

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 15 OF 2003

LONG BEACH INTERPRISES LTD. PLAINTIFF

- Versus -

KENYA POWER & LIGHTING LTD. DEFENDANTS

RULING

On the 29th October 2003 this court issued a mandatory injunction compelling the defendant to restore the electric energy to the plaintiff's premises which the defendant had disconnected and a further temporary injunction restraining the defendant from disconnecting the power supply until this case is heard and disposed of. On the 11th March 2004 the defendant went back to the premises and disconnected the supply this time round on the allegation that the plaintiff had tampered with the meter measuring the energy consumed by the plaintiff. On the 12th March 2004 the plaintiff filed another application seeking another mandatory injunction to compel the plaintiff to restore the power supply. The application is supported by the affidavit of ANGELO LATTINELLI a director of the plaintiff company. He deposed in that affidavit that on the 11th March 2004 at about 8.50 a.m. he was called by an official of the defendant to the rear of their supermarket where the meters for all the tenants in the premises are located. On arrival he was informed by Mr. Mutunga Kasao, an official of the defendant, that they (the plaintiffs) had tampered with their meter for account No. 0406076-02 and that it was not recording the value of the energy consumed in their premises. He immediately called their electrician and they vehemently denied having tampered with the meter. The deponent refused to sign the liability form as doing so would mean they had tampered with the meter. Upon refusal to sign the form the defendant's officials disconnected the supply. He further deposed that this was yet another malicious act by the defendant intended to strengthen their case against the plaintiff. In response the defendant filed two replying affidavits. One by Mr. Mutunga Kasao, an Internal Auditor with the defendant company in charge of coast region and another by David Tanui, an Electrical Inspector also with the defendant company. In his affidavit Mr. Mutunga Kasao deposed that on instructions of the defendants management he went with a team of Electrical Inspectors on random spot checks on meter installations in the area. This inspection he said was prompted by cases of theft of electrical energy which have become prevalent in the country. On arrival at the shopping complex in which the plaintiffs business is situate and accompanied by one of the tenants in the complex he went to the cabin housing all the meters in the complex. On observation they noted that the display screen of one meter was blank and on checking they found out that it was not recording although the supply was still connected. They called for the owner and in his presence they opened the meter and found out that it had been tampered with. Upon the plaintiffs refusal to sign the liability form they disconnected the supply and went away. Counsel for the parties argued their respective client's cases on the basis of the above depositions.

As I said earlier the Applicants are seeking a mandatory injunction to compel the Respondent to restore the power supply. The law on interlocutory mandatory injunctions is quite clear. The jurisdiction to grant an interlocutory mandatory injunction must be exercised only in special cases - **The Despina Pontikos [1958] EA 38. In Belle Maison Ltd. Vs Yaya Towers Ltd. Nairobi HCCC No. 2225 of 1992** (unreported) Bosire J. (as he then was) held that "Special circumstances, however, depend on the facts and the circumstances of each case and the good sense of the trial Judge".

What are the facts and the circumstances in this case? I have hereinabove briefly set them out. I have considered the facts as stated in the depositions in the supporting and replying affidavits as well as the submissions made by counsel for the parties. To understand the genesis of this matter I have also read the whole file and noted that the plaintiff has complained of previous disconnections and made serious allegations of malice against some officials of the defendant company. I have noted that some of those

allegations have not been addressed by the defendant. For instance the plaintiff has in paragraph 8 of the further affidavit of Angelo Lattinelli sworn and filed on the 1st August 2003 alleged that it issued a cheque for Sh. 130,472.30 in settlement of some bills. That cheque was however, returned unpaid due to an error on dates. It is further alleged that the defendant's cashier, one Mr. Abuya, sat on that cheque from 10th May 2002 to 14th June 2002 when he called the plaintiff and threatened to disconnect the power supply unless payment was received immediately. The plaintiff made good of that cheque by paying the amount in cash but the defendant went ahead and disconnected the supply on the ground that a meagre sum of Sh. 674/= being bank charges on the returned cheque had not been paid. The defendant has been loud in their silence on this.

There is another allegation in the plaint against the same Abuya that he had unsuccessfully solicited a bribe of Sh. 10,000/= from the plaintiff if the plaintiff wanted to avoid disconnection. The defendant was economical with its words in response to that. It content itself with a general denial. The plaintiff has also made other allegations including being sent a bill of Sh. 386,396.80 which was scaled down to Sh. 130,472.30 and another one of Sh. 224,681.70 which was later traced to a Mr. Sammy Rioba and cancelled.

The plaintiff has also stated in paragraph 6 of the supporting affidavit that on the 5th March 2004 one Mr. Maina of the defendant company went to the premises and took the meter reading. At that time the meter was running properly and Mr. Maina did not raise any issue on it. There is nothing forthcoming from the defendant on these allegations.

On the legal aspect of the matter Section 92(1) of the Electric Power Act Cap 314 of the Laws of Kenya authorizes the defendant's appointed officers to enter any premises to which electrical energy has been supplied to, inter alia, inspect the installations and ascertain the amount of energy supplied or consumed and or ascertain the consumer's requirements. The proviso to that section however states that the defendant requires to first obtain the permission of the occupier before entering any premises. It states:-

“Provided that no officer appointed by the licensee shall enter such premises without the permission of the occupier first had and obtained. Such permission shall not be refused”.

There is nothing on record to show that the defendant's officers sought or obtained the permission of the plaintiff to go to the rear of the supermarket where the meter cabin is situated. All they say is that they were accompanied by one of the tenants in the premises whom they have not named. The impression one gets is that if that tenant did not choose to accompany them they could still have gone unaccompanied. The plaintiff's representative was not called until after they had inspected the installations and found that the plaintiff's meter was not functioning. That is clearly in breach of section 92(1). I do not believe Mr. Mutunga Kaso when he states in the replying affidavit that he did not know to which account the defective meter related. Being the Internal Auditor of the defendant company in charge of Coast region he surely must have known the plaintiff's account which had a dispute running for several years previously.

Having considered all these matters, without making any definitive finding on the case as I have not heard evidence, I am, however, satisfied that the plaintiff's complaints of habitual disconnections and allegations of malice, cannot be said to be without basis. Consequently I find that the plaintiff has made out a special case for the intervention of this court by way of interlocutory mandatory injunction.

I therefore grant this application and order that the defendant shall install a proper functioning meter to the plaintiff's premises and restore the power supply to the plaintiff forthwith. This being a second mandatory order this court has had to issue I further order that, pending the hearing and final determination of this case, the defendant shall not disconnect the power supply to the plaintiff without leave of this court. Needless to say that the plaintiff shall promptly settle all future bills rendered by the defendant in respect of the energy consumed by them.

As tampering with a meter is criminal offence I direct that the defendant shall immediately lodge a formal complaint with the police for investigation and appropriate legal action regarding the meter alleged to have been tampered with.

DATED this 22nd day of March 2004.

D.K. Maraga

Ag. JUDGE