THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA\
(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0200 OF 2007
(ARISING FROM HCT-00-CC-CA-0002 OF 2007)

ELECTRO MAXX (U) LTD …… …… APPLICANT

VERSUS

ELECTRICITY REGULATORY AUTHORITY ……..RESPONDENT

BEFORE: **HON. MR. JUSTICE LAMECK N. MUKASA**

RULING:

This is an application brought by Notice of Motion under section 110 (3) and (4) of the Electricity Act Cap 145, Rules 5 (2) (b) and 42 (I) and (2) of the Court of Appeal Rules Directions L. N. II of 1996 and Section 98 of the Civil Procedure Act, Cap 65. The Applicant M/S Electro-Maxx (Uganda) Ltd is seeking for orders that:-

(a) An injunction be issued to restrain the Respondent, Electricity Regulatory Authority (ERA) from granting an Independent Power Producer (IPP) license to M/S Jacobsen Electro As for the generation and sale of 50MW of thermal power until the final determination of Commercial Appeal No. 02 of 2007.

(b) The costs of this application be provided for

The grounds of this application are that:-

1. The Applicant has lodged Commercial Appeal No 2 of 2007 pending in this honourable Court for hearing and final determination.
2. The Applicant has, in the Commercial Appeal No. 02 of 2007, a prima facie case with a high probability of success.
3. The Ministry of Energy and Mineral Development concluded the re-evaluation of bids and set up a Committee which is engaged in negotiations with Jacobsen Electro As with the intention of executing a Power Purchase Agreement (IPP) that will lead to the grant by the Respondent of the IPP license to Jacobsen Electro As before the hearing and final determination of the appeal.
4. If the imminent grant of the IPP license to Jacobsen Electro As by the Respondent is not halted, the Applicant stand to suffer irreparable business loss and opportunity that cannot adequately be compensated by way of damages.
5. The justice of the matter requires that an injunction does issue to restrain the Respondent from granting an IPP license to Jacobsen Electro As before the hearing and final determination of the appeal.
6. On the balance of convenience the Applicant shall suffer more inconvenience than the Respondent if an injunction is not granted to restrain the Respondent from granting the IPP license to Jacobsen Electro As.

The brief background to this application is that the Government of Uganda, through the Respondent, in December 2005 invited independent power producers to bid for the generation and sale of 50 megawatts of thermal electricity to be added to the national grid. M/S Jacobsen Electro As, Ms African Power Initiatives and the Applicant were the bidders. At the close of the bidding process, in March 2006, the Respondent had selected M/S Jacobsen Electro As the most responsive bidder. The applicant was aggrieved by the Respondent's decision and lodged EDT Appeal No. 1 of 2006 before the Electricity Disputes Tribunal. In the said Appeal the Applicant sought for orders that:

(a) The appeal is allowed.

(b) The resolution to award the license by the Respondent to M/S Jacobsen Electro As be revoked or set aside.

(c) The license for the generation and sale of 50 megawatts of thermal electricity be awarded to the appellant (Applicant) having come out as the second most responsive bidder.

(d) Alternatively that the bids be reopened or re evaluated and that Jacobsen Electro As be disqualified from the entire bidding process.

This application is supported by an Affidavit deponed to by Charles Muhumuza, the Executive Director of the Applicant. In paragraphs 4 to 7 he avers that prior to the commencement of the hearing by the Electricity Disputes Tribunal of the Applicant's appeal No. 01 of 2006 - Electro-Maxx (Uganda) Ltd Vs Electricity Regulatory Authority, the Ministry of Energy and Mineral Development conducted the re-evaluation of the bids originally evaluated by the Respondent. That in the re-evaluation the Ministry chose Jacobsen Electro As the most responsive bidder and recommended for negotiations between the Ministry and Jacobsen Electro As to start which would lead to the execution of the Power Purchase Agreement (PPA) and the eventual award of the IPP licence to Jacobsen Electro As by the Respondent. In paragraphs 5 and 7 Charles Muhumuza states:-

> "5. That when the hearing of the Applicant's appeal before the Electricity Disputes Tribunal commenced on 21st February 2007, the Respondent's Counsel raised preliminary objections, inter alia, that the Applicant agreed to participate in the re-evaluation that was conducted by the Ministry of Energy and Mineral Development and since the said re-evaluation that was conducted by the Ministry of Energy and Mineral Development had been concluded by that date, it would be futile for the hearing of the appeal to proceed.
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> 7. That the Electricity Disputes Tribunal was swayed by the outcome of the purported re-evaluation of the original bids by the Ministry of Energy and

> Mineral Development and accordingly dismissed the Applicant's appeal on the ground that proceeding with the hearing of the Appeal before it (Tribunal) would be for mere academic purposes and futile."

It is against that dismissal by the Electricity Disputes Tribunal of the Applicant's EDT Appeal No. 01 of 2006 on preliminary or technical objections raised by the Respondent and delivered on the 15th March 2007 that Applicant filed Commercial Appeal No 0002 of 2007 which is pending hearing and determination before this Honourable Court. Meanwhile vide this application the Applicant is seeking an injunction to restrain the Respondent from proceeding with the process which might lead to the award of the IPP license to M/S Jacobsen Electro As. The Applicant contends that it has a prima facie case in Commercial Appeal No 0002 of 2007 with a high probability of success. That if the grant of the IPP license to Jacobsen Electro As by the Respondent is not halted the Applicant stand to suffer irreparable business loss and opportunity which cannot be adequately compensated by way of damages and is likely to suffer more inconvenience than the Respondent if an injunction is not granted.

In his submission, in support of the Application, Mr. Magellan Kazibwe, Counsel for the Applicant invited Court to be guided by the settled conditions upon which Court should exercise its judicial discretion to grant or refuse to grant a temporary injunction. These are first that the applicant must show a prima facie case with a probability of success.

Secondly, that the applicant would suffer irreparable injury which an award of damages would not adequately atone if the injunction was refused and later on the Applicant turned out to be successful in the appeal.

Thirdly, if the Court is in doubt on any of the above two, it will decide the application on the balance of convenience. That is whether the balance of convenience is in the applicant's favour. In this regard Counsel referred me to *Giella Vs Cassman Brown & Co Ltd (1973) EA 358, ELT Kiyimba – Kagwa Vs Haji Abdu Nasser Katende (1985) HCB 43; Robert Kavuma Vs Hotel International S.C.C, A. No 8 of 1990 See also E. A. Industries Vs Trufoods (1972) E A 420*.

Mohamed Mbabazi, Counsel for the Respondent, pointed out and rightly so, that since the Revised Edition 2000 of the Laws of the Republic of Uganda, the application should have been made under the provisions of Rules 6 (2) (b) and 42 (1) and (2) of the Judicature (Court of Appeal) Rules. Counsel also raised three points which I must dispose off first before I proceed further with the merits of the application.

Section 110 of the Electricity Act provides that appeals from the Electricity Disputes Tribunal shall be to the High court and that the Court of Appeal Rules shall apply.

Firstly, Mr. Mbabazi submitted that for the purposes of the Electricity Act the High Court stands in for the Court of Appeal and the Electricity Disputes Tribunal stands in for the High Court under Rule 42 (I) of the Judicature (Court of Appeal) Rules. He accordingly argued that this application should have been made first in the Electricity Dispute Tribunal and the Applicant could only make another application in this Honourable Court, the Appellant Court, if the first one had been rejected, delayed or dismissed by the Tribunal. Mr. Mbabazi supported his submissions with the following authorities:-

1. National Housing and Construction Corporation Vs Kampala District Land Board and Chemical Distributors Ltd S.C.C.A. No. 6 of 2002
2. Shashikani Patel Vs Akampulira Michael, Court of Appeal Civil Application No 98 of 2003.
3. Editor –in-chief of New Vision Newspaper Vs Jeremiah Ntabgoba, Court of Appeal Civil Application No. 63, 2004.

Mr. Kazibwe submitted that the above authorities dealt with applications for stay of execution but not injunction perse and I agree. Counsel argued that none of the above authorities explicitly nor even by necessary implications provide that an application for injunction under Rule 6 (2) (b) of the Court of Appeal Rules must be made in the trial Court first before it is made in the appellate Court. However, learned Counsel appear to agree that the law governing applications for injunction, just like the law governing applications for stay of execution, in the Court of Appeal is Rule 6(2) of the Rules of that Court. The Rules states:-

"2. Subject to sub-rule (I) of this rule, the institution of an appeal shall not operate ---- to stay execution, but the Court may ----

(a) ---

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 76 of these Rules, order a stay of execution, an injunction or stay of proceedings on such terms as the Court, may think just."

And Rule 42 (I) provides:-

"(I) Whenever an application may be made either in the Court or in the High Court, it shall be made first in the High Court."

While considering the above provision the Court of Appeal in *Patel Vs Akampulira* (above) held:-

"The provisions of this rule were judicially considered by this Court in the case of *National Enterprises Corporation Vs Mukisa Foods Ltd. M. A. No. 07/98* (unreported). In that application this Court reiterated the position that was set out by the Supreme Court in the case of Kyaze that this Court has concurrent jurisdiction with the High Court to grant stay of execution. However, before an applicant lodges an application to this Court, he has to bring his application within the principles laid down in the case of *Cropper Vs Smith (1883) 24 Ch D. 305* where Cotton J stated that:

'In cases where the High Court has doubted its jurisdiction or has made some error of law or fact, apparent on the face of the record which is palpably wrong, or has been unable to deal with the application in good time to the prejudice of the parties or the said property, the application

> may be made to this Court. It may however, be that this Court will direct that the High Court should hear the application first or that an appeal be taken against the decree of the High Court, bearing in my mind the interest of the parties and the costs involved. The aim is to have the application for stay of execution heard and delays avoided'.
>
> The Supreme Court and this Court quoted the above excerpt with approval in the cases of ***Kyazze*** and ***National Enterprises Corporation*** respectively. Therefore the law and practice is that an application for stay of execution must first be made before the High Court unless the party applying can bring the application within the exception set out in the cases we have just referred to."

Under the Court of Appeal Rules where a notice of appeal has been lodged the application either for stay of execution, an injunction or stay of proceedings is governed by the provisions of Rule 6(2) and Rule 42 (I). Though the above cases were considering applications for stay of execution I find that the same provisions govern applications for an injunction before the Court of Appeal. Therefore, this application should have been first made before the trial Court, that is the Tribunal, unless the application can be brought within the exceptions.

Mr. Kazibwe submitted in reply that since the Applicant had already filed an appeal before this Appellate Court it would be incorrect to file an application which arises from the Appeal case before the Tribunal which was the trial Court. I appreciate Mr. Kazibwe's submission that there is already Commercial Appeal No 0002 of 2007 before this Honourable Court, out of which the instant application arises. The filing of the notice of appeal is an important aspect of Rule 6 (2) (b). It stipulates that:-

> "Where a notice of appeal has been lodged in accordance with rule 76"

the court of Appeal may stay execution, grant an injunction or stay of proceedings. If I understand Mr. Kazibwe properly, his argument is that in the instant case the process had gone beyond the lodgment of a notice of appeal since a memorandum of appeal had already been filed. I note that a memorandum of appeal which satisfies the provisions of Rule 86 was filed in this

Court on 23rd March 2007. I must, however, observe that the filing of a Memorandum of Appeal alone does not amount to institution of an appeal under the provisions of Rule 83. Further Rule 76 (I) provides:-

> "Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in duplicate with the registrar of the High Court."

Notice of Appeal was in the instant case filed in the High Court on 21st March 2007. However, as already stated hereinabove, for the purposes of the Electricity Act in respect to proceedings before the Electricity Dispute Tribunal the High Court stands in for the Court of Appeal and the Tribunal for the High Court. Consequently, the Notice of Appeal should have been filed in the Tribunal. There is no evidence of such filing. The applicant has not made any effort to show that the application was within the exception set out in the cases referred above. However, sub rule 2 of Rule 42 provides:-

> "Notwithstanding sub rule (I) of this rule in any civil or criminal matter, Court may on application or of its own motion, ----- entertain an application under rule 6(2) (b) of these Rules, in order to safeguard the right of appeal, notwithstanding the fact that no application for that purpose has first been made to the High Court."

Therefore, the technicality of failure to apply to the original Court first should not be used to deny the Applicant to be heard by the appellate Court if the circumstances of the case so require. Before this Court can invoke its powers to entertain the application under the subrule above it must, however, be shown that there is need to safeguard the appeal.

Whether Commercial Appeal No. 02 of 2007 is properly filed or not is not one of the issues raised before me at this stage. Both Counsels did not address me on that point. Therefore, I will not pronounce myself on that issue at this stage. So proceeding on the assumption that there is a proper appeal pending before this Court, the Applicant in its memorandum of appeal disputes that it agreed to the re-evaluation which was conducted by the Ministry of Energy and Mineral Development. It also contends that the re-evaluation was conducted without legal authority and

further that the Electricity Disputes Tribunal dismissed the Applicant's Appeal on the basis of an illegal, null and void re-evaluation and contrary to the principals of natural justice. The Applicant thereby raises serious matters and in the circumstances I find that there is need to safeguard the applicant's right of appeal. The prime purpose for a temporary injunction is to preserve the status quo pending the disposal of the main suit so that the main suit is not rendered nugatory. Considering all the above on that technicality alone I will not be prepared to deny the Applicant the entertainment of his application on merit.

Secondly, Counsel for the Respondent submitted that the conditions in Rule 6 (2) (b) providing for the grant of a stay of execution must be the same conditions applicable to an application for an injunction under the same rule. Though where a Notice of Appeal has been lodged, an application for an injunction, just like that for a stay of execution or for a stay of proceedings; is provided for by the same rule, the conditions for granting either may be similar but not necessarily the same. I accordingly do not agree with Counsel.

On his part Mr. Kazibwe submitted that the conditions for grant of an injunction by the High Court as set out in the *Giella* case and *Kaiyimba – Kaggwa* case above should be the same for granting an injunction under Rule 6 (2) (b) above. The applications before the High Court, while sitting as an appellate Court pursuant to the provisions of the Electricity Act , can only be entertained under Rule 6 (2) (b) of the Court of Appeal Rules. The Rule provides that the Court may order an injunction:-

> "---on such terms as the Court my think just"

The court is thereby given wider powers than it has in normal circumstances. Under the Rule the Court of Appeal may set the same terms or such other terms as it may think just in the circumstances of the case.

Thirdly, and specifically, Mr. Mbabazi argued that the considerations for a stay of execution by the High Court as provided in Order 43 rule 4 of the Civil Procedure Rules are the ones which have been considered by the Court of Appeal. These are:

"(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be biding upon him."

See Order 43 rule 4 (3) CPR.

The instant application is not for stay of execution but for an injunction. Under Rule 6 (2) (b) of the Court of Appeal Rules stay of execution, injunction or stay of proceedings are provided as alternative orders which the Court may make. Stay of execution is a relief normally granted to suspend the operation of a judgment, order or decree of Court. To the contrary an injunction, unless it is a permanent injunction, is intended to restrain a party from doing something pending the determination of the main matter. Rule 6 (2) (b) envisages that each relief can be granted in given circumstances. The Supreme Court in *Somali Democratic Republic Vs Anrop S. Sunderlal Treon S.C.C. Application No 11 of 1998*, stated the tests for granting an injunction as:-

"--- where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the Court in ordinary cases to make such order for staying proceedings under the judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the Court will not interfere if the appeal appears not to be bonafide, or there are other sufficient exceptional circumstances."

While dealing with whether Order 43 rule 4 (3) CPR (then Order 39 rule 4 (3)) apply to the Court of Appeal, the Court of Appeal in *Patel Vs Akampulira* (supra) stated:-

"Although the Supreme Court in the case of *Kyazze* stated that a party applying for stay of execution should be prepared to meet the conditions laid down under the said

order, this Court in the case of *National Enterprises Corporation* (supra) held that the order governs applications to stay of executions of the High Court."

The Court quoted from page 6 of its ruling in the *National Enterprises Corporation* case and went on to state:-

"Essentially what this court stated is that in exercising its discretion to grant the order of stay of execution it may set such terms as it thinks just in the circumstances of the case. It is not bound to impose the terms contained in Order 39 ---"

Therefore even if this application had been for a stay of execution, which it is not the Court would not be bound to impose the terms contained in Order 43 rule 4 (3) of the Civil Procedure Rules.

I now proceed to consider the merits of the application. Both counsel, in their respective submissions delved a lot on the merits of both the appeal before the Tribunal and before this Court which is outside the scope of this application. I will avoid temptation to do the same.

The Applicant, as already pointed out, based its case on the conditions for grant of an injunction as set out in the *Giella* case and *Kjyimba-Kaggwa* case above and other related cases. Regarding the first test, whether the Applicant has a prima facie case with a probability of success, it is now the general trend of courts in Uganda to consider only whether there are serious questions to be tried. See *Napro Industries Vs Five Star Industries Ltd & Anor HC Misc App No. 773 of 2004 (Comm. Court Division) Kiyimba – Kaggwa Vs Katende (Supra).* In *Robert Kavuma Vs Hotel International* (Supra) Wambuzi CJ stated:

"---what was required at that stage was to show prima facie case and probability of success but, not success."

The burden of proof that the conditions upon which an injunction can be granted do exist lies on the Applicant.

One of the Applicant's grounds of appeal is that the Tribunal erroneously held that the Appellant agreed to the re-evaluation which was conducted by the Ministry of Energy and Mineral Development without appreciating and properly construing the meaning of "*without prejudice*" in the Applicant's communications and actions before and at the commencement of the said re-evaluation. In effect the Applicant contends that the Tribunal erred in holding to the effect that the Applicant was bound by the re-evaluation conducted by the Ministry with the participation of the Applicant. In paragraph 4 of the Applicant's affidavit in support of the application it is averred that the Applicant had participated in the re-evaluation exercise "*without prejudice*" to the hearing and final determination of the appeal before the Tribunal. The Applicant has not adduced any communication or minute of the re-evaluation exercise to show that it had participated in the exercise "without prejudice. " However, in Annexture "B" to the Affidavit in support, which is entitled the "Brief on the progress of Re-evaluation process of the 50 MW Heavy Fuel Thermal Power Plaint" under the sub-heading "Stay of the Proceedings in the Electricity Disputes Tribunal" it is stated:

> "4M/S Electro-Maxx (U) Ltd filed an appeal in the Electricity Disputes Tribunal against the Electricity Regulatory Authority in respect of the licensing process which was conducted by the ERA. While accepting to participate in the re-evaluation process, M/S Electro-Maxx (U) Ltd indicated that they will continue to pursue their appeal in the Tribunal. Consequently, before the re-evaluation could be carried out, it was necessary to have a stay of the proceedings in the Tribunal. The stay of the proceedings was granted on December 6. 2006"

In light of the above a triable issue arises on appeal whether in the circumstances the re-evaluation decision could operate to dispose off the Appeal before the Tribunal.

The Application further contends that the re-evaluation was conducted by the Ministry without the legal mandate and outside the legal framework. Annextures, A, B, D, to the Affidavit in support show that the re-evaluation was conducted in accordance with the Public Procurement and Disposal of Public Assets Act. The Applicant contends that the evaluation of bids was the mandate of the Electricity Regulatory Authority to be conducted pursuant to the provisions of the

Electricity Act. There is a triable issue whether the Ministry had the legal mandate to carry out the re-evaluation exercise and whether it did so pursuant to relevant legal provisions.

The above considered together raise serious legal issues to be determined on appeal. They are not merely frivolous or vexatious. I therefore find that the first issue has been satisfied.

The next issue is whether the applicant would suffer irreparable injury which an award of damages can not adequately atone if the injunction was not granted and latter the applicant turned out to be successful in the appeal. To warrant a grant of an injunction the circumstances should be such that if the court does not issue an injunction the applicant would suffer irreparable loss even if he subsequently succeeds in the action. *See Napro Industries vs. Five Star Industries Ltd (Supra)*. *In Kiyimba-Kaggwa Vs Katende (Supra) Odoki J (as he then was)* held that irreparable injury does not mean that there must not be physical possibility if repairing injury, but means that the injury must be substantial or material one, that is, one that can not be adequately compensated for in damages. See also *Tonny Wasswa vs. Joseph Kakooza (1987) HCB-85*. The applicant must show that he has a claim in damages in the main suit, which even if awarded would not adequately compensate the loss he is to suffer if the injunction is not granted.

In the Respondent's affidavit in reply deponed to by its Secretary/ Legal Counsel Mr. Johnson Kwesigabo, paragraph 3 it is averred that the Applicant would not suffer any irreparable damage that cannot be adequately compensated for by way of costs or damages in the event a license is issued to an operator. In reply thereto Mr. Charles Muhumuza, in the applicant's affidavit in rejoinder, avers in paragraph 3 thereof, that the Applicant will suffer immense business loss and irreparable damage that cannot adequately be compensated for by way of costs or damages in the event the Respondent grants the license to Jacobsen Electro As which company had no better proposal than those of the Applicant on all the major bid considerations but just favored by the Respondent. The Applicant had earlier in paragraph 12 of its affidavit in support made a similar averment, adding that it also stands to suffer loss of the opportunity to obtain the IPP license if its appeal is successful. In the Appeal before this Court the Applicant in principle seeks for a declaration that the re-evaluation conducted by the Ministry was illegal, null and void ab initio, an order setting aside the dismissal of the Applicant's appeal before the Tribunal and for an order

that the Tribunal hear and determine the appeal before it on its merits. Save for prayer for costs, the Applicant does not, in the appeal before this Court pray for damages of any sort.

In paragraph 6 of its affidavit in rejoinder the Applicant contends that it is a capable, reputable company and part of the Simba Group of Companies with very prominent directors and shareholders who have impeccable investment credentials in telecommunications, tourism, banking, insurance, and real estate development in Uganda, and Nigeria. That it has bided for generation and sale of electricity in collaboration with re-known multinational corporations like Hyundai Heavy Industries Company Ltd of South Korea, CarlBro International AB, Roko Construction Limited, Multi Konsults Limited, Reschcon (pty) Limited and ABB Limited of Uganda. The deponent also avers to the willingness by Stanbic Bank Uganda Ltd to issue a performance bond in favour of the Respondent for an amount of US$ 750,000 in the event the Applicant is awarded the IPP license, and an interest by the same bank in arranging the debt financing for the project in an approximate amount of US$34 million. In paragraph 12 of its affidavit in support it is averred that the Applicant spent huge sums of money in the preparation of the original bid documents, consultations, professional fees, investigations of the act of unfairness, bias and favoritism, which the applicant attributes to the Respondent and the costs of litigation.

Mr. Kazibwe, in his submissions relied on the above as evidence of loss which cannot be adequately atoned by an award of damages. Mr. Mbabazi referred to such creation of associations and consortiums and the expenses incurred as attendant to the bidding process. I agree with him. It is like the Applicant undertaking and paying for a course to acquire the necessary qualifications for an advertised post and spending on acquisition of the necessary tools for the job in anticipation that he will be the successful applicant. Even Counsel for Applicant in his submission appears to concede that the applicant, in the circumstances, has not maintainable action for damages. I am equally in doubt.

As to the balance of convenience the Applicant contends that it stands to suffer more inconveniences than the Respondent if the Respondent is not restrained from granting the IPP

license to Jacobsen Electro As before the hearing and final determination of the appeal. In paragraph 6 of the Respondent's affidavit in reply it is averred that as a result of delay in implementing the Cheaper Heavy Fuel Thermal Plant the Country and the electricity consumers continue to suffer a welfare loss due to paying unnecessary high electricity tariffs which would otherwise have been saved or used to increase power supply. Mr. Kazibwe argued that such inconvenience was not being suffered by the Respondent but the Country or consumers who were not party to the suit.

One of the functions of the Electricity Regulatory Authority is to issue licenses for the generation, transmission distribution or sale of electricity. In the performance of its functions the Authority must ensure a fair balance of the interests of the consumers, the Government and participants in the power sector. See *Sections 10 and 11 of the Electricity Act*. If an injunction was to issue which restrains the Authority from the due performance of its statutory functions, and on appeal the Authority turns out to be the successful party, the Authority would thereby have suffered inconvenience because it would have been disabled in the timely execution of its functions. As already pointed out, under Rule 6 (2) (b) of the Court of Appeal, Rules Court is given wider powers when determining whether to grant or not grant an injunctions. It is my considered view that public interest should not be disserved by an injunction. The inconvenience to be suffered by the Country and the electricity consuming public cannot be overlooked.

Further the evaluation by either the Respondent or the Ministry was not the end of the road. Though Jacobsen Electro As was declared the best evaluated bidder, it still had to submit an application to the Respondent for the IPP license pursuant to section 33 of the Act, Section 35 requires the application to be published in the Gazette and a newspaper and section 36 allows an affected party to lodge an objection to the grant of a license. In granting or rejecting the application the Authority, among others, has a statutory duty to consider the objections so raised. Therefore even if the injunction is not granted, the Applicant's grievances can still be entertained by the Respondent at that stage. The record actually shows that on 25th April 2007 the Applicant filed in court copy of its objection to the Notice of Application for license of generation and sale of Electricity by Jacobsen Electro As.

Considering all the above I find that the Applicant as failed to prove that the balance of convenience is in its favour. In the result the application for a temporary injunction fails and it is dismissed with costs to the Respondent.

In view of the urgency of the matter Commercial Appeal No 0002 of the 2007 is fixed for hearing on 17th August 2007 at 9:00 a.m.

Hon. Mr. Justice Lameck N. Mukasa

JUDGE

20th July 2007