Case Number:	civ case 9 of 04
Date Delivered:	21 Jan 2004
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	-
Judge:	David Kenani Maraga
Citation:	OCEANVIEW BEACH HOTEL LIMITED vs THE KENYA POWER & LIGHTING CO. LTD.[2004] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 9 OF 2004

OCEANVIEW BEACH HOTEL LIMITED …….. PLAINTIFF

Versus

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

R U L I N G

Contemporaneous with the filing of this suit on 16th January 2004 the plaintiff filed an application under certificate of urgency seeking a temporary injunction to restraine the defendant from disconnecting the power supply to its premises until this suit is heard and determined. The matter came before me on the same day. I declined to grant an ex-parte injunction and ordered that the Application be heard inter-partes on the 19th January 2004. I am told the application was served on the same day, 16th January, and the following day the defendant disconnected the electric power supply to the plaintiff's premises.The plaintiff argues that that act of disconnection was illegal. I will deal with that issue later in this ruling.

The plaintiff is a consumer of electricity supplied to its premises by the defendant. In 1999 the plaintiff disputed the amount demanded in the bills raised by the defendant in connection with that supply. The plaintiff contended that the bills were inflated and that in spite of its letter to the defendant dated the 29th June 2000 the defendant had never expressly responded. The only response the plaintiff got from the defendant was that the inflated bills were as a result of the shortage of the power supply and the rising petroleum fuel prices. The plaintiff further contended that due to constant threats and actual disconnections of electricity it decided to settle the matter. Consequently a meeting was held by the representatives of both parties and their respective advocates on 13th October 2003. In that meeting it was agreed that the amount due from the plaintiff to the defendant was sh. 5,800,000/=. It was further agreed that that amount was to be reduced to sh. 5,000,000/= by the 28th November 2003 after which the parties would agree on how the balance was to be paid. According to the plaintiff when its representative called on the defendant on 14th January 2004 to agree on how the balance was to be paid the defendant not caring that the plaintiff had reduced the amount to sh. 4,600,000/=, less than the agreed figure of sh. 5,000,000/=, the defendant demanded that the figure be reduced to sh. 4,000,000/= by 19th January 2004 failing which power would be disconnected. And that prompted this case.

The defendant on its part has filed a replying affidavit and averred that the plaintiff in the past constantly abused court process by obtaining court injunctions which have had the effect of barring the defendant from recovering the amount due to it. It has annexed to that affidavit copies of agreements previously reached with the plaintiff and proposals for payment which the plaintiff has not honoured. Other than what has been expressly admitted the defendant denied all the allegations contained in the plaintiffs pleadings. As power was disconnected the plaintiff has amended its Chamber Summons and sought a mandatory injunction to compel the defendant to reconnect the power supply.

As I said earlier the plaintiff has taken serious issue of the disconnection. Mr. Kiume for the plaintiff argued that this case having been filed the disconnection was illegal. He cited section 63(2) of the Electric Power Act (the Act) in support of that proposition. Mr. Kiume also argued that the disconnection was in contravention of section 63(1) of the Act in that the mandatory 14 days notice required by that section to be given to the customer before disconnection was not given. He also referred to sections 64 and 87 of the Act and concluded his submissions by urging me to follow the authority in the case of **Palace Drycleaners Ltd. & Another Vs Kenya Power & Lighting Co. Ltd. Nairobi HCCC No. 837 of 2000** (unreported) and grant the mandatory injunction.

Mr. Mwangi for the defendant took me through the replying affidavit and strongly submitted that the plaintiff has filed numerous cases on the matter and irregularly obtained injunctive orders against the defendant. The last of those cases that the plaintiff obtained an injunction was Mombasa CMCC No. 2444 of 2003 filed late last year which counsel for the plaintiff said was withdrawn on the 14th January 2004 before the injunction application was heard inter-partes. Mr. Njenga further submitted that given the history of this matter the plaintiff did not require any notice under section 63(1) of the Act. If any notice was necessary at all then the defendants letter to the plaintiff dated the 4th December 2003 and annexed to the replying affidavit as exhibit JM11 is such notice.

I have carefully perused the amended application together with the supporting affidavits and the annextures thereto. I have also perused the replying affidavit and the annexures thereto and considered the submissions by counsel for both the parties. It is clear from the consent letter dated 31st January 2002 annexed to the replying affidavit that the plaintiff had as of that date filed seven cases against the defendant. There is also Mombasa CMCC No. 2444 of 2003 which I referred to earlier plus this one making a total of 9 cases. The defendants argument that the plaintiff has in those previous cases irregularly obtained injunctive orders was not controverted. Although I do not accept that argument entirely as only a few copies of the injunctive orders were annexed, I am inclined to accept it as not being without basis.

My understanding of section 63(1) of the Act is that the notice envisaged thereunder is to be given where demand for payment is being made for the first time. And where the customer may not know of the amount due and requires notice to advise him of the same. But in a case like this one where demand has been made previously, where numerous cases have been filed, where consents have been reached on the amount due and where proposals for payment have been given which have not been honoured, I don’t think that any further notice is required. I therefore find that the defendant did not require to give any further notice to the plaintiff before disconnecting the supply. However if I am wrong in this and any further notice was required to be given to the plaintiff then I agree with Mr. Njenga that such notice was given by the defendants letter to the plaintiff dated the 4th December 2003.

By its own admission contained in the plaint and the affidavit in support of its application, the plaintiff has confirmed that at the meeting of 13th October 2003, the amount due from it to the defendant was agreed as sh. 5,800,000/=. There is therefore no “difference or dispute” in respect of the amount. The disagreement on the mode of payment cannot, in my view amount to the difference or dispute envisaged by sections 63(2) and 64 of the Act. With respect I do not understand how section 87 of the Act fits into Mr. Kiume’s argument. That section deals with disputes arising from the recording by a defective meter of the value of the electric energy supplied. That is not the case in this matter.

The plaintiff has sought for orders of both prohibitive and mandatory injunctions. Visram J. in the **Palace Drycleaners case**, (supra) held that where the two injunctive orders are sought and the mandatory one is granted, the prohibitive one follows automatically. I agree. Is the plaintiff entitled to a mandatory injunction in this case"

The jurisdiction to grant an interlocutory mandatory injunction must be exercised only in special cases - **The Despina Pontikos [1975] EA 38**. Bosire J. (as he then was) held in **Belle Maison Ltd. Vs Yaya Towers Ltd. Nairobi HCCC No. 2225 of 1992** (unreported) that "special circumstances, however, depend on the facts and circumstances of each case and the good sense of the trial Judge".

In that case the facts and special circumstances which he found and relied upon to grant a mandatory injunction were the illegal acts of the defendant. The eviction of the defendant by the plaintiff from the suit premises in that case was in flagrant disregard of the provisions of the Transfer of Property Act. In the Palace Drycleaners cases (supra) the defendant alleged that the meter had been tampared with and estimated the amount and value of the electric energy consumed. There was therefore a clear dispute between the parties and in disconnecting the supply to the plaintiff without notice the defendant in that case contravened section 63(1) of the Act. The court held that that was illegal and granted a mandatory injunction. The two cases are clearly distinguishable. The defendants' acts in both cases were contrary to provisions of law and therefore illegal.

In this case as I have already found given the history of the matter the defendant did not require to give any notice and that if any notice was required the same was given vide the defendants letter of the 4th December 2003. I have also found that there was no dispute between the parties. The defendant was therefore perfectly entitled to disconnect the supply of electric energy to the plaintiffs premises. I agree with Mr. Njenga that the plaintiff has grossly abused court process and should not be allowed to continue doing so. The application for both mandatory and prohibitive injunctions is therefore dismissed with costs.

DATED this 21st day of January 2004.

D.K. Maraga

Ag. JUDGE