

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

Civil Case 28 of 2005

GAPCO KENYA LIMITED.....PLAINTIFFS

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

Coram; Before Hon. Justice Mwera

Kadima for the plaintiff

J. Munyithya for the Defendant

Court clerk - Sango

R U L I N G

The plaintiff company filed the suit herein on 9-2-2005 along with a Chamber Summons under Order 39 rule 1, 2, 3, 9 Civil Procedure Rules and Section 3A 63 (c) (e) Civil Procedure Act, seeking two main orders;

(1) That the defendant power company be restrained from demolishing the applicant's perimeter wall and gate on PLOT NO. MBA/BLOCK1/476 until the Chamber summons is determined or further orders of this court and

(2) That a mandatory injunction do issue that the defendant do rebuild and restore the part of the said perimeter wall which is demolished OR that the plaintiff be allowed to rebuild it itself but at the defendant's cost.

There were five (5) grounds, affidavits and annexures on which Mr. Gautama argued this application. Some of those points were that if the defendants are to demolish the said perimeter wall stated above all contrary to the Electric Power Act and the Petroleum Act. That the wall in question followed the rerouting of power lines at the plaintiff's expense but in accord with the plans drawn and approved by the defendant.

Further that the wall was built in 1999 and for all that time it has stood there, there has been no complaint to the effect that it interfered with the defendant's power lines. That indeed in its public duty to supply electric power, the defendant has exercised the right of way leave and at no time has the plaintiff company obstructed it from entering/leaving its premises in the course of attending to the power lines and pylons.

The court heard that the plaintiff had the initial lease from Kenya Ports Authority which was replaced by the present one and it was utilizing the property to store petroleum products. That when the wall was demolished, the oil tanks and products were exposed to risk of damage, loss and even theft. That strangers were now criss-crossing the plaintiff's property.

The defendant filed a defence and a replying affidavit to the application under review. Each side also had additional affidavits and annexures.

Mr. J. Munyithya for the defendant opposed this application beginning with the aspect that one

Albert Scammel, the Project Manager of the plaintiff company did not swear and file a competent verifying affidavit to the plaintiff because he did not annex the authority by which he swore that affidavit. The court did not easily follow that line of argument and the substance it had. The end result was that the deponent swore an affidavit which appears to be in order. The court did not easily follow that line of argument and what substance it had. The end result was that that deponent swore and filed an affidavit which appears in order. If it is proved otherwise, then it would be prudent to consider to have a proper verifying affidavit filed rather than throw out the plaintiff. But for these proceedings, nothing amiss was noted with the said verifying affidavit.

Mr. Muniyithya continued that the power lines (cables) passing over the disputed area are of very high voltage and serving wide and distant consumers and yet with the plaintiff's wall or structures, those cables are lying too close for public safety. The court was told that the offending structure was not erected in 1999 but as recently as January 2005 when the defendant noticed its proximity to the supply line – that the defendant's lines and installation are in fact enclosed in the plaintiff's compound. That this constituted an infringement which the plaintiff was unwilling to rectify even with the notice of 7-1-2005, to pull down the wall. That in case of power outages the defendant's staff must access the rerouted (underground cables) as well as the above ground systems. And that the offending wall is not the whole of it but only a portion that the defendant caused to be demolished, and the part running parallel to the overhead cables. That accordingly the mandatory orders of injunction should not issue. That to do so would mean perpetration of acts contrary to the law (Under the Power Act and Rules) requiring that proximity of structures built along or near power lines/installations should be a certain minimum distance apart, for public safety – some seven (7) feet from the way leave. And that the plaintiff should so realign its structures and if any damages or loss occur the same can be compensated. The above form compressed arguments by both counsel.

There were arguments as to whether at one stage a company called M/s Fort Properties Ltd was an agent of or was a separate entity who on 31-3-2000 sought permission from the defendant and was granted authority to reroute and place underground power cables on PLOT 476, which state of things the plaintiff company is enjoying advantage of. Sure, indeed any link or relationship seems not to have been pleaded or deposed to. The rerouting was paid for (the cheque of 16-1-2001 does not show by who). The court was also not told or shown whether CAPCO KENYA LTD of P O Box 84104, MOMBASA was related to or was meant (can it be so?) to be one and the same entity as GULF AFRICA PETROLEUM CORPORATION of P O Box 8716, MOMBASA; the leaseholder of PLOT 476 in issue. Mr. Gautama told the court that notwithstanding the postal addresses we/were dealing with one and the same entity. Be that as it may. In this court's view there are two aspects of power lines involved here. While the plaintiff's focus was on the rerouted (underground) cables which were laid at its cost after due plans were drawn and approved by the defendant, the defendant does not appear much concerned with these. Its main concern is that part of the plaintiff's wall is lying so close to the overhead power lines and enclosing some installations in such a manner as to interfere with way leave rights as well as pose a danger to safety. That is what this court's impression is. That on the account of the latter case, the defendant ordered demolition of part of the plaintiff's wall. The plaintiff seemed to say that all along the defendant's way leave rights have not been infringed upon. There has been no complaint in the past and that the defendant can go in and out of the plaintiff's compound while attending its installations.

In this case, the parties will, at the trial for the final reliefs adduce relevant and vital evidence. For now it looks like the plaintiff emphasized and focused on the rerouted cables to be the problem here with the defendant. At least not much. The defendant's concern is the wall in relation to overhead power lines and related structures and how safety ought to be ensured. The plaintiff does not seem to have made out a case about this aspect. The wall may have been there since 1999 or it was recently extended but the plaintiff has not shown that its proximity to the power lines and cables is not an infringement to the way leave rights or that the wall is not at least 7 feet from the cables. This court was not left with the impression that the power company ordered the demolition of part of the subject wall due to malice, ulterior motive or other. Putting up structures are expensive affairs and the defendant should know that. So unless it was for the public need of safety and easy access to its installations the defendant cannot be expected to go knocking down walls for other reasons. After all the plaintiff is also its customer. At this

point the court is of the view that the defendant must have been acting according to the legal requirements covering electrical installations vis a vis other structures and so the temporary injunction sought will not issue.

In case at the end of the case it is proved that the acts by the defendant were unwarranted, then the plaintiff will get general damages sought by its plaint and such other reliefs as shall have been proved.

In sum the temporary injunction is refused. It has not been shown that special circumstances exist to warrant ordering the defendant to should rebuild the demolished part of the wall. The plaintiff may rebuild it to secure its installations but it may consider to do so in accordance with the requirements attaching to the electrical installations passing nearby.

This application is dismissed with costs.

Orders Delivered on this 18th day of May 2005

J. W. MWERA

JUDGE

18-5-2005