REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 352 OF 2002

DARAD LIMITED ……………..………………………… 1ST PLAINTIFF

LEISURE LODGE LTD ………………………………….. 2ND PLAINTIFF

VERSUS

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

RULING

This is an application brought under Order 39 Rules 1, 2, and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is seeking Order for injunction against the Respondent, Kenya Power & Lighting Company Ltd. The specific prayer states as follows:

> *"3. That the Defendant/Respondent be hereby restrained by itself, its agents, servants or agents or otherwise from disconnecting supply of electricity to the 1 st Plaintiff (Darad Farm) borehole supplying electricity to the 2 nd Plaintiff pendin g the hearing and determination of the suit."*

There is also a prayer for costs to be provided for. The grounds upon which the application is brought are eleven in all. In a summary form, they are that due to change in the management of the second Plaintiff in 1996, the first Plaintiff instructed the Defendant to disconnect electricity supply to Darad Farm Borehole; on 20th August 1999, Defendant confirmed having removed the meter from the Darad Farm Premises; the original owner took over the management of the 2nd Plaintiff but there was no records or bills issued by the Defendant to the supply to the Borehole. However, unknown to the Plaintiffs the Defendant acting in collusion with former Manager of the 2nd Plaintiff had installed another meter No.467504 having electricity supply account No.399699-1; on 30th July 2002 the Defendant threatened to disconnect the electricity supply to the borehole unless the Defendant was paid fictitious bill of KSh.2,000,000/- whereas no supply of any particulars of this amount or how it accrued over the last five years was even supplied to the Plaintiffs. The Applicant feel this bill could have accrued during the time a liquidator had been managing the affairs of the 2nd Plaintiff from 16th October 1996 to 17th February 2001. The 2nd Plaintiff is desirous of having the electricity supply continued but only in terms where bills are supplied on a monthly basis; that if the supply is disconnected the hotel would have to close down, and as the hotel was as at the time the application was filed 70% full, the 2nd Plaintiff would suffer irreparable loss and lastly that KSh.1,000,000/- has been paid under duress. The application is supported by an Affidavit sworn by Suresh C. Patel, the financial controller of the 2nd Plaintiff. There are several exhibits annexed to the same affidavit.

The Respondent opposed the application and filed Grounds of Opposition in which it did maintain that the Plaintiffs application is a serious abuse of the court's process; that first Plaintiff has not established a cause of action for the court's determination; that 2nd Plaintiff has no locus standi to bring

this suit against the Defendant and if it has then it is estopped by deed and conduct from claiming the relief sought, that the application is brought in bad faith and 2nd Plaintiff has not brought the same with clean hands, and that the application does not meet the minimum prerequisite of grant of temporary injunction. There is also a Replying Affidavit sworn by the Assistant Regional Manager of the Defendant, Joshua Mwangi in opposition to the application.

I have carefully considered this application, the grounds for the same application; the affidavits, the grounds in opposition, the annextures to the Affidavits and the able submissions of the learned counsels.

The general principles to be considered in an application for injunction are now well known. They are found in the case of ***Giella vs. Casman Brown & Co. Ltd 1973 EA 358*** . The principles are in the holding and they are:

> *"(iv) An ap plicant must show a prima facie case with a probability of success;*
>
> *(v) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;*
>
> *(vi) When the court is in doubt, it will decide the application on the balance of co nvenience."*

The fourth principle which has now gained the full legal support is that the injunction order being an equitable remedy, the applicant must seek it with clean hands i.e. the applicant must deserve the remedy. I do share Justice Ringera's sentiments in the case of ***Albert Mario Cordeiro vs. Cyperr Enterprises Ltd & others HCCC No. 2430 of 1996*** where he stated:

> *"I must add that an injunction is an equitable remedy and accordingly it will not issue even if the necessary conditions are satisfied i f it is proved to the court that the applicant is undeserving of equitable relief."*

In this case it is not certain that the first Plaintiff who had some contract in the supply of electricity is complaining against the Defendant. In fact what is stated is that the same first Plaintiff had instructed the Defendant to disconnect electricity. There is nothing stated that the same first Plaintiff did reconnect electricity for its benefit at all. It does not appear to me that it has any claim against the Defendant. The second Plaintiff on the other hand had no agreement with the Defendant and the full reading of the supporting affidavit of Suresh Patel is clear on the same. Further the full explanation given by the Defendant in its Affidavit sworn by Joshua Mwangi has not been rebutted. In saying so, I am aware that the Plaintiff did file a further affidavit which was expunged from the record as it was filed without leave of the court, but it is clear that having expunged the same from the record, no attempt was made to seek leave of the court to file any further affidavit to challenge the allegations in the respondent's affidavit which makes it clear that Meter No.467504 has always been at the First Plaintiff's suit premises since 1990 and only the contract numbers had been changed as a result of the introduction of new systems of billing and that the same meter had been tampered with so that it became difficult to record the reading. I also note that although the Plaintiffs maintain that the payment of KSh.1,000,000/- towards the disputed bill was made under duress, the letters dated 30th July 2002, 31st July 2002, and the signatories acknowledging that the metres were tampered with (annexture JM 8) were not written in a without prejudice basis or under protest. It is true the two letters made it clear that the second Plaintiff is blaming a third party for the late payment of the bill but it is not stating in so many words that it will not pay it. In fact in the letter dated 31st July 2002, the 2nd Plaintiff says inter alia as follows:

> *"This is to confirm that we shall settle the balance of the DARAD outstanding account that we were not aware of at all and which was unfortunately tampered with by liquidators and others. Our lawyers will take up the matter with them accordingly.* ---------------
>
> *We wish to propose to pay the balance in 3 equal installments from the end of August 2002, and issue post dated cheques accordingly which can be collected on Tuesday 6 th August 2002. This is due to severe cash flow problems being experienced by the hotel industry*

caused by the unfortunate disastrous events of Likoni."

That original approach by the 2nd Defendant of settling the balance and taking up the matter with the first Plaintiff was right approach. Unfortunately, it did not do so and instead has joined hands with First Plaintiff to sue the Defendant who may very well be legitimately pursuing its money which has not been denied to be due to it by the first Plaintiff and/or liquidates. Lastly, the Applicants claim threat to disconnect water supply. Where is that threat? They have not annexed any letter to that effect.

I am not satisfied that the Applicants have demonstrated a prima facie case with a probability of success against the Defendant.

Even more important, the injury that the 2nd Defendant would suffer if the orders sought are not granted are no more than that they would be required to pay the remaining KSh.1,000,000/- to get their water. If in the end their water. If in the end it wins this case the entire amount plus perhaps damages will be refunded to them. They say that if water is disconnected hotel will close down. No. The hotel will close down if they fail and or refuse to pay for water. In any case as I have stated the Plaintiff's claim that the Defendant has threatened to disconnect the water supply yet there is no evidence of such a threat exhibited. At paragraph 21, of its affidavit, the Defendant states:

> *"21. That contrary to Suresh Patel's assertion in paragraphs 17, 18, and 20 of hi s affidavit, no notice of disconnection or at all was even served upon the 2 nd Plaintiff. In any event, any Notice thereof must be properly directed to the 1 st Plaintiff who maintained a power supply contract No.389699 -1."*

This allegation has again not been challenged. It is clear to me that 2nd Plaintiff used paragraphs 17, 18, and 20 of that Affidavit to obtain exparte interim orders unfairly and by untruths. I do agree that they have not come to court with clean hands. They do not deserve equitable remedy.

In conclusion as I have stated, no prima facie case has been shown.

No irreparable injury has been demonstrate and Applicants are undeserving of equitable remedy. Application dismissed with costs to the Defendant/Respondent. Orders accordingly.

Dated and Delivered this 9th Day of December 2002 at Mombasa.

J.W. ONYANGO OTIENO

JUDGE