



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 4 OF 2003

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

V E R S U S

JOSEPH KIPRONO KOSGEYRESPONDENT

(From the Ruling and Orders of the Hon. Resident Magistrate (Miss Priscillah Ngigi), in Eldoret C.M.CC NO. 590 OF 2002, Dated 18/12/2002)

JUDGMENT

Joseph Kiprono Kosgei, manages an electrically operated posho mill, at Plot 40, Chuiyot Esso. During the month of March 2002, he received an invoice from Kenya Power and Lighting Company Limited (KPLC), in which he was required to pay a sum of K. shs.131,666/20, for power which he had allegedly consumed. He considered it highly abnormal, as his prior monthly consumption had hardly exceeded K.Shs.5,000/00. His efforts to obtain a clarification from KPLC's District Regional Manager, Eldoret proved futile. Having deemed the said levy as unfair, and being of the opinion that the meter which he had been supplied with was faulty, he referred the matter for arbitration, to The Electricity Regulatory Board (ERB), on 11/6/2002. Two days later, he filed a suit in the subordinate court against KPLC, and prayed for inter alia, mandatory and permanent orders of injunction, firstly to compel KPLC to install power to his premises, and secondly, to restrain it from disconnecting his power supply. He made specific reference to the matter that was then pending before the ERB in his plaint.

He simultaneously filed an application in which he sought the following orders:-

'a temporary mandatory injunction directing the Defendant/Respondent, its agents and or servants to reconnect within North Rift Area Office electricity in the plaintiff's premises situate at Plot No. 40 Chuiyat Esso within Uasin Gishu District of the Rift Valley Province pending the determination of this application and the main suit.

Alternatively and without prejudice to paragraph (b) above there be a temporary mandatory injunction compelling the defendant, its agents and or servants within the North Rift Office Area to reconnect electricity to the Plaintiff's premises aforesaid and pending the determination of the arbitration referred to the Electricity Regulatory Board by the Plaintiff.

There be temporary injunction to restrain the Defendant, its agents and or servants from disconnecting electricity supply to the Plaintiff's premises situate at Plot No. 40 Chuiyat Esso within Uasin Gishu District of the Rift Valley Province pending the determination of this application and the main suit.'

The learned Resident Magistrate, Eldoret allowed the application in its entirety, an act which has now

triggered this appeal as K P L C, feels aggrieved her ruling and the consequent orders. It bases its appeal on four grounds, which are that:-

‘The learned Magistrate erred in law and in fact in failing to find that she had no jurisdiction to hear and determine the said Eldoret Cause No. 590 of 2002 and ought to have held that the matter be heard at the Electricity Regulating Board Established under Section 119 of the Electric Power of 1997.

The learned trial Magistrate erred in law and address (sic) in failing to address the arguments and issues raised by counsel for the appellant and particularly the fact that the respondent tampered with the meter and therefore was not entitled to the equitable remedy of an order of temporary injunction in his favour. The learned magistrate erred in law and in act (sic) in failing to establish that the respondent had not satisfied the principals of law, available to issue (sic) an injunction in favour of the Respondent.

The learned trial magistrate erred in law and in fact in allowing the application for injunction when there were no sufficient grounds to do so.’

Mr. Nyaundi, learned counsel for KPLC, chose to combine the four grounds into two, and to urge grounds 1 and 2 as one, and grounds 3 and 4 as the second ground.

It was his submission that the trial magistrate did not have the jurisdiction to entertain the matter, as she lacked the relevant jurisdiction, as only this court, with its unlimited jurisdiction can grant restraining orders. He relied on sections 119 and 87 of the Electric Power Act No. 11 of 1997, (‘the Act’), as well as sections 121 (1) (b) and 63 (1) of the same Act, in that the issues that arose in the application hinged on sums owing to KPLC as a result of the respondent’s interference with the power meters. It was also his submission that having conceded that he had interfered with the meter the respondent did not satisfy the mandatory conditions which are pre-requisite to the granting of a mandatory injunction, which can only be granted in the clearest of cases. In his opinion, the respondent ought to have waited for the decision of the ERB in the matter.

Mr. Chemitei, was however of a different opinion. It was his submission that The Electric Power Act of 1997 does not deny or oust the jurisdiction of the courts to hear suits of his client’s nature, and that having registered the complaint with ERB, which is not empowered to do grant restraining orders only a court of law could grant orders of injunction.

I have taken into account the submissions by both counsel, and I have reevaluated the evidence that emanates from the proceedings in the subordinate court, and in my humble opinion, the issue that arises from this appeal is what steps should a party who is aggrieved by KPLC, on a matter involving meter readings and billing, and take to ensure that his matter is dealt with fairly?

It cannot be gainsaid that KPLC derives its powers from section 63 (1) of the Act,

which stipulates that “If any public or local authority, company person or body of persons neglects to pay any charge for electrical energy or any other sum due from him or them the licensee in respect of the supply of electrical energy, the licensee may, after giving not less than fourteen days’ notice in writing to such authority, company, person or body of persons and without prejudice to his right to recover such charge or sum, cut off such supply, and for that purpose may cut or disconnect any electric supply line or other works through which electrical energy may be supplied, and may be supplied, and may, until such charge or other sum together with any expenses incurred by the licensee in cutting off such supply of electrical energy as aforesaid and any lawful charges for or incidental to reconnection, are fully paid, but no longer, discontinue the supply of electric energy to such authority, company, person or body of persons...”

It is also important that I point out at this stage that the Act clearly stipulates that grievances that shall

arise from the acts of KPLC shall be resolved by way of arbitration, exclusively by ERB. Indeed section 87 (1) thereof, clearly stipulates that *“If any dispute arises between any consumer and the licensee as to whether any meter whereby the value of the supply is ascertained (whether belonging to the consumer or to the licensee), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that difference shall be determined upon the application of either party by the Board, and the Board shall also order by which of the parties the costs of and incidental to the proceedings before it shall be paid, and the decision of the Board shall be final and binding on all parties.....”*

Having found as I do, the issue that would then arise is what recourse does an aggrieved party, whose power supply stands to be disconnected, have in the intervening period, as he awaits the arbitration by ERB? It is evident that though the respondent filed his reference to ERB on 11/6/2002, the arbitration process had not even commenced by the time when the contentious ruling was delivered, on 18/12/2002.

I have perused the Act, and it is only under section 63 (2), where an aggrieved party can obtain respite, but he can only obtain it if he has already referred the matter to ERB for arbitration, but such respite will only be available in situations where a notice of disconnection has not been given. In this particular instance, it is evident that by the time when he referred the matter to ERB, he had already been served with a disconnection notice and in the circumstances no restraining orders would lie against KPLC under that section of the Act, and in my humble opinion, the only avenue open for the respondent would be to move the court with a view to obtaining restraining orders. Though Mr. Nyaundi was of the view that it is only this court that would have the jurisdiction to deal with such issues, but I believe that even the subordinate court would have the jurisdiction to deal with such application, and the only determining factor would be the value of the subject matter and therefore whether that particular court would have the relevant pecuniary jurisdiction. I find that the learned trial Magistrate had the relevant jurisdiction to handle the matter, which fell well within her pecuniary jurisdiction.

Be that as it may, the next issue that comes to mind is whether, taking all the circumstances into account, the award of a mandatory injunction, was deserved

I agree with learned counsel for KPLC that such orders are granted only in the clearest of cases, and that he who moves the court for such orders must do so with clean hands. He bases his submission on an allegation that the respondent had admitted having tampered with the electricity meter. I have looked at the proceedings and I form the opinion, that though the respondent had appended his signature to a form in which he admitted having tampered with the meters, he was however adamant that he had been forced to sign the form as a precondition to having his electricity supply reconnected. I find that such an act cannot be held against him as he did so under duress, in any event, the balance of convenience tilted heavily in his favour for KPLC would not lose any revenue, as not only is he remitting monthly payments for his current consumption, but KPLC will have an opportunity to invoice him for any shortfall should there be any, should ERB determine the matter that is pending before it in its favour.

I would therefore not fault the learned trial Magistrate for having arrived at her conclusion, and decision.

The upshot of all this is that this appeal fails. It is dismissed with costs.

Dated and delivered at Eldoret this 8th day of February 2005.

JEANNE GACHECHE

Judge.

Delivered in the presence of:

Mr. Kathili holding brief for Mr. Chemitei for the Respondent.

Mr. Kuloba holding brief for Mr. Tuiyot for the Appellant.