



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 301 of 2004**

**KENYA LOCAL GOVERNMENT SUPERANUATION  
FUND .....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING  
COMPANY .....DEFENDANT**

**RULING**

In a plaint filed on 9<sup>th</sup> June 2004, the Plaintiff claims against the Defendant a prohibitory order of injunction prohibiting the Defendant from carrying out its threat to disconnect electricity supply to its premises on the basis of an alleged debt of kshs 22,972,142.94. The Plaintiff further prays for declaratory Orders that the rebilling of the Plaintiff's account for a period of 53 months is irregular and unlawful.

The Plaint is accompanied by an application by way of Chamber Summons dated 9<sup>th</sup> June 2004 which seeks *inter alia* an interlocutory injunction restraining the Defendant by itself, its servants agents and/or employee's from disconnecting stopping or otherwise interfering with the supply of electricity to the Plaintiff's premises known as Loita House L.R./No. 209/638/1 pending the hearing and determination of this suit.

The application is supported by an affidavit sworn by one Moses Oyugi, the Plaintiff's Managing Director. Annexed to this affidavit are various exhibits. The main reasons for the application are that the Defendant has raised against the Plaintiff an arbitrary bill of Kshs 22,972,182.94 alleged to be for electricity consumed by the Plaintiff between August, 1998 to September, 2002. Yet the Plaintiff has paid its bills on their due dates. The Plaintiff further complains that if the electricity supply is disconnected, it will suffer irreparable damage.

The application is opposed and there are Grounds of Opposition and a replying affidavit sworn by one Kennedy Kariuki a Customer Service Engineer of the Defendant.

The Defendant has filed a written statement of defence and has raised a counterclaim. In its defence, the Defendant objects to the jurisdiction of this court contending that the dispute falls under the ambit of arbitration by the Electricity Regulatory Board. It has further averred that the Plaintiff was erroneously under-billed and after correction it served a bill of Kshs 22,972,142.94 upon the Plaintiff. This is the sum

due and payable by the Plaintiff to the Defendant. This liability according to the Defendant has been admitted by the Plaintiff and should be paid failing which the Defendant is entitled to disconnect the electricity supply to the Plaintiff's premises.

In the Counterclaim, the Defendant claims the said sum of Kshs 22,972,124.94 on account of electricity consumed but not paid for by the Plaintiff.

The application was canvassed before me on 30<sup>th</sup> November, 2004. Mr. Masese Learned Counsel for the Plaintiff/Applicant argued the application for the Applicant and Mr. Wairagu Learned Counsel opposed the application for the Defendant. Counsel for the Applicant recited the averments in the supporting affidavit aforesaid. He emphasized that the Defendant changed its meter supplied to the Plaintiff's contrary to Section 83 of the Electric Power Act. Notwithstanding the change, the Plaintiff continued to pay its bills as usual until the 13<sup>th</sup> March 2003 when the Defendant debited the Plaintiff's account with a sum of Kshs 23,028,348/= which was later reduced to Kshs 22,972,142.94 on 4<sup>th</sup> April, 2003. This sum, according to the Plaintiff is arbitrary and without legal basis. Counsel further submitted that discussions were held between the Plaintiff and the Defendant and despite the negotiations the Defendant on 18<sup>th</sup> May 2004 disconnected electricity supply to the Plaintiff's premises. The supply was restored on 19<sup>th</sup> May 2004 and further discussions held. In Counsel's view the threat to disconnect the electricity supply to the Plaintiff's premises still exists, hence this application. Counsel placed reliance on Sections 63, 64, and 87 of the Electric Power Act for the proposition that as there is a dispute supply of electricity cannot be disconnected. In Counsel's view the threatened action of the Defendant is wrongful.

Counsel further relied upon the case of Palace Drycleaners Limited and another –v- Kenya Power and Lighting Company Limited: Nairobi HCCC NO. 837 of 2000 (UR) for the same proposition that where there is a dispute on the amount due there should be no disconnection and the dispute should be referred to the Electricity Regulatory Board.

Further reliance was placed upon the case of John D. Skoda –v- Kenya Power & Lighting Co. Ltd: Nairobi HCCC No.886 of 2003 (UR) for the same proposition.

Finally counsel placed reliance on the case of Lucy Njoki Waithera –v- Industrial and Commercial Development Corporation: Nairobi HCCC No. 321 of 2001 (U.R) for the proposition that an injunction may issue even if the injury were adequately compensable in damages.

On balance of convenience Counsel submitted that the same tilts in favour of the Plaintiff on the basis that the Plaintiff's property in question is a commercial one with various tenants and if disconnection is effected other parties who are strangers to the dispute will be adversely affected. Counsel therefore prayed for the injunction sought with costs.

Mr. Wairagu for the Defendant in reply submitted that the Plaintiff had come to Court prematurely as there is no disconnection and no dispute had been filed with the Electricity Regulatory Board. Counsel further submitted that the sum demanded by the Defendant of Kshs 22,972,182.94 is rightly due from the Plaintiff to the Defendant. This was because the relevant notices were served before there were meter changes and the error detected was communicated to the Plaintiff.

In Counsel's view the Defendant has not acted unfairly. Indeed in Counsel's view, the Plaintiff did not complain about the rebilled amount and did not even declare a dispute yet it consumed the electricity supplied by the Defendant. Counsel in the circumstances argued that the Plaintiff is not entitled to the equitable relief of injunction.

On the authorities cited Counsel submitted that the same were only of persuasive value and this case should be decided on its own peculiar facts. Counsel placed some reliance upon the English case of Norweb PLC. –v- Dixon (1995) 3 All ER 953.

In a brief reply Counsel for the Plaintiff submitted that the English case of Norweb PLC – Dixon

(supra) is not relevant as it concerned interpretation of the English Electricity Act 1989 which is not the case here.

I have now considered the pleadings, the application, the affidavit, the annexures thereto, the Grounds of Opposition the succinctly of Counsel and the authorities cited. Having done so I take the following view of the matter. The conditions for the grant of an Interlocutory Injunction have now been settled. They were successfully laid down in the rule setting case of Giella –v- Cassman Brown & Co. (1973) E.A. 358. Firstly the Applicant must show a *prima facie* case with a probability of success at the trial; Secondly a temporary injunction will not issue where the injury complained of would be adequately compensated in damages; Thirdly if the Court is in doubt it should decide the matter on a balance of convenience.

In the present case the Plaintiff has shown that the Defendant has raised against it a bill of Kshs 22,972,182.94. The Defendant has admitted raising this bill but argues that the same arose from error made by its technicians which error its technicians have corrected and the sum has been correctly charged. The Plaintiff disputes this bill. A dispute having arisen it would appear as if Electricity Regulatory Board has jurisdiction to deal with the same. It is however clear from the defence delivered and the replying affidavit filed that the Defendants believe it is entitled to disconnect the Plaintiff's account to recover its debt. The threat of disconnection of electricity to the Plaintiff's premises is therefore real and it is only this Court that has jurisdiction to consider the injunctive relief sought.

From the material availed to me I am satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success. The Plaintiff however, still had to cross the second hurdle set by the Giella –v- Cassman Brown & Co. case (supra) that normally an injunction will not issue where the injury complained of would be adequately compensated in damages. The language used in this condition is permissive. It does not suggest that an injunction will always not issue where damages would be an adequate compensation. I have considered the circumstances of this case. The Plaintiff has alleged breach or violation of a statute. The sum in dispute is not a small sum. The Defendant has freely admitted that the error in the billing was made by its technicians. If indeed there was an error, the Plaintiff had no way of knowing. This has to be resolved on evidence. In these circumstances, I think this case should be treated as one where notwithstanding the adequacy of damages a temporary injunction should nonetheless issue. The only consequence the Defendant stands to suffer is delay in the payment of the disputed sum in the event it succeeds at the trial.

In the result, I order that a prohibitory interlocutory injunction be and is hereby issued in terms of prayer (iii) of the Chamber Summons dated 9<sup>th</sup> June 2004. For avoidance of doubt while the suit is pending hearing and determination the Plaintiff will continue to pay for electricity consumed by it on the said premises in the usual way. This suit is also not a bar to arbitration that the parties may wish to commence under the Electric Power Act 1997.

The injunction granted herein is conditional on the Plaintiff filing an undertaking on oath to pay damages if any to the Defendant in the event that it is found at the trial that the injunction ought not to have issued. This undertaking should be filed within seven (7) days from today.

Costs shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY 2005.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-