

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA - NAKAWA CENTRAL CIRCUIT
MISCELLEANOUS APPLICATION NO.512 OF 2013
(Arising out of Civil Suit NO. 291 of 2013)

**SILIVER SPRINGS LIMITED:..... APPLICANT/
PLAINTIFF**

Versus

**UMEME LIMITED:.....
RESPONDENT/DEFENDANT**

BEFORE: HON.LADY JUSTICE ELIZABETH IBANDA NAHAMYA
RULING

This Application was brought by Notice of Motion under Section 98 of the Civil Procedure Act and Order 52 rules 1 and 3 of the Civil Procedure Rules SI 71-1. The Application is for Orders that the electricity supply at the Applicant's hotel premises on Plot 76A/ 76D, Port bell road, Bugolobi, Kampala on meter No. U32627; Account Number 200877459 be restored/reconnected immediately; and a temporary injunction issues restraining the Respondent from any further disconnection of the Applicant's power supply until final disposal of the main suit. The Applicant also prayed for costs of the Application.

The Application was accompanied by an Affidavit of Joseph Tuhaise, the General Manager of the Applicant. He deponed that the Applicant operates the hotel business situate at Plot 76A/ 76D, Port bell road, Bugolobi, Kampala. And that the Applicant has at all material times consumed

electricity supplied by the Respondent under Account Number 200877459. Unfortunately, on the 7th day of October 2013, the Respondent unjustifiably disconnected its power supply notwithstanding that the Applicant has at all material times been clearing its electricity bills. He averred that the Applicant has no unpaid electricity bills. Further, that the Applicant filed Civil Suit No. 291 of 2013 seeking for declarations that the Respondent is in breach of its contractual duty to supply electricity to the Applicant's premises, a declaration that the disconnection of electricity supply was unlawful, and an Order for a permanent injunction.

In addition the Deponent stated that it will suffer irreparable damage if the electricity supply is not reconnected immediately and that the balance of convenience is in favor of the Applicant.

The Respondent filed an Affidavit in Reply deposed by Susan Nafula Bukenya, the Respondent Company Legal Services Manager. She denied the Applicant's claim and deposed that the disconnection of the Applicant's electricity supply was lawfully done and that it was done in accordance with the procedure regulating customers who tamper with their meters. In further deposition, that the disconnection was carried out following the Applicant's act of tampering with its meter in a bid to consume unmetered electricity supply. She stated that upon examination of the Applicant's meter, it was discovered that the Applicant owed the Respondent unbilled energy amounting to 236,405 units valued at Ug shs 133,078,358 (Uganda shillings One Hundred Thirty Three Thousand Seventy Eight Thousand Three Hundred Fifty Eight). In conclusion, she prayed that the Application should be dismissed.

When this Application came up for hearing, Mr. Evert Byenkya of Byenkya, Kihika & Co. Advocates represented the Applicant while the Respondent was

represented by Mr. Noah Mwesigwa of Shonubi, Musoke & Co. Advocates represented. And both parties filed Written Submissions.

I have carefully read the pleadings in this matter together with the relevant documents attached thereon. And also given due consideration to submissions made by both Counsel. Counsel for the Respondent raised some objections in relation to the propriety of this Application. Therefore, the issues for determination are whether this Application is properly made. I will resolve this issue later.

The second issue is whether in the premise Orders that the electricity supply at the Applicant's hotel premises be restored or reconnected immediately and whether the Applicant is entitled to an interlocutory injunction restraining the Respondent from any further disconnection of the Applicant's power supply until final disposal of the main suit.

However, before, I proceed with this Ruling, it suffices to note the issue whether an Order that the electricity supply at the Applicant's hotel premises be restored or reconnected immediately needs no determination. This is because, according to the parties' submission and paragraph 9 of the Affidavit in Rejoinder by deposed by Joseph Tuhaise dated 28th January, 2014, it is explicit that the Applicant's power supply has already been reconnected. This issue has been overtaken by events. Therefore, making a determination on it would be redundant. Paragraph 9 states:

9. That the Applicant's premises are currently supplied with electricity and the Applicant has duly paid its electricity bills for the uncontested current consumption. Copies of receipts are hereto attached and marked 'D1, D2, D3, D4 and D5'

I now turn to the 2nd issue of whether a temporary injunction issues restraining the Respondent from any further disconnection of the Applicant's power supply until final disposal of the main suit. There are a large number of judicial decisions in which Courts have reiterated the principles upon which an Order for temporary injunction can be granted that is if it is necessary to preserve matters in status *quo* until questions to be investigated in the suit can be finally disposed of. See ***Geilla vs. Cassman Brown and Co. Ltd [1973] EA 358***. In relation to the Application before me, the rationale for the Application is to maintain the subsisting status quo that is the Applicant's electricity supply is by the Respondent. Its power supply was reconnected and the Applicant has been duly paying for its current electricity bill as and when they are due. The Applicant's power supply was reconnected pursuant to an interim injunction issued where it was ordered that the power supply on the Applicant's hotel premises be reconnected immediately and the Respondent is restrained from disconnecting the Applicant's power supply.

The purpose of the Application is to restrain the Respondent from disconnecting the Applicant's power supply until the final disposal of the main suit which is in relation to the disputed bill arising out of unmetered bill valued at Ug shs 133,078,358.

It is trite law that for an Application for a temporary injunction to be maintained, three conditions must be satisfied by the Applicant. That is:-

The applicant must show a prima facie case with a probability of success.

That the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

If the Court is in doubt, it would decide an application on the balance of convenience.

See ***E.L.T Kiyimba Kaggwa vs. Hajji Abdu Nasser Katende [1985] HCB***

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I will now consider each of the grounds upon which this application is based to establish whether this is a case which warrants grant of the temporary injunction in the premise prayed for.

With regard to the 1st principle, whether the Applicant has established a prima facie case with a probability of success. It is a principle of law that the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. **See American Cynamide vs. Ethicon [1975] ALL ER 504.** For purposes of granting a temporary injunction, it is sufficient for the Applicants to prove that there are triable issues that merit judicial consideration.

In Australia, the High Court in **ABC vs. Lenah Game Meats (2001) 208 CLR 199at [91]** stated that the purpose of the interlocutory injunction is to preserve identifiable legal or equitable rights. The basic proposition remains that where interlocutory injunctive relief is sought in a judicial system, it is necessary to identify the legal or equitable rights which are to be determined at the trial and in respect of which there is sought final relief which may or may not be injunctive in nature.

According to the record, Counsel for the Applicant submitted that the Applicant filed High Court Civil Suit No. 291 of 2013 against the Respondent which establishes a prima facie with likelihood of success. The main suit is for declarations that the disconnection of electricity supply was unlawful, and that the Respondent's Bill for alleged energy loss is unlawful, null and void; special damages, general damages and costs of the suit. A copy of the amended plaint Annexure 'B' as attached to the Applicant's Affidavit in Rejoinder. Further, paragraphs 3, 4, 5, 6 of the Affidavit in Rejoinder the deponent stated that the disconnection of the Applicant's power supply was without any prior notice, was done unlawfully and unjustifiably pursuant to an alleged meter by pass by the Respondent. The deponent further deposed

that the Applicant does not have access to meter soft ware installed by the Respondent or have capacity to access one. Indeed the Applicant attached Annexure "A" which is the Disconnection Order in respect of the electricity supply on the Applicant's premises dated 7th October, 2013 on the ground of meter by pass.

The Respondent in its Affidavit in Reply Paragraphs 3, 6, 7, 9 in the deposition by Susan Nafula Bukenya denied the Applicant's claim and averred that the disconnection was legally made pursuant to the laws and procedures governing customers who have illegally tampered with their meters in order to consume unmetered electricity supply. Further, in paragraph 6 of the Affidavit, she averred that the Applicant's meter was taken to the Respondent's workshop for examination, and it was found that the total unbilled energy amounted to 236,405 units valued at Ug shs 133,078,358 (Uganda Shillings One Hundred Thirty Three Million, Seventy Eight Thousand, Three Hundred Fifty Eight).

Notwithstanding that Counsel for the Applicant cited a number of authorities regulating the Respondent and its procedures. He relied on the Electricity (Primary Grid Code) Regulations SI 24 of 2003, the Electricity (Quality of Service Code) Regulations SI No. 21 of 2003 and the Electricity (Safety Code) Regulations SI No. 22 of 2003. However, it should be noted that this is an interlocutory matter and I desist from relying on the same since to do so would prejudice the main suit.

Therefore, the Applicant has proved that it has a prima facie case with probability of success. The Applicant operates the business of hotel which relies heavily on the supply of electricity by the Respondent. The Respondent disconnected the Applicant's power supply on the 7th October, 2013 on grounds of fraudulently tampering with its meter. However, the Respondent disputed liability. Therefore, from the above, it can be concluded that the

Applicant has proved that there are triable issues which merit judicial determination.

Irreparable damage

On the ground the Counsel for the Applicant submitted that the Applicant deals in the hotel business and use of electricity is indispensable with its business, therefore, if the Application is not granted, the Applicant will suffer irreparable damage. According to paragraphs 10 of its Affidavit in Reply, it was deposed that the Applicant deals in hotel business and that it would suffer substantial loss which cannot be atoned for by damages if the application fails. The particulars of damage include irreparable loss to its reputation in the hotel business; substantial loss of clientele and business; incurred costs of preserving and preparing food stuffs and all other activities incidental to running a hotel. Counsel cited the case of ***Sendagire Stephen & another vs. Kirumira Godfrey Kalule HCMA NO.331 of 2012***, where it was held that no amount could adequately atone for the loss of the Applicants in replacing the suit property together with the goodwill of the school.

However, Respondent's Counsel submitted on that there were no such special circumstances that required the Respondent Company as a utility provider, to be compelled to provide its services to any of its customers found to be illegally utilizing electricity in a bid to defraud the Defendant and or fails to comply with its Contractual obligations to pay for electricity services consumed by it. In response, the Respondent in its Affidavit paragraph 10 it dismissed the ground on the basis that the Applicant has alternative sources of electricity supply.

Further, that the Applicant did not stand to suffer any damages that could not be atoned for by way of damages. The Applicant would suffer no substantial loss if the application was dismissed by the Honorable Court. And

besides, the Respondent is aware that the Applicant has alternative sources of electricity supply.

According to precedent, irreparable damage is not necessarily monetary value. In ***Kiyimba Kaggwa V. Haji Abdu Nasser Katende (supra)***, the Court observed that irreparable injury does not mean that there must not be physical possibility of repairing an injury. Rather, what it means is that the injury must be a substantial or material one that cannot be adequately compensated for in damages.

From the above submissions it is quite clear that the Applicant heavily relies on the power supplied by the Respondent. And it is clear that the Applicant has been paying off its current bills as they do fall due to the exclusion of the contested amount in the disputed bill which arose out of the alleged meter by pass. However, although, the Applicant stated and submitted that it will suffer irreparable damage with the disconnection, it did not however, guide Court this will affect its clientele, incurred costs of preserving and preparing food stuffs and all other activities incidental to running a hotel which I believe, the hotel previously was facing. It is trite law that the burden of proof in proof of any fact lies on the party who would lose if no other evidence is provided in that respect. Section 101 Evidence Act. Therefore, this ground fails.

Therefore, I will proceed to determine the issue on the balance of convenience. The law is that where Court is in doubt whether to grant an Order for a temporary injunction, the Court will decide the application on the balance of convenience. See ***Kiyimba Kaggwa V. Haji Abdu Nasser Katende (supra)***; ***Robert Kavuma V. Hotel International SCCA No. 8 of 1990***

On this issue while relying on grounds 6 & 7 of the Affidavit, Counsel for the Applicant maintained that the balance of convenience favored the Applicant as a law abiding consumer and that it was just and equitable that the application be granted.

In response, Respondent's Counsel stated that the balance of convenience rested heavily on the Defendant since it's a utility provider tasked with the mandate of ensuring that it collects revenue to keep the distribution of electricity to all Ugandans.

I agree with the Counsel for the Respondent's submission that the Respondent is a utility provider which collects revenue from which its clients. It therefore suffices that the Applicant has a mandate to pay off the bills. The Application as earlier submitted arises out of the dispute unmetered bill. Otherwise it is not in contention that the Applicant has not paid its current bill. The Applicant adduced the following adduced the following in evidence adduced by Silver Springs Ltd, the Applicant, on Account No. 200877459:

Date	Annexure	Receipt No.	Amount
17/01/2014	D1	40408637 - 35924683	20,000,000
17/01/2014	D2	40408678 - 60770393	3,505,870
14/12/2013	D3	39731600 - 18984032	640,602
14/12/2013	D4	39731569 - 05125766	20,000,000
27/11/2013	D5	39431916 - 46727139	7,864,101

Therefore, it is evident the balance of convenience is on the Applicant since even If the Applicant were to lose the main Application, it would still be required to meet its unpaid bill which would otherwise not be the case if this Application is dismissed and the Respondent is allowed to disconnect the power supply. The Applicant will be more inconvenienced.

Preliminary Objection

I already noted at the introduction of this Ruling that Counsel for the Respondent in his Written Submissions raised several objections relating to the propriety of the Application. Therefore, I now proceed to make a determination on each of them.

Counsel contended that the Application is materially defective, incompetent and should be struck out on the basis that it was brought under Section 98 Civil Procedure Act which is a wrong provision in relation to the issue and it was also commenced by a wrong procedure. He relied on the case of ***Kibuuka Musoke V. Toru & Travel Centre Limited HCT MA 603 of 2008*** before Justice Lameck Mukasa where he cited the case of ***Salume Namukasa V Yosefu Bulya (1966) EA 433*** where it was held that while considering the invocation of the Court's inherent powers under the equivalent of Section 98 of the Civil Procedure Act, sir Udo Udoma CJ observed that before the provisions of the Section can be invoked the matter or the proceedings concerned must have been brought to the Court the proper way in terms of the procedure prescribed by the rules. That is the manner prescribed by law." Counsel further submitted that whereas bringing an Application under the wrong law may be cured by the provisions of Article 126 (2) (e) of the Constitution, the procedure had to be as prescribed by law. It was Counsel's contention that the Application should have been brought under the right law and the prescribed procedure is by chamber summons *Per Order 41 Rule 9 Civil Procedure Rules.*

In rejoinder by Counsel for the Applicant submitted that the Notice of Motion was drawn and filed by previous Counsel. Relying on the case of ***Francis W. Bwengye V. Haki W Bonera HCCA No. 0033 of 2009*** before Hon. Justice Yorokamu Bamwine referring to the Court of Appeal case of ***Tarlol Singh Saggu V. Roadmaster Cycles (U) Ltd CACA No. 46 / 2000*** in which Court

cited with approval the East African Court of Appeal in **Nanjibhai Probohusda & Co. Ltd V. Standard Bank Ltd [1968] EA 670** where it was held that the Court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature. In conclusion Counsel conceded that the Application cited the wrong law and wrong procedure. He prayed that the mistake be rectified by inserting the right law. Further, he asked Court to exercise its discretion to determine the Application on its merits and grant it in favour of the Applicant.

It is true that the Applicant is for seeking Orders that the electricity supply at the Applicant's hotel premises on Plot 76A/ 76D, Port bell road, Bugolobi, Kampala on meter No. U32627; Account Number 200877459 be restored/reconnected immediately; and a temporary injunction does issue restraining the Respondent from further any disconnection of the Applicant's power supply until final disposal of the main suit. According to the Record and facts, the main cause, Civil Suit No. 291 of 2013, is for declarations that the Respondent is in breach of its contractual duty to supply electricity to the Applicant's premises among others.

As such, the proper law under which to maintain the action is Order 41 Rule 2 (1) CPR which provides '*In any suit for restraining the Defendant from committing a breach of the contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the Court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of or any injury of a like kind arising out of the same contract or relating to the same property or right.*'

And the proper procedure would be by summons in chambers per Order 41 Rule 9 CPR. However, on the authorities of **Tarlool Singh Saggu V.**

Roadmaster Cycles (U) Ltd CACA No. 46 / 2000 where it was held that the Court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. It is true that the Applicant here cited the wrong law and failed to bring the Application by chamber summons, however, no injustice has been shown to have been occasioned to the parties. Therefore, the delusionary conduct by the Applicant is not of a fundamental nature to warrant this Court dismissing the Appeal. Besides, the counsel who drafted the Application is different. There is a Notice of change of Advocates on the file. Therefore this should not be visited on the innocent Applicant.

The other point of contention raised by Counsel for the Respondent is that the application amounts to a claim for a mandatory injunction which has an effect of curtailing the rights of the Respondent from performing its contractual duty and recovering from its customers monies which are due to it. That injunction is granted to restrain the performance of an act rather than compel performance of an act. Further, Counsel cited Section 79 (3) of the Electricity Act, Cap 145 where any claims are directed to be made to the Electricity Regulatory Authority. That the claims as set out in the plaint are claims which the Authority exercises jurisdiction in the first instance and that for this Court to proceed and make a determination on the issue would be to usurp powers of the Authority since High Court exists as an Appellant forum. In the alternative, Counsel prayed that conditional Order be issued pursuant to which the Applicant deposits at least 50% of the disputed bill in Court; that the Applicant undertake to pay all subsequent bills for the power consumed presently and in future until the determination of the matter in dispute; and also pays the cost of the Application.

In rejoinder, Counsel for the Applicant that it was immaterial whether the injunction sought is prohibitory or mandatory in nature. He relied on **Philip**

H. Petit 'Equity and the law of Trusts' 4th Edition Butterworths at p. 400 at page 401 where the author stated that there is no distinction between granting a prohibitory or mandatory injunction: every injunction requires to be granted with care and caution but it is not more needed in one case than the other. The Court will not hesitate to grant a mandatory injunction in an appropriate case but whenever it does so it must be careful to see that the Defendant knows exactly what he has to do, and this means not as a matter of law but as a matter of fact.

The other objection raised by Counsel in Rejoinder is that the Respondent failed to, file their submissions on time and that no formal or informal Application was made in respect to seek leave of Court to allow them file out of time.

Resolution of the Preliminary Objection

I will first resolve the issue of filing out of time. It is indeed true that the Respondent filed his Written Submissions outside the stipulated period. However I allowed him to file them because the justices of the case require that both parties be heard. For the Respondent Counsel appeared before me on the 7th February, 2014 and stated that they were served by a day later however, they were unable to meet the time within which to file their Submission because Counsel involved in the personal conduct of the matter was indisposed. But she took it upon herself to get in touch with the Applicants which I believe she did since the counsel for the Applicant was able to file Written Submissions in rejoinder. Therefore, no injustice was caused to any of the parties. Therefore this objection fails.

Further the other objection was in respect of the fact that the Applicant is seeking to have the Respondent offer his services in perpetuity until the determination of the suit.

I have already noted in the resolution of the issue of the balance of convenience that the Applicant has been paid for its current consumed bills as and when they fall due with the exception of the disputed unmetered bill which will be resolved upon in the main suit. From the above it is clear that the Applicant has been making payment for the current consumed bill. Therefore, the Applicant is not consumed electricity on credit as stated by the Applicant rather, the Application is intended to restrain the Respondent from further disconnecting the Applicant's power supply until the final determination of the issues in the main suit . Therefore, the application will only operate to deter the Respondent in respect of those acts but not the Applicant from carrying out its obligations to pay the current bill as and when it falls due.

The Application is for Orders that the electricity supply at the Applicant's hotel premises on Plot 76A/ 76D, Port bell road, Bugolobi, Kampala on meter No. U32627; Account Number 200877459 be restored/ reconnected immediately; and a temporary injunction does issue restraining the Respondent from further disconnecting power supply to the Applicant / Plaintiff's premises until the final disposal of the main suit. According to the Amended Plaint in Civil Suit No. 291 of 2013 filed on the 13th November, 2013 the Plaintiff's claim among others is for a declaration that the disconnection of electricity supply to the Plaintiff's hotel premises was unlawful, a declaration that the Defendant's bill for alleged energy losses is unlawful, null and void.

The purpose of a temporary injunction just as an application of this nature is to maintain the status quo until the final determination of the main suit. The claim in this suit is premised on the disputed amount from the unmetered bill. Therefore basing on the fact that the Applicant is making payments in respect of the current bill, there is no reason why I cannot proceed and allow this Application.

I HEREBY ORDER that:-

- 1.** A temporary injunction issues restraining the Respondent from any further disconnection of the Applicant's power supply on Plot 76A/76D Portbell road, Bugolobi, Kampala until final disposal of the main suit
- 2.** The Applicant shall constantly pay its current meter bills as and when they fall due
- 3.** The Costs of this Application shall be in the main cause.

Signed:.....

Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

17th February 2014