



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI Miscellaneous**

**Civil Case 119 of 2009**

**ANNA WAUSI POLCINO.....APPLICANT**

**VERSUS**

**COSIMO POLCINO**  
**KENYA POWER & LIGHTING Co. LTD.....RESPONDENTS**

**R U L I N G**

When this matter came up for hearing of the application dated 16<sup>th</sup> December 2009, Mr. Mouko (Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendant/respondents) raised a preliminary objection to hearing of that application.

In the notice of preliminary objection dated 18<sup>th</sup> December 2009 it is stated that:

- (1) The suit is incurably defective as the plaintiff is not suited to bring up the suit on behalf of the 3<sup>rd</sup> defendant.
- (2) The orders sought in the Notice of Motion are not available to the plaintiff as she has no personal interest other than the 3<sup>rd</sup> defendant.
- (3) The plaintiff has no authority nor is one exhibited as proof of authorization to bring the suit as required unless the Articles of Association to the 3<sup>rd</sup> defendant and hence Companies Act Cap 486.
- (4) The suit is subjudice to Malindi PMCC No. 429 of 2009.
- (5) The entire application is an abuse of the court process.

In arguing the application, Mr. Mouko submits that there is a similar suit pending before the Chief Magistrate seeking the same orders as the present suit, and he refers the court to annexure GG3. He points out that the prayer in that suit is for a declaration that the defendant's action of disconnecting power to the 3<sup>rd</sup> defendant's premises is illegal. Further, that suit has with it, a notice of motion made under Section 3A and 63E Civil Procedure Act and the prayers sought are similar to the ones in the present suit in that they are seeking temporary orders directing KPL&C to reconnect power to a company called Polcino Oasis Ltd. yet the account does not belong to the plaintiff/applicant but rather to the said company

The matter in the lower court also seeks temporary mandatory injunction for KP&L.Co. to reconnect power allegedly because the same was disconnected illegally – the suit in the lower court was filed on 11<sup>th</sup> December 2009, whereas the one before the High Court was filed on 16<sup>th</sup> December 2009 by the applicant in person.

Mr. Mouko points out, that this suit seeks a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendant's action of disconnecting electricity supply was illegal – which is exactly what is sought in the lower court.

Mr. Mouko views the present suit and application as an abuse of the court process.

Secondly, it is submitted that the entire application and plaint are an abuse of the court process as the suit is brought on the basis that plaintiff is an administrator of Nicola Policino yet the account sought to be reconnected belongs to a third party and no law allows the plaintiff to file the action she has brought.

In response, Mr. Ogonya submitted that the matter said to be subjudice involves different parties – this one of 2009 only seeks orders against 2<sup>nd</sup> defendant so Mr. Mouko is submitting on instructions that he does not even have and Mr. Ogonya urges this court to consider the provisions of section 6(Cap 2) on the rule on sub-judice. He also argues that the prayers sought here are different because the present suit seeks other prayers not sought before the lower court. He points out that in the present suit, the application is brought by a share holder, to enforce her rights, whilst in the lower court it is the plaintiff in her personal capacity. It is his contention that it is 1<sup>st</sup> respondent/defendant who is in fact abusing the court process and he who comes to a court of equity must have clean hands.

Mr. Mouko's response to this is that the law requires full disclosure as under Order VII a party is required to disclose if there is another suit pending – yet she has failed to disclose thus and such non disclosure is an abuse of the court process.

In the matter pending in the magistrate's court PMCC 429 of 2009, the parties are ANNA WAUSI POLCINO V THE KENYA POWER AND LIGHTING CO. LTD where plaintiff/applicant states in the plaint that she has been in use of electricity Account No. 354136-03 in Malindi.

The power supply to this account has been disconnected and she was informed it was in arrears of Kshs. 15137.70 (fifteen thousand, one hundred and thirty seven shillings and seventy cents). She undertook to settle the account and defendant activated the supply on 2<sup>nd</sup> November 2009. On 4-1-09, she made payments of Kshs. 35,000/- in respect of the said account, but thereafter, the KPLC disconnected power supply in the evening. She sought for an order of declaration that the action of disconnecting power to Account No. 354136-03 is illegal. She then filed a notice of motion seeking temporary orders directing KPLC to reconnect electricity supply, pending hearing and determination of the suit.

In the present case, there are two parties in addition to KPLC where the same plaintiff (Anna describes herself as a majority shareholder of the 3<sup>rd</sup> defendant company – whilst 1<sup>st</sup> defendant has five shares. The third defendant, holds an electricity account No. 354136 -03 in Malindi (which is the same account referred to in the matter pending in the lower court). The pattern of events is the same, culminating in power being disconnected and in all this she states it is the 1<sup>st</sup> defendant who has maliciously prevailed upon KPLC to disconnect the supply to the 3<sup>rd</sup> defendant's account. She seeks a declaration that 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant (i.e KPLC) action of disconnecting electricity supply to the third defendant's account is illegal. She has then filed a Notice of Motion seeking temporary orders or reconnection.

The prayers ought are similar, the electricity account is one and the same, the chain of events leading to the disconnection of the power is one – really why file two separate suits in different courts over the same matter? To be fair to the plaintiff, she did disclose at paragraph 12 of her pleadings in HCCC 19 of 2009 that she had filed another related matter - in the lower court. The matter in the lower court was filed prior to this one, there is nothing barring applicant/plaintiff – from amending her pleadings before the lower court to introduce 1<sup>st</sup> and 3<sup>rd</sup> defendants in the matter – the illegal action complained of being the same and affecting the same subject matter, so really to allow this matter to run alongside the one pending before the lower court is an abuse of the court process. My finding is that the preliminary objection has merit and is sustained.

This application and the entire suit is struck out with costs to the defendant/ respondents.

Delivered and dated this 2<sup>nd</sup> day of **March 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr. Nyakoe for applicant

Mr. Ikubi holding brief for Mouko for respondent