



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 202 OF 2015

JOSEPH KITHOKOI MUTIAAPPLICANT/PLAINTIFF

VERSUS

KENYA POWER & LIGHTING

COMPANY LIMITEDRESPONDENT/DEFENDANT

RULING

1. By an application dated 29th September 2015 supported by the applicant/plaintiff's affidavit sworn on the same date by Kithokoi Mutia, the applicant seeks from this court that by way of a mandatory injunction the respondent Kenya Power & Lighting, by itself, its servants, agents and or employees be and is hereby directed to install, supply and or provide electricity to the plaintiff at his farm house on plot No. 506 KITOO-KASUNGUNI SUB LOCATION, MUTITO LOCATION, Mutito Division, Mutito Sub County, Kitui County pending the hearing and determination of this suit, and that costs of this application be provided for. The application is premised on the grounds that :

- i. In the year 2012 the plaintiff and the defendant entered into a contract wherein the defendant was to supply electricity to the plaintiff at his farm house aforesaid; Through its letter to the plaintiff the defendant assigned him application NO. 25802050672 dated 24th May 2012 and this became the contract between the parties.
- ii. That on 7th December 2012 pursuant to the contract aforesaid the plaintiff paid to the defendant the requisite full consideration.
- iii. That in flagrant breach of the contract aforesaid the defendant has failed refused and/or neglected to supply the electricity as agreed.
- iv. That the defendant has arrogantly refused to respond to any queries or correspondence from the plaintiff regarding the supply of the said electricity.
- v. That the defendant is in abuse of its monopoly status.
- vi. That the defendant's conduct is arbitrary, oppressive, wrongful, and unlawful and contrary to the principles of fair play, constitutional economic and social rights, the rules of commercial integrity, discipline and corporate governance and the consumer protection Act.

2. In the supporting affidavit sworn by the applicant on 29th September 2015, the applicant reiterates the grounds and annexes receipt for payment, letters dated 7th December 2012, letter by his advocate to the defendant dated September, 2012 and deposes that he urgently needs electricity to his premises and that the defendant has acted in a discriminatory manner by supplying electricity to his neighbors whilst deliberately omitting to supply him for no reason and which exposes the applicant and family to

attacks by wild animals hence he stands to suffer irreparably and that the suit herein shall be rendered nugatory.

3. The application herein was opposed by the respondent Kenya Power & Lightning Company Limited (KPLC) through its advocates Professor Albert Mumma & Company Advocates the respondent/defendant who filed grounds of opposition dated November 2015 on 12th November 2015 contending that:

- i. The orders sought in the application are the same as the orders that have been sought in the plaintiff's plaint and if granted would have the effect of dispensing with the main suit without hearing accorded to the defendant/respondent.
- ii. That the defendant/respondent has raised triable issues in its defence which require a hearing on the merits and the production of documents and calling for witnesses.
- iii. That the said notice of motion application is misconceived, bad in law and therefore suitable for being struck out.
- iv. That it is only just that this Honourable court dismisses the plaintiff/applicant's notice of motion application dated 29th September, 2015 with costs to the defendant/ respondent.

4. The application was orally argued before me on 18th February 2016 with Mr Nzamba Kitonga, Senior Counsel submitting on behalf of the plaintiff/applicant whereas Mr Obok submitted on behalf of the defendant/respondent.

5. According to Senior Counsel Mr Nzamba Kitonga, relying on the grounds and supporting affidavit and annexures of the applicant, the parties hereto entered into a contract of supply of electricity to the applicant's premises by the defendant/respondent monopoly. The defendant issued an advise letter to the plaintiff on how much money was required to be paid before the installation which the applicant paid in 2012 but that despite reminders to the respondent to install electricity to the applicant's premises, the respondent has arrogantly refused to respond or give reasons for the delay or failure to supply/install electricity thereby compelling the applicant to institute this suit and hence the application herein.

6. In the applicant's view, this is a clear case of gross impunity and abuse of monopoly status, and that the defendant feels like it has no responsibility towards anyone since people/consumers have no alternative source of electricity. The plaintiff contends that it is a violation of his economic and social rights under Article 34 of the Constitution and the Consumer Protection Act.

7. Senior Counsel further submitted that his client had fulfilled the conditions precedent for the grant of a mandatory injunction as set out in the case of **Peninah Mbithe Mbithi V Kenya Power & Lighting Company Limited HCC 215/2015** where the defendant herein had forcefully installed electricity in the applicant's premises wherein the applicant/ owner had not requested for such installation and it had failed to respond to letters of correspondence written to it by the plaintiff. The court granted a mandatory injunction, accusing the defendant of behaving arrogantly. The applicant's contends that in this case the defendant had refused to install power to his premises, refused to respond to correspondence and had not even sworn a replying affidavit explaining its inaction. He relied on the **Locabail International Finance Ltd Vs Agro Export & Another [1986] ALL E R 901** on the circumstances under which a mandatory injunction can be issued. The plaintiff's counsel also submitted that this suit has high chances of success; the defendant must be compelled to install power to forestall abuse of statutory power otherwise the court will be abetting an injustice by rewarding a party who abuses the law. It was further submitted that the defendant had absolutely nothing to lose if it supplies electricity since it has been paid installation charges as billed. He prayed for orders as per his application.

8. In opposition to the applicant's application, the respondent's counsel submitted relying on the grounds of opposition filed in court and the case of **Kenya Breweries Ltd Vs Okeyo CA 332/2000**. In his view, there must be special circumstances and the case must be clear for a mandatory injunction to issue. Further, he relied on the case of **Alex Wainaina T/A John Commercial Agencies V Janson Mwangi Wanjihia CA 297/2014** where the Court of Appeal held that a mandatory injunction need not be

granted at the interlocutory stage except in the clearest of cases to remedy a simple and summary act or if the defendant attempted to steal a match on the plaintiff; and that the decision to grant a mandatory injunction sought at this interlocutory stage was a decision of a Judge and each case has to be decided on the basis of its own peculiar facts and circumstances.

9. It was submitted on behalf of the defendant/respondent that facts of this case are not clear and straight forward to dispose of the case at this stage. That payment for electricity supply was made 7 months after the contract whose terms have not been complied with. That the defence as filed denies the plaintiff/applicant's claim and that there are no such numerous letters shown seeking reasons for non supply of the electricity. Further, that there are no grounds to show that the defendant was acting with impunity and abusing the monopoly status that it enjoys.

10. The respondent's counsel further submitted that the defence filed by the defendant raises triable issues and that this is not a simple case. It was stated that once the plaintiff complies with the terms of the contract, the power will be supplied to his premises. Counsel therefore prayed for dismissal of the application by the plaintiff/applicant and the suit is set down for hearing.

11. In a brief rejoinder Mr Nzamba Kitonga (Senior Counsel) submitted that the defendant/respondent's counsel had urged statements of fact from the bar without the benefit of a replying affidavit for interrogation. That without such an affidavit no such case is made out why the application cannot be granted as prayed. Senior Counsel Nzamba Kitonga further submitted that the plaint also seeks for general damages besides a mandatory injunction and that there was no explanation given by the respondent why it had supplied power to the plaintiff/applicant's neighbors but adamantly refused to supply to his premises without giving any reasons for non supply. That there was no response to that effect and that the contract terms had not been complied with by the plaintiff. Further, that the two decisions relied on by the respondent in any case, supported the applicant's case and that the said authorities are anchored on the *Locabail International* case (supra). The applicant's Senior Counsel further submitted that the applicant had fulfilled the conditions for the issue of a mandatory injunction and prayed for the orders sought with costs.

12. I have carefully considered the applicant's application, the grounds, supporting affidavit, annexures and the grounds of opposition by the respondent. I have also considered the respective parties advocates rival submissions on the application and the authoritative decisions relied on by both learned counsels. The law governing/relating to granting of interlocutory mandatory injunction is now well settled, as espoused in the provisions of Order 40 Rules 1,2 and 4 of the Civil Procedure Rules, and as interpreted in judicial decisions, from which, in my view, the issues for determination in this application are:

- i. Whether the applicant is truly entitled to a discretionary order of mandatory injunction at this interlocutory stage of the proceedings; and therefore
- ii. Whether a mandatory injunction is justified in the circumstances of this case.
- iii. What orders should this court make?
- iv. Who should bear costs of the application?

13. The locus classicus case of **Giella V Cassman Brown [1973] EA 358** provides courts with the guiding principles on applications for injunctive relief. Those principles are:

- i. The applicant must show a prima facie with a probability of success.
- ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages.
- iii. When the court is in doubt, it will decide the application on a balance of convenience.

14. The Court of Appeal has severally held that in considering the first principle, the trial court must avoid the temptation of making conclusive findings of fact before they are tested in cross examination. However, when faced with an application for a mandatory injunction, the principles under which a mandatory injunction is granted are as settled in the case of **Locabail International Finance Ltd V Agro-export and Others [1986] ALL ER 901 at page 901** where it was stated that :

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff.”

Moreover, before granting a mandatory interlocutory injunction, the court had to feel a degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

15. The Court of Appeal applied this principle in the case of **Kenya Breweries Ltd & another V Washington O. Okeyo** CA 332/2000 verbatim. In the **Halsbury’s Laws of England VOL 24 paragraph 948** it is stated 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 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 attempts to steal a match on the plaintiff, such as, where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.”

16. From the above authorities, it is clear to me that the circumspection with which the court approaches the matter when asked to grant an interlocutory mandatory injunction is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage. In **Shepherd Homes Ltd V Sandahm [1971]ICH 34**, Megamy J stated that:

“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effects than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires, but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation.(emphasis added).

... In a motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

17. In the **Locabail International Finance Ltd** (supra) case, the court further restated the same principles that:

“The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.”

18. The Kenya Court of Appeal has consistently followed the principles settled in the above authorities

in many other decisions among them: **East African Five Spinners Ltd** (in receivership) and **2 Others V Bedi Investments Ltd CA Nairobi 72/94**; **Muchuha V Ripples Ltd [1990-94] EA 388**, Kenya **Airports Authority V Paul Njogu Muigai & 2 Others CA No. Nairobi 29/97**, **Gusii Mwalimu Investments Company Ltd & others V Mwalimu Hotel Kisii Ltd [1995-98] 2 EA 100**; **Malindi Air Services & Another V Halima Abdinoor Hassan, CA No. Nairobi 2002/98**.

19. Among the special circumstances that may justify the grant of a mandatory injunction at the interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to restrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a march on the plaintiff.

20. On the other hand, as was held in **Lucy Wangui Gachara V Minudi Okemba Lore [2015] e KLR** by the Court of Appeal, that:

“ the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. Further, that save in the clearest of cases, the right of parties to a fair and proper hearing of their dispute, entailing calling and cross examination of witnesses must not be sacrificed or substituted by a summary hearing.”

21. There is also persuasive judicial pronouncements by Indian Courts affirming that great circumspection is called for before awarding a mandatory injunction at interlocutory stage. In **Bharat Petroleum Corp Ltd V Haro Chard Sachdeva, AIR 2003**, Gupta J (Delhi HC) cited with approval in **Lucy Wangui Gachara** (supra) case CA 4/2015 Malindi observed as follows:

“ While court's power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

22. In an earlier case of **Nandan Pictures Ltd V Art Pictures Ltd & others, AIR 1956 CAL 428**, Chakrararhi CJ set out a rather limited scope in which a mandatory injunction is available at the interlocutory stage by stating that:

“At the same time, I may point out what the accepted principles have been and what has been, according to the reported cases, the practice of the courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted. The one cases in which a mandatory injunction is issued on an interlocutory application is where, with a notice of the institution of the plaintiff's suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issues in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position, the court grants a mandatory injunction even on an interlocutory application, directing the defendant to undo what he has done with notice of the plaintiff's suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

23. The Court of Appeal in **Lucy Wangui Gachara** (supra) case agreed with the above persuasive

opinions. The consistent reiteration of those principles by the courts in an affirmative tone is that the remedy of mandatory injunction is a drastic one which ought not to be granted mechanically but considered with caution (See **Alex Wainaina T/A John Commercial Agencies V Janson Mwangi Wanjihia [2015] e KLR (CA)**)

24. The question therefore in this case, is the factual matrix of this case clear and straight forward, capable of summary disposal of the case or is there any evidence that the defendant/respondent attempted to steal a march on the applicant? What is the status quo that this court is being asked to restore, or would the grant of the order sought establish a new state of *things, differing from the state, which existed at the date when the suit was instituted.*? The answer is found in the pleadings and statement by the plaintiff to the effect that in the year 2012 the applicant applied for installation of electricity to his farm house on plot NO. 506 KITOO-KASUNGUNI sublocation, Mutito location, Mutito Division, Mutito Subcounty, Kitui County. That the defendant/respondent agreed to supply the said electricity on condition that the applicant pays shs 34,980 being the installation charges, and through its letter to the applicant dated 24th May 2012, it assigned the applicant application No. 25802012050671. That the said required charges were settled on 7th December 2012 and he waited for the installation of electricity to his premises in vain. The applicant then instructed his advocates to write to the respondent and request for the installation of power as shown by the two letters. That to date, there has been no response to the said correspondence thereby necessitating this suit. According to the applicant, the respondent conducts itself through its officers in a rough shod manner because it is a monopoly, which inaction betrays a lack of commercial integrity on its part and thereby violating its contractual obligations while wantonly trampling upon the applicant's constitutional social and economic rights and contrary to the consumer protection Act.

25. The applicant avers that he urgently needs power supply as he lives in an area inhabited by wild animals and which has a lot of thugery and other criminal activities. It is also contended that the respondent has acted in a discriminatory manner by supplying electricity to his neighbors while deliberately omitting him and without offering him any explanation, thereby subjecting him to mental agony and suffering, financial loss and inconveniences.

26. In its defence filed on 21st July 2015 the defendant contends that it has not breached the contract and that the conditions for supply expressly stipulated that the offer of supply was subject to the defendant being able to obtain the necessary way leaves and easements from various way leaves authorities and property owners in order to be able to construct the power lines through private property, public roads and county government property which permissions have not been secured hence frustrating the defendant's ability to provide the supply. Further, that the applicant had not fulfilled the precondition of engaging services of a Registered Electrical Contractor licensed by the Energy Regulatory Commission ERC to carry out internal wiring and to issue test certificates in respect of internal wiring installation, which test certificates have not been submitted to it as required hence the applicant's application is incomplete.

27. It is further contended that the plaintiff had not complied with the express requirements of the offer of supply within the timelines stipulated thereby effectively causing the termination of the offer of supply and therefore the contract of supply had not crystallized.

28. Further, that this court has no jurisdiction to hear this suit as the plaintiff had not exhausted the complaints and disputes resolution mechanisms provided in the Energy Act 2006 for resolving the kind of complaint upon which this claim is founded.

29. From the above facts of this case which are reproduced in the application and grounds of opposition and submissions by the respective parties' advocates (save for the issue of jurisdiction of this court which was not submitted on), the question is, is the case herein unusually strong and clear? In addition, is there an immediate, urgent pressing injury that would cause the plaintiff/applicant extreme hardship if the mandatory injunction is not granted?

30. The power to grant any injunctive relief is a discretionary power. That discretion must however be

exercised judiciously and not capriciously. As to whether the plaintiff/applicant's case is unusually strong and clear, I note that the plaintiff relied on the exhibit KM1(a) which he asserts is a contract for supply of electricity to his premises and which he avers was breached by the respondent. In the said exhibit KM1(a), the respondent advised the applicant, referring to the latter's application dated 18th May 2012 for supply, that the connection charges would be shs 34,980 inclusive of costs of supply 28,000 VAT 16% and account deposit of shs 2500. The applicant was advised to pay the amount within 90 days from 24th May 2012, and to fulfill the following conditions:

- i. That if payment is not received within that period of 90 days, the terms may be revised; the supply would be subject to the respondent being able to obtain the necessary way leaves (ie permission to construct power lines through private property, public roads and local authority properties).
- ii. The applicant's attention was also drawn to important responsibilities to be undertaken by him to enable the respondent connect the supply and which he was to use as a check list namely:
 - a. Engage the services of a Registered Electrical Contractor, who must be licenced by the Electricity Regulatory Commission (ERC), to do the following :
 - b. To guide in the excavation and reinstatement of the cable trench (es) as well as the provision of suitable cable conduits or ducts where applicable.
 - c. To carry out the electrical wiring installation and issue commencement of work, completion of work and test certificates in respect of his internal wiring installation.
- iii. Complete and return the attached supply contract form.
- iv. Supply copy of ID and PIN certificate.
- v. Submit a route sketch to his premises to facilitate speedy processing of his application. He was also advised to submit items 1(b), 2,3 and 4 at the same time.

31. Annexure exhibit KM1 (b) is evidence of payment of shs 34,980 by the applicant to the respondent vide customer transaction voucher No. K 562142 dated 7th December 2012 which was over six months from the date of 24th May 2012. The applicant's annexure KM1 II (a) is a letter by his counsel Nzamba Kitonga to the Chief Engineer (Design and Construction). It is dated 23rd September 2014, complaining that the applicant had complied with all other conditions and enclosing copies of supporting documents to confirm that his client applied and paid for electricity connection on 24th May 2012 but that the respondent had failed, refused and or neglected to connect the electricity.

32. Annexure exhibit KMII (b) is another letter dated 21st November 2014 by Mr Nzamba Kitonga to the respondent complaining that no response had been received to the letter of 23rd September 2014 and threatening legal action for breach of contract.

33. Based on the above facts, this court is not persuaded that at this interlocutory stage, the applicant has on a balance of probabilities demonstrated an unusually strong case against the respondent to warrant grant of a mandatory injunction. The reasons being that there has been no attempt to show that the applicant complied with the terms of the letter dated 24th May 2012. Other than payment for the contemplated supply contract which payment was made after six months from the 24th May 2012, in total disregard of the stipulated 90 days of the date of letter of offer, there is nothing annexed to the supporting affidavit of the applicant to show that the applicant complied with the other conditions in the checklist as reproduced above to facilitate speedy processing of the application for supply of electricity to the applicant's premises.

34. There is also no evidence that the respondent obtained the necessary way leaves and or easements permission or that it refused to seek permission for the way leaves/easements from property

owners/county government to enable it construct the power lines. The respondent in its defence filed on 21st July 2015 contends that it had been unable to secure the necessary way leaves/easements permission from property owners which had frustrated its ability to provide the supply.

35. In addition, the respondent contended that the applicant had not submitted test certificates to it as required hence his application was incomplete and that the timelines for the supply offer were not adhered to leading to the termination of the offer of supply.

36. With the above position prevailing, it was incumbent upon the applicant to demonstrate at this stage that he had complied with all the conditions required for the installation of electricity before supply of electricity could be installed and that the respondent had unreasonably failed to install the electricity despite his compliance thereby breaching the contract, to warrant a mandatory injunction.

37. In my humble view, the applicant's application for installation of electricity to his premises is incomplete, in the absence of any evidence to the contrary. It is not sufficient for the applicant to claim that supply to his neighbor's premises had been done and that he had been discriminated against or that failure to supply him with electricity was contrary to the provisions of the consumer protection Act or that it is in breach of his constitutional consumer rights. No specific provisions of the consumer protection Act were referred to or alluded to, to have been breached. It has not been demonstrated by the applicant that the contractual obligations under the agreement for supply of power is contrary to the constitution. It has not been shown that the contract and its conditions requiring compliance contravene the supreme law of the land. Courts do not exist to rewrite contracts between parties but to enforce them, except where the contract is illegal then the court would not sanction it. Further, there is no affidavit evidence that under the same prevailing circumstances as the applicant's, his neighbors had electricity installed at their premises. This court does appreciate that the respondent is a monopoly in the electricity supply. However, in the absence of any evidence that the respondent has no reason why it has not installed power to the applicant's premises, in view of the absence of proof by the applicant that he complied with all conditions for supply of electricity, this court is unable to exercise its discretion in favour of the applicant. This court is equally unable to find that the applicant's case is unusually strong or that it is so clear that this court would decide the matter at once. I do not find the matter before me being a simple and summary act which could be easily remedied or that the respondent/defendant has attempted to steal a march on the plaintiff/applicant.

38. The respondent's conduct of not responding to correspondence from the plaintiff/applicant is indeed despicable and offensive and unjustified. However, failure to respond to correspondence per se could not have given rise to the cause of action herein and therefore the case of **Peninah Mbithe V Kenya Power & Lighting Company HCC 215/2015** is not applicable or in *pari materia* to this case. It was upon the applicant to fulfill his part of the bargain and then demand performance by the respondent. The standard required for the grant of a mandatory injunction is much higher than that required for a prohibitory injunction. In the instant case, it is my humble view that the applicant has not demonstrated and or discharged that higher standard of proof.

39. Furthermore, although the applicant claims that he has suffered financial losses and or that his family risks being invaded by wild animals and criminals which is an irreparable loss, this court is unable to believe him for reasons that he only paid for the installation over 6 months after being advised to do so. Secondly, from December 2012, it was not until September 2014, nearly two years that he instructed his advocate to demand for supply. There is no reason why the applicant took that long to demand for supply of power to his premises, after paying for installation on 7th December 2012 if the supply was that urgent in view of the risks of being invaded by criminals and or wild animals. There is no evidence that parties had been negotiating for a settlement. Again, from December 2014 when he last send a reminder letter to the respondent, it took him another seven months to 4th June 2015 to institute this suit and two months later on 29th September 2015 to file an application subject of this ruling under certificate or urgency.

40. The applicant has failed to demonstrate to this court that he has suffered, continues to suffer or will suffer irreparable harm/loss or injury if the mandatory injunction is not granted in his favour. He has not

even laid a basis for this court to believe that failure by the respondent to supply him with electricity will subject him to invasion by criminals/wild animals and or that the said power supply will wade off criminals/wild animals. In **CA 332/2000 Kenya Breweries Ltd & Another V Washington O. Okeyo** the Court of Appeal was clear that the court will not grant a mandatory injunction if the damage caused by the unlawful acts of the defendant is trivial or if the granting of it will inflict on the defendant disproportionate detriment than the benefit it would confer upon the applicant/plaintiff and that the basic concept is that of producing a 'fair result' which involves the exercise of the court's judicial discretion in coming to the conclusion at the interlocutory stage that the granting of it is right.

41. In this case, even applying the basic principles established in the **Giella V Cassman Brown** case for the grant of interlocutory injunction, I find that on the facts and affidavit evidence availed to court, a prima facie case with a probability of success has not been established at this stage. Secondly, the applicant has failed to demonstrate that if the mandatory injunction is not granted in his favour, then he will suffer irreparable loss that cannot be compensable by an award of damages. And if the above two issues are not in his favour, as to whether, considering the circumstances of the case, the balance of convenience tilts in his favour. I find that in this case, in the absence of any evidence that the respondent did obtain way leaves/easements permission but nonetheless refused to construct the power lines to the applicant's premises, to grant the mandatory injunction against it would in my view inflict on the respondent/defendant a disproportionate detriment than a benefit it would confer upon the applicant/plaintiff who has by his plaint sought for general damages for breach of contract. The respondent would be sued for trespass to private property.

42. In the end, I have no difficulty in finding and concluding that the plaintiff/applicant has failed to demonstrate on a balance of probabilities that he deserves a mandatory interlocutory injunction against the respondent/defendant at this stage. I find that it is more convenient for the applicant to comply with all the requirements for installation of power supply to his premises before demanding for such supply.

43. Accordingly, I reject the application for a mandatory injunction at this interlocutory stage and dismiss the application dated 29th September, 2015.

44. Costs are in the discretion of the court and in any event to successful party. In the instant case, I would exercise my discretion and order that each party bear their own costs of the application for the reasons that the respondent did not in the period 2012-2015 provide to the applicant any specific reasons for non installation of the power supply to his premises, until this suit was instituted and the reasons disclosed in the defence. Such conduct in my view does not deserve an award of costs even if the defendant is successful party and therefore the same are hereby denied.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 12th day of April 2016.

R.E. ABURILI

JUDGE

In the presence of

Senior Counsel Mr Nzamba Kitonga for the plaintiff/applicant

Mr Obok for the defendant/ respondent

Henry: Court Assistant