



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO.80 OF 2015**

**1. ROBAI KADILI AGUFA**

**2. IRENE MARIA MBOGA AGUFA ..... APPELLANTS/APPLICANTS**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT**

**RULING**

On 17<sup>th</sup> September, 2015, *Hon S.N. Mwangi*, Resident Magistrate at Vihiga delivered a ruling in the applicants case (PM C.C. No.70 of 2015) which aggrieved the applicants. They then lodged the present appeal on 28<sup>th</sup> September, 2015. Thereafter, on 2<sup>nd</sup> November, 2015, they took out a motion on Notice brought under *sections 1A, 1B, 3A 78(2) and 79* of the Civil Procedure Act (Cap 21) laws of Kenya, and *Order 42 rule 6(6)* of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking, in the main, a interim injunction compelling the respondent to restore electricity power supply to the applicants' respective premises under supply contract *Nos.223009-01 and 22073001* or under supply contracts on either prepaid or post paid meter connection subject only to the applicants payment for consumption after the said restoration. The applications have also sought to have power supply to those premises to remain connected until the hearing and determination of this appeal.

The application is supported by an affidavit sworn by *Rabai Kadili Agufa* the first applicant on his own behalf and on behalf of the second applicant. The applicants deponed that they have had supply of power for over two years and have routinely paid their power bills but power to their premises was disconnected by the respondent without notice or explanation. The applicants say that even though they have sought explanation from the respondent why power to their premises was disconnected, there was none. The applicants further state that they have suffered huge losses since disconnection of power to their premises and if the state of affairs continues, they will continue to suffer even more losses. They therefore urged the court to grant their application.

The respondent opposed the application through grounds of opposition filed on 10<sup>th</sup> November, 2015, saying the application lacked merit; the applicants failed to demonstrate the substantial loss they would suffer in terms of *Order 42 rule 6* of Civil Procedure Rules; they are guilty of delay, laches; gross and unreasonable delay; there is no demonstration *prima facie*, that they deserve the orders; and that there is no arguable appeal. They also say that the applicants have not offered security.

During the hearing of the application, *Mr Musiega* learned counsel for the applicants urged the application and pleaded with the court to grant the orders sought, arguing that the applicants' case has

not been heard since the court below denied them the opportunity on account of jurisdiction prompting the present appeal. The applicants had sought an injunction in the lower court which was not heard and the plight of the applicants remains unaddressed, he said. Counsel argued that under *Order 42 rule 6(6)* the applicants seek the intervention of this court to have power supply restored to their premises. He submitted that this court has jurisdiction to grant an injunction during the pendency of an appeal. He also cited *section 78(2)* to show that the court has jurisdiction saying that power to their premises was disconnected without reason hence the court should intervene.

On the question of jurisdiction, counsel cited a decision of the Court of Appeal in the case of *Kenya Power and Lighting Company Ltd vs Kiprino Kosgei Civil Appeal No.333 of 2005* (Eldoret), to show that the court has the necessary jurisdiction to deal with the dispute before it. He further submitted that the applicants are ready and willing to pay for electricity on pre-paid or post paid basis during the pendency of this appeal from the date of re-connection.

Responding to the grounds of opposition, Counsel submitted that the respondent had not alleged anywhere that the applicants had breached any terms of their power supply contract; the respondent has not alleged failure to pay power bills or any indebtedness on their part. Counsel took issue with the respondent's action saying it was using its monopoly to harass, penalise and oppress the applicants. Counsel argued that unlike an application for stay of execution under *Order 42 rule 6(2)*, the applicants had moved the court under *Order 42 rule 6(6)* and therefore did not have to comply with the conditions under the former rule (*Order 42(6)(2)*). He prayed for the orders.

*Mr Weche*, learned counsel for the respondent, opposed the application and submitted that the matter was not heard for lack of jurisdiction following a preliminary objection raised on behalf of the respondent citing *section 59(3)* of the Energy Act. According to counsel, courts do not have jurisdiction hence the complaint should have been referred to the *Energy Regulatory Commission* following disconnection of power by the respondent. Counsel continued that since the applicants are seeking a mandatory injunction, they have to establish special circumstances which they have not done in this case. Learned counsel took issue with the applicants saying that they had not attached receipts to show that they have been paying for power consumption; have not shown that they are incurring losses; have not shown power supply contracts, permit for business or tax returns to show the losses. He urged that the respondent has a duty to the public but that the applicants have not shown how their right outweighs the respondent's duty to the public. Referring to the case of *Kenya Power & Lighting Company Ltd vs Kiprono* (supra), *Mr Weche* submitted that the Electric Act considered in that decision had been repealed and replaced with the Energy Act, which gives the *Energy Regulatory Commission* power to deal with disputes such as that of the applicants. According to counsel the applicants have not complied with *Order 42 rule 6(2)* of the Civil Procedure Rules. He further submitted that the applicants have no arguable appeal since the case at Vihiga was a non-starter. He also faulted the applicants for failure to provide security. He cited the case of *Kenya Power & Lighting Co. Ltd vs Esther Wanjiru Nyokabi* [2014] eKLR to strengthen his case and prayed for the dismissal of the application with costs.

I have considered the application, the affidavit in support the grounds of opposition and submissions by counsel for the respective parties. I have also taken into account the authorities by counsel in support of their respective positions in this matter.

The applicants have sought an injunction pending appeal under *Order 42 of rule 6(6)* of the Civil Procedure Rules, 2010, (The Rules) *Order 42 rule 6(6)* of the Rules provides as follows:-

*"Notwithstanding anything contained in sub-rule (..) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just*

*provided the procedure for instituting a appeal from a subordinate court or Tribunal has been complied with.”*

The applicant has indeed lodged an appeal against the decision of the learned magistrate thus complying with the procedure for instituting the appeal to this court. This court is therefore properly seized of this matter and has the necessary jurisdiction to consider the application by the applicants before it.

The applicants are seeking an injunction to restore or reconnect electricity to their premises and pray that upon such reconnection, power supply remains uninterrupted pending the hearing and determination of this appeal. This of-course is, as it were, an application for a mandatory temporary injunction. A mandatory injunction is not the same as a prohibitory injunction and considerations for granting the two injunctions are slightly different. Whereas in the case of prohibitory injunction an applicant must establish *prima facie* case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted or further still, that the balance of convenience tilts in the applicant’s favour. In the case of mandatory injunction, the applicant must in addition establish special circumstances and the standard for its grant is usually higher than that of prohibitory injunctions.

The considerations for granting interlocutory mandatory injunctions were well stated in the case of Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR where the Court of Appeal said:-

*“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4<sup>th</sup> Edition paragraph 948 which read:-*

*‘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 attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”*

The Court of Appeal quoted with approval an English decision in the case of Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901 where it was stated:-

*“A mandatory injunction ought not to be granted on an interlocutory application in the absence or 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 march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”*

In the recent case of Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR the Court of Appeal said:-

*“It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”*

The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. What is the applicant's case then"

The applicants say that they are businesspeople who have had electricity connected to their premises for nearly two years now. They say that the respondent disconnected electricity to those premises without reason despite the fact that they have paid their power bills. They have also deponed that there are no bills outstanding and they are not indebted to the respondent in any way. They have argued that the respondent is using its position of monopoly to penalise and embarrass them. The applicants have further stated on oath that they operate businesses in those premises which require electricity and without this service they are incurring losses.

Despite this evidence on oath the respondent did not file any affidavit to counter the applicants' assertions or even offer a glimpse on why it disconnected power to the applicants' premises. It only filed grounds of opposition which did not raise any case against the applicants' claim that electricity was disconnected without justification. As it is, the respondent has not controverted the applicant's case that the respondent has acted against them without any reasonable justification. The respondent has not even denied the applicants' claim that they have sought reasons and explanation from the respondent's offices without success. The respondents' grounds of opposition appear to address other issues rather than the application for injunction, more so whether or not the respondent was right in acting the way it did by disconnecting power to the applicants' premises.

The respondent is a public body charged with the responsibility of supplying electricity to customers and, it is true that at the moment, it is only the respondent that distributes and supplies electricity to consumers throughout the country and has that monopoly. For that reason, it should not use its position to penalise and oppress customers. It is of course allowed to take action and even disconnect power only after giving due notice to the customer concerned whether or not this happened is a matter that cannot be decided in this application. It should not act in a capricious manner and must at all times justify its actions. The applicants as consumers have a legitimate explanation and the respondent has a duty to the applicants' expectation.

Without power connectivity to their premises, the applicants have expressed fear of incurring more losses especially during this festive season.

The respondent's counsel attacked the applicants' application saying that they did not attach bills or receipts to show that they have been paying for electricity. With due respect to the learned counsel, the respondent has not alleged any impropriety on the part of the applicants. At least not in this application. The applicants' statement on oath remains unanswered and therefore uncontroverted. It was upon the respondent to justify its action once challenged in the manner the applicants have done. Without doing so, the applicants' position remains unchallenged.

In an application like the one before court where an applicant seeks a mandatory interlocutory injunction, the court will act sparingly and only accede to the request and grant such an order in the clearest of cases (see *Kenya Airports Authority vs Paul Njogu Mungai & 2 others*) [1997] eKLR. *Megarry J* sounded this caution in the case of *Shepherd Homes Ltd vs Shadahu* (1971) 1 Ch 34 as follows:-

*"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action the court will of course grant such injunction as the justice of the case require; 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 can be granted even if it is sought to enforce a contractual obligation.”*

Taking into account the warning sounded by Megarry J. and other decisions cited above and bearing in mind the circumstances of this case and also considering that the respondent has not controverted the applicants' assertions in this application that it acted unreasonably and without justification, I am satisfied that the applicants have met the test of special circumstances and this application warrants the court exercising its discretion in the applicant's favour.

Consequently, the application dated 2<sup>nd</sup> November, 2015 is allowed as follows:

1. *An interim injunction is hereby granted compelling the respondent to restore electricity power supply to the applicants' respective premises under supply contract Numbers 223009-01 and 220730-01 forthwith.*
2. *The applicants do pay a pre-paid amount of Kenya Shillings five thousand (Kshs.5,000/- each to the respondent which money shall be utilized to pay for power consumption until it is over, and thereafter, the applicant shall continue to pay bills for power consumption after reconnection following this order until the hearing and determination of this appeal.*
3. *The applicants do file a Record of Appeal within forty five (45) days from the date hereof and thereafter the appeal be fixed for directions within thirty (30) days from the date of filing the Record of Appeal.*
4. *There be liberty to apply.*
5. *Costs of the application shall abide by the result of the appeal.*

**Dated and delivered at Kakamega this 15<sup>th</sup> day of December, 2015.**

**E.C. MWITA**

**JUDGE**



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