



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL CASE NO.122 OF 2004
ELDORET WHITE CASTLE MOTEL
LIMITED.....PLAINTIFF/APPLICANT
VERSUS
THE KENYA POWER & LIGHTING COMPANY LIMITED
.....DEFENDANT/RESPONDENT
R U L I N G

Whenever I make a decision, I am very open minded in the sense that I appreciate that I could be wrong, and hence the fact that a party has a recourse to the Court of Appeal, which might just as well as upset my decision.

On the 30/11/2004, I delivered a ruling in a matter where Eldoret White Castle Motel Limited had filed a suit against Kenya Power and Lighting Company Limited ('KPLC'), which had threatened to disconnect its power supply on the reasons that the Motel had not paid it a sum of Kshs. 3,941,388.30. The Motel disputed that it owed the said sum. I had found that this court lacked the jurisdiction to entertain an interlocutory application for interim injunctive orders and though I did not dismiss the same, I ordered that the application be forwarded to the Electricity Regulatory Board and at the same time, I granted the Motel leave to appeal and also a 30 days order of stay, pending a formal application for stay.

The Motel proceeded and filed its notice of appeal on 10/12/2004, and on 19/1/2005, KPLC disconnected the power supply to the Motel, which action triggered the application which is now before me taken out under Section 3A of the Civil Procedure Act and Order XLI rule 4 of the Civil Procedure Rules and in which the Motel prays that this court do order "*the defendant its servants and agents to restore the supply of electricity to White Castle Motel and further to refrain in future from disconnecting the supply of electricity to the said Motel on the basis of the dispute sum of Kshs. 3,941,388.20 pending the hearing and determination of the intended Appeal to the Court of Appeal and /or reference to the Electricity Regulatory Board*", and in the alternative, that "*there be stay of execution of the disconnection Notice dated 02/10/2004 pending the hearing of the intended Appeal to the Court of Appeal and /or Electricity Regulatory board.*"

The application which is opposed is based on the grounds that it intends to appeal against the aforementioned ruling, and also that the disconnection of the electricity supply would result in enormous and substantial loss and inconvenience to it. It is interesting to note that the order which the Motel seeks is mandatory in nature, yet this is an interlocutory application.

I feel that it is important, before I proceed, that I state that I am well alive to the proposition that "where a

judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal” (**Evinford Properties Limited vs. Cheshire County Council [1974] 2 All ER 448**) and that it would not be necessary for the aggrieved party to apply to the Court of Appeal as “*there would be no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision from being rendered nugatory should that court reverse the judge’s decision*”, (**Principles of Injunctions 1987 Edn., by Kuloba J**). *In the circumstances, the Motel is properly before me.*

I have therefore taken the submissions of both counsel into account, and especially the case law which they cited in support of those submissions. Of relevance is the case of **Belle Maison Limited vs. Jaya Towers Limited HCCC 2225 of 1992**, where Bosire J. (as he then was), while relying on the case of **Despina Porticos [1975] EA 38** reiterated the fact that a mandatory injunction could be granted at interlocutory stage, to a party whose application is meritorious and which was filed under Section 3A of the Civil Procedure Act, in which instance, the court would be exercising its power under its inherent jurisdiction.

But one may as well ask, in which circumstances can a mandatory injunction issue at an interlocutory stage.

The position was well enunciated in the case of **Gusii Mwalimu Investment Company Limited and others vs. M/s Mwalimu Hotel Kisii Limited CA (Ksm) 160/1995**, where the learned judges of Appeal, cited paragraph 948 of Vol24 of Halsbury’s Laws of England 4th Edn., held that “*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 it 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 Motel indicates, and it has not been disputed, that it has duly paid whatever has been payable for the power supply to its premises, and it undertakes to do so as and when it is furnished with the relevant invoice. It however disputes charges which emanate from billings for supply which was consumed by a third party prior to the date when it instituted these proceedings. I am therefore convinced that by the mere act of disconnecting the said power supply, despite the fact that the Motel has paid for what it has been consuming, KPLC attempted to steal a march on the Motel, which situation, calls for the issuance of the orders, which are sought herein, which I hereby grant in terms of its main prayer.

I have arrived at the said decision having taken into account the fact that “*a party who shows that he is entitled to a mandatory injunction, must not be compelled to take damages in lieu*” (Belle Maison Limited vs. Jaya Towers Limited)

Dated and delivered at Eldoret this 27th day of April 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Kibichy with Mr. Kahindi for the Respondent.

No appearance for the Applicant.

