicant's interference and act, the Defendant contends that unknown to it, it billed the Applicant with only 1/3 of power supply consumed and therefore lost 2/3 in revenue. The Defendant relies on the letter marked **TM2,** in the Applicant's affidavit, to demonstrate that the anomaly was detected in the presence of the Applicant, and that the letter was a documentation of the same.

The Defendant's replying affidavit depones further that the Defendant carried out various tests through which it established that the loss it suffered was from 2000 up to 2004. The Defendant assessed the loss and that is when it raised a bill of 63 million. It relies on 'BO2', the Debit Computation which shows the charged units and the undercharged units, between February, 2000 to December, 2004.

Mr. Onyango for the Respondent submitted that as averred in paragraphs 19 to 25, the anomalies detected by the Defendant in the Applicant's electricity supply installation were as a result of interference by the Applicant and that it ought not to be allowed to benefit from the same, as it has come to a court of equity with unclean hands. Counsel further submitted that the interference is what led to a re-computation and re-billing, and urged the court to find that, the issue of power surge was not the cause of the re-computation. Counsel submitted that the reason for reconnection was interference with the metering devices and the non-payment of the disputed amount. Counsel submitted that the Applicant was guilty of material non-disclosure. He relied on the case of **MILIMANI HCCC 504 of 2005 ROSE WAKUTHII MWANGI NJUNU VS EDWARD KITHINJI AND OTHERS** a ruling by **Azangala J**. The learned counsel did not indicate the actual sections of the ruling relied on. However I see relevant portions where my brother deals with issues of material non-disclosure by an Applicant seeking injunctive relief. At page 13 of the Judgment, **Azangalala, J** quotes from the Court of Appeal's holding in **OWNERS OF THE MOTOR VESSEL "LILIANS' VS CALTEX OIL (KENYA) LTD [1989] KLR I** as follows:

"***It is axiomatic that there should be full and frank disclosure to the court of facts known to the applicant.***

Failure to make disclosure may result in the discharge of any Order made upon the ex-parte application, even though the facts were such that with full disclosure an Order would have been justified."

I also quote from the same ruling **I.C.F. Spry in Principles of Equitable Remedies Specific Performance Injunctions Rectifications and Equitable Remedies (1st edition) 1997** at page 410 where author opines.

"An injunction is ordinarily refused when it is sought in furtherance of a deception, …where the right sought to be enforced has been obtained in circumstances which involve fraud; where the plaintiff has acted unlawfully; or had not done equity."

Counsel submitted that the injunction sought was in furtherance of a fraud and unlawful actions and that the applicant has not done equity and should fail in its application.

It is true that an injunction can only be granted where the Applicant establishes that it has a ***prima facie*** case with a likelihood of success, or that it stands to suffer damage or injury which cannot be compensated by an award of damages or that on a balance of convenience the scales tilt to its favour. See **GIELLA VS CASSMAN BROWN 1973 E.A.**

The Defendant has brought in a second issue which is for consideration; whether there has been material non-disclosure on the Plaintiff's/Applicants part to the effect that the disconnections which initially led to the filing of this application, was as a result of interference with CTS devices and for non-payment of disputed amount.

There was disclosure that the Applicant had failed to pay disputed amount billed at Kshs.63,930,232.09. That is therefore not an issue. In regard to the issue of CTS devices and their installations, it is not in dispute that the Defendant Company was the one charged with the sole duty of installing CTS devices at the Applicant's premises. The Respondent alleges that it discovered interference and replacement of its CTS devices at the Applicant's premises in May 2004. Each party relies on a letter by the Defendant, to the Plaintiff/Applicant, dated 14th October, 2004 and marked **TM2** in the Applicant's supporting affidavit. The letter is reproduced hereunder in full.

"***M/s Wax & Polypack Ltd,***

P. O. Box 17592,

NAIROBI.

ACCOUNT NO. 530688-02, KANGUNDO RD

We refer to a metering inspection done at your above premises on 20th May 2004 during which it was discovered that double current transformers (CTs) per phase had been used for the metering. Due to possible losses in such an arrangement, we proposed to change the metering to one CT per phase, whereby we asked you to provide but-bar extensions to facilitate the same – this was done on 15th September 2004.

The removed CTs were later tested with the intention of being installed in another installation but there rating was found to be 3000/5A instead of the expected and labeled 1000/5A CTs and meter. The check metering set was installed on 4th October 2004 and the initial results of this test indicate that K.P.L.C has been losing at least half of the expected revenue due to the anomalous metering, though the expected loss theoretically is two thirds.

The above tests have been taken in your knowledge and presence and we hereby request that you acknowledge the same.

Further, due to the foregoing, the lost revenue taking the lower figure of half instead of the expected two thirds is estimated to be around Kshs.45 million.

We are in the process of computing the lost revenue when we obtain our final check meter result and we will contact you should we require to do any further tests.

Yours faithfully,

FOR: Kenya Power & Lighting Co. Ltd.

K. CHEGE

CUSTOMER SERVICE ENGINEER,NAIROBI SOUTH.

Nowhere does the Respondent company accuse the Applicant of tampering with the metering or with installing its own CTs devices in place of those installed by the Defendant's. It is curious that despite the Defendant discovering the anomaly in May, 2004 as alleged, no communication was made to the Applicant to that effect. The letter of October 2004 was written to communicate to the Applicant of the Respondent's intention to compute lost revenue due to the anomaly discovered in the CTS devices. It

was not an accusation that the Applicant was to blame for it. In light of that finding, I do not accept the Respondent's submission that the Applicant tampered with the CTS devices and neither do I accept that the Applicant at any time, admitted interfering with the said devices. I find the allegation of interference an afterthought, which has arisen only since the matter was brought to court by the Applicant.

The Applicant has annexed various correspondences exchanged between it and the Respondent. From the correspondences, the Applicant sought an explanation for the sudden rise in the bills. None of these correspondences were responded to. If the Respondent was aware all along that the cause of the situation that has arisen between it and the Applicant was purely as a result of the Applicant's act of interfering with CTS devices and therefore with the metering, I believe that nothing was easier than for the Respondent to do one of three things:

(i) disconnect the electricity;

(ii) have the Applicant charged in a court of law for illegal act, and in the very least;

(iii) write to the applicant to inform it that the problems that have arisen was a direct result of their illegal and unlawful acts.

I do find that on a ***prima facie*** basis, the evidence before me does not establish that the applicant was guilty of material non-disclosure neither does it show that the Applicant interfered with the metering of electricity supply in its premises.

Having come to that conclusion I am satisfied that the Applicant has established that it has a ***prima facie*** case with a probability of success.

Even if I was to decide this application on the basis of the principle of irreparable loss, I would still find that the Applicant has demonstrated that if the electricity supply is disconnected, it would suffer loss which may not be compensatable by an award of damages. It has demonstrated that it has several industries running on the Respondent's eclectricity supply, which may be closed down and several employees laid off, if the injunctive relief sought is not granted. The loss of closing down these businesses is massive and even if the loss may be computable, it may be not sufficiently be compensatable by an award of damages. The damage the Applicant may suffer is grave, while the Defendant on the other hand, can recover its loss, if proved at the trial through an award of damages. The Defendant does not stand to suffer any prejudice if the application is allowed.

I find that the mandatory injunction sought herein should be granted due to special circumstances of the case and the grave damages the Applicant may suffer if it is not granted. It will cause greater hardship if the application is rejected. I will allow the application in terms of prayer 5. Since the matter discloses a dispute as to accounts I will also grant prayer 6.

The two orders are granted subject to the Applicant paying the electricity bills as and when they fall due, less the amount in dispute, pending the hearing and disposal of the suit or further orders of the court. Each party has leave to apply.

Dated at Nairobi this 19th day of October, 2007.

LESIIT J

JUDGE

Read, signed and delivered in presence of:-

Mr. Omindo for Applicant

Ms. Kamau holding brief Onyango for Respondent

LESIIT, J.

JUDGE