



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1766 OF 2000

KALIMA BAKERY LIMITED.....PLAINTIFF

-VERSUS

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

RULING

On 30th October 2000, Kalima Bakery Limited filed a Chamber Summons against the Kenya Power and Lighting Company Limited under a Certificate of Urgency.

The application was filed under Order 39 rule 2 of the Civil Procedure Rules and all enabling provisions of the law. The grounds on which the application was made were that; the Defendant had disconnected the plaintiff's electricity service at its premises in Sultan Hamud in breach of contract for provision of electricity supply on the basis of an alleged under-charge of Kshs.216,278.20 on the plaintiff's account between December 1999 to March 2000 which the plaintiff disputes; that the plaintiff's monthly electricity bills have been duly paid for the relevant period and up to date and that the defendants' actions have caused irreparable loss and damage to the plaintiff's bakery business.

On the same day, an interim injunction issued directing the Defendant by itself, its agents and or servants to reconnect and reinstate the plaintiff's electricity supply at the plaintiff's premises. That order is still in force having been extended when the matter came up for inter parties hearing.

Mr. Kyalo, the Learned Counsel for the applicant submitted that the applicant has been making payments and all bills raised for the period in dispute were settled. That it was a surprise therefore that the defendant disconnected electricity supply. That the dispute has not been resolved. That as a result, the bakery was closed for two weeks. That what is in dispute is a civil debt. That the applicant has established a prima facie case and will suffer irreparable damage if disconnection is effected and that balance of convenience favours the applicant. He cited Ripples Limited v. Kamau Mucuha HCCC No. 4522 of 1992 (unreported), Daniel v. Ferguson 1891 Ch.D 27 and Eso Petroleum Co. Ltd. v. Kings wood Motors Addlestone Ltd. & others (1973) 3 All E.R. 1057 in which he submitted injunction sought has been given. He further submitted that the Respondent's only dispute what the applicant says but does state how much power was consumed in the relevant months. That there is no evidence that the applicant had anything to do with the alleged under charging and there are no criminal charges preferred.

Mr. Onguto the Learned Counsel for the Respondent/Defendant submits that on suspicion the Respondents representatives went to the applicant's premises where they found the meter seals had been interfered with. That the data obtained shows that there were times when the meter was not recording consumption. That the applicant has not come up with a proposal of how the money is to be paid and that Section 96 of the Electric Power Act gives the respondent power to disconnect.

The issue here is whether a mandatory injunction should be ordered at this stage.

Although there is no provision under the Civil Procedure Act and the Civil Procedure Rules empowering the court to grant a mandatory injunction, the courts in this country have often granted the remedy (see the Despina Pontikos Case and Belle Maison Ltd. v. Yaya Towers Ltd, Nairobi HCCC No. 2225 of 1992 (unreported). The remedy is available under Section 3A of the Civil Procedure Act, which confers inherent jurisdiction on the court. (See the Adoria v. Mute Kanga 1970) E.A. 429). It is on this basis that the courts grant mandatory injunction at interlocutory stage. This jurisdiction is to be exercised only in special circumstances. (See the Despina Pontikos) (supra)

In the present application, the applicant has had its electric service disconnected on an alleged sum owing from it to the respondent and arising out of an alleged under-charging. It is noteworthy that the applicant has paid all the bills raised for the relevant period. In my view, the course taken by the respondent is draconian. It is evident the respondent is taking advantage of its monopolistic privileges to oppress the applicant. The applicant has been paying all electricity bills due and it continues to do so to date. It is inconceivable that the action taken by the applicant might have been merely to enable it to recover its money. The respondent did not have to take an action which would ground the plaintiff's business when it had other avenues of enforcing payment of the alleged debt such as filing suit or reference to an electrical inspector or to arbitration under the Act.

The Respondents' contention that the applicant can be compensated in damages is not acceptable. The plaintiff cannot be compelled to take damages in lieu. See Achilli v. Toveli (1927) 2 Ch. 243. If the applicant proves that he is entitled to a mandatory injunction he cannot be granted damages in lieu. In Belle Maison Supra, Bosire J. said:

“the position in law as I understand it is that a person who shows he is entitled to a mandatory injunction must not be compelled to take damages in lieu”.

The applicant's electricity service was disconnected when he failed to pay not monthly electricity bills, but an amount which the respondent claimed should have been paid (under-charge). The Electric Power Act, 1997 Laws of Kenya provides for when power supply may be refused. Section 64 provides that:

“The licensee may refuse to supply electrical energy to any local authority, company, person or body of persons whose payments for the supply of electrical energy are for the time being in arrears (not reasonably being the subject of dispute)”

There is a dispute of the amount in arrears. The action taken by the respondent is therefore unlawful, as it was aware that the amount in arrears was disputed. The Act does not allow disconnection when there is a dispute.

Further the respondent ought to have given the applicant a notice to disconnect under Section 83 of the Act. The absence of notice rendered the respondent action unlawful. The law does not permit such unlawful and insensitive action and the court will therefore not allow it. A mandatory injunction shall issue in aid of the applicant and the same is so ordered.

Delivered and dated this 21st day of November, 2000.

KASANGA
JUDGE

MULWA