



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & MURGOR, JJ.A)

CIVIL APPLICATION NO. 152 OF 2016

BETWEEN

JOSEPH KITHOKOI MUTIA.....APPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED...RESPONDENT

*(Being an application for a mandatory injunction pending the hearing of the appeal from the Ruling (Aburili, J.) delivered on 12<sup>th</sup> April, 2016*

*in*

*HCCC No. 202 of 2015)*

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**RULING OF THE COURT**

By a letter dated 24<sup>th</sup> May, 2012 to the applicant, which constituted a contract, the respondent agreed, on terms, to supply electricity to the former at his farm on **PLOT No. 506 Kitoo – Kisunguni**, Mutito, Kitui County. Pursuant to this contract, the appellant paid to the respondent the full requisite consideration in the sum of Kshs.34,980/-. Despite this and reminders from the applicant's advocates, the respondent has failed or neglected to supply the applicant's home with electricity forcing the applicant to institute a suit in the High Court for breach of contract, an award of general damages and a mandatory injunction. Subsequently, he took out an application for a temporary mandatory orders of injunction to be directed to the respondent to install, supply or provide electricity to his property.

In reply, the respondent asserted that in fact it was the applicant who had failed to pay the requisite connection charges within the specified time under the contract; that he had also failed to obtain the necessary way-leaves and easements from various way-leaves authorities and property owners to able the respondent to construct the power lines through private property, public roads and county government property; that the applicant had not fulfilled the pre-condition 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; and that the court below had no jurisdiction to entertain the action as the applicant had not exhausted the complaints and disputes resolution mechanisms provided for in the Energy Act, 2006.

Upon consideration of the arguments, the learned Judge, **Aburili, J.** found no merit in the applicant's case and dismissed it. In her view, the applicant's suit did not qualify for an order of mandatory injunction, without proof that he had an unusually strong case or that his case was so simple and clear that a mandatory injunction could be issued or that there was evidence pointing to the respondent's attempt to steal a match on the applicant. Finding no substance in the application, the learned Judge dismissed it.

The applicant has evinced his intention to challenge that dismissal before this Court by filing a notice of appeal. In the meantime, he has applied, in the motion before us, expressed to be brought under **Rule 5(2)(b)** of the Rules of the Court, that we order the respondent to install, supply and or provide electricity to the applicant at his aforesaid farm, pending the hearing and determination of the main appeal. What the application seeks is a mandatory order of injunction similar in all respects to that rejected by the court below. It is premised on the very grounds advanced in the High Court, that despite having paid for electricity supply, the respondent has failed to do so; that as a result the applicant is exposed to danger of an attack by criminals and wild animals; that the respondent has discriminated against him by failing to supply his home but connecting his neighbours with electricity; and that he had fully complied with the conditions of the contract.

The respondent has urged us to dismiss the application because if granted the orders, by their very nature were capable of disposing of, not

only the intended appeal, but also the suit that is still pending in the High Court.

We reiterate that the application is premised on **Rule 5(2)(b)** of the Rules of the Court and seeks mandatory injunctive orders. **Rule 5(2)(b)**, in relevant part provides that;

**“...the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—**

**(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”** (Emphasis added).

The jurisdiction of the Court under this rule is limited to granting of an order of stay of execution, injunction or stay of any further proceedings. There is no mention in the rule of mandatory injunction. But the power under the rule is to grant injunction, prohibitory or mandatory. It is settled that whether it is an application for stay of execution, an injunction or a stay of any further proceedings, under **Rule 5(2) (b)** the strictures are the same. The jurisdiction under **Rule 5 (2) (b)** is original as opposed to exclusive appellate jurisdiction under **Article 164 (3)** and in dealing with a **Rule 5 (2) (b)** application the Court exercises a discretion as a court of first instance. So that, even where a similar application has been made in the High Court or other similar court under **Rule 6(1)** of order 42 Civil Procedure Rules and refused, this Court in dealing with a fresh application is deemed to exercise an original independent discretion. See **Githunguri V Jimba Credit Corporation Ltd.** (No. 2) (1988) KLR 838 and **Equity Bank Limited v West Link Mbo Limited** (2013) eKLR.

Both sides did not specifically address the two well-known principles in their submissions. Those principles are that, for an application under **Rule 5(2)(b)** to succeed, the applicant must satisfy the Court first, that he has an arguable appeal and second, that if the order sought is not granted, the appeal, if successful, shall be rendered nugatory or valueless or worthless. See **Stanley Kangethe Kinyanjui V. Tony Ketter & 5 others** [2013] e KRL. Both limbs must be proved to exist.

The learned Judge rejected the application on the ground that the applicant’s application did not meet the test in the celebrated case of **Locabail International Finance Ltd V Agro-export and Others** [1986] ALL ER 901 for the grant of a mandatory injunction; that the applicant did not demonstrate the existence of special circumstances; and that the applicant’s case was not a simple, straight forward or a clear one.

We cannot determine here whether or not the applicant has satisfied the conditions in the contract for the supply of electricity. That is the question before the High Court. But he insists that he has met the conditions. On the other hand the respondent is adamant that he has not. That contest in itself is evidence that the appeal is arguable. Being settled that an applicant need not demonstrate a plethora of arguable points, we are persuaded, on this ground alone that the intended appeal will not be frivolous.

But will the appeal be rendered nugatory if an order of mandatory is not granted? We do not think so. By declining to grant the order sought in this application we do not think that the intended appeal will be rendered nugatory in the event the Court later finds in the intended appeal that **Aburili, J** ought to have granted an order of mandatory injunction. The applicant has never had electricity supply to his home all this time. The delay and inconvenience can be compensated by an award of costs.

The applicant is required to satisfy both limbs of **Rule 5(2)(b)**, arguability of the appeal and the nugatory aspect. Here, the applicant has satisfied us only on one limb, therefore the application must fail.

Accordingly, we dismiss it with no orders as to costs.

As we conclude, we, like the learned Judge below, must disapprove the respondent’s attitude in this dispute. Having received the money from the applicant, and if indeed certain terms had not been fulfilled by the latter, the least the respondent was expected to do (as a service entity), was to respond to many letters addressed to it by the applicant’s advocates and explain why they could not supply electricity to the applicant. Instead, they waited and only raised this when the suit was filed. We wish to say no more.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of February, 2018.**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true  
copy of the original.*

**DEPUTY REGISTRAR**