



Cerapack Products Limited v Kenya Power & Lighting Co. Ltd (Civil Case 137 of 2018) [2023] KEHC 21730 (KLR) (Civ) (24 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 137 OF 2018**

**AN ONGERI, J
AUGUST 24, 2023**

BETWEEN

CERAPACK PRODUCTS LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING CO. LTD DEFENDANT

JUDGMENT

1. The plaintiff's claim against the defendant is for special damages in the sum of kshs 11,826,319.20 in respect of damages suffered by the plaintiff when the plaintiff's business premises were burnt down due to an electric fault.
2. The plaintiff in its plaint filed in court dated 8/2/2014 alleged that on 23/2/2012 the plaintiff's premises at Industrial Area along Enterprise Road were burnt down due to an electric fault by reasons of the defendant's negligence.
3. The plaintiff suffered the following damages in respect of stock and premises;
 - i. Cost and labour of repairing the Building ksh 550,000.00
 - ii. Cost of replacing the burnt generator set ksh 4,800,000.00
 - iii. Cost of replacing the burnt rewinding Machine ksh 800,000.00
 - iv. Value of burnt packaging materials ksh 600,000.00
 - v. Value of burnt adhesive & masking tapes ksh 4,000,000.00
 - vi. Loss adjusters fees for services rendered ksh 1,076,319.29Total ksh 11,826,319.20



4. The defendant denied the plaintiff's claim in their defence filed in court on 4/7/2014 dated 3/7/2014.
5. The plaintiff called three witnesses. PW 1 Bernard Maina adopted his written statement dated 3/5/2014 in which he stated that he is the Managing Director of the Plaintiff.
6. It was his evidence that the Defendant supplied electric power to the Plaintiff on Account number 30XXXX02 connected through underground cables.
7. On February 23rd, 2012, the Plaintiff's premises caught fire and burnt down destroying its stock. A report by contracted loss adjustors indicated the value of damage as Kshs 10,750,000 which report cost the Plaintiff a further Kshs 1,076,319.20.
8. Nairobi Fire Brigade investigated the fire and prepared a report indicating the cause of fire as "suspected fault in KPLC main cables.
9. Before the incident on 23/2/2012, the Plaintiff had experienced explosions or arcing from the joint where the KPLC armored cables were connected on November 1, 2011, November 22, 2011 and February 8, 2012 which were reported to the Defendant who had in turn sent its technicians to fix but they did not take sufficient action.
10. After the fire, the Defendant sent its personnel to install new underground armored cables up to the powerhouse and the trench was covered and cemented.
11. The Plaintiff did not operate for a period of one month from the date of the fire incident.
12. In his oral evidence in court PW 1 said the fire was caused by an electric fault. He said after the fire it took the company one month to resume operations.
13. PW 1 said the loss was assessed at kshs.12 million. He said he made a report to the police and obtained a report from Synergy Risk Solution who is a loss adjuster. PW 1 also produced stock records to show the stock that was lost.
14. PW 2 Kimani Ndungu, an electrical engineer who is a risk surveyor with Jubilee Insurance Company produced a report contained on page 90 – 99 of the plaintiff's bundle.
15. PW 2 said he received instructions one year after the accident to assess the loss. He said although the scene had been tampered with, the signs of the fire were still evident.
16. PW 2 inspected the generator on site and an underground Kenya power cable installation and he saw a fault in KPLC cable which had been replaced with points of the KPLC cable near the generator set removed.
17. PW 2 said the fire was caused by loose connection of the KPLC cable joint. He said the joining exercise was not done professionally. He said the joint was less than one meter from the generator and that the generator had fuel. The building was about 3 metres from the generator and the fire spread to the building due to the fuel from the generator.
18. PW 3, Robert Ochieng who is also an insurance loss adjustor and risk surveyor also produced the report from page 24- 88 of the plaintiff's bundle.
19. PW 3 said he did the assessment one week after the incident.
20. PW 4 Joseph Oginga who works with Nairobi fire station said he was called by control room to go attend to the fire at 7.20pm. He said he proceeded to the scene and managed to put off the fire after one hour. PW 4 prepared the reports at page 57 and 52 of the plaintiff's bundle.



21. PW 5 Julius Nyerere Mwilu also adopted his witness statement dated 8/5/2014 in which he stated that he was informed by his colleagues, on the evening of February 23, 2012 that a fire had broken out in the Plaintiff's premise. Prior to that, there had been a loud explosion from the generator area, lights in the premises were flickering. The matter was reported to the fire brigade, Industrial area.
22. On reaching the premises, he saw fire on the upper left hand side of the building. It was extinguished at about 10.30 p.m. after which the Defendant's personnel arrived and surveyed the area.
23. The following day, the Defendant's technicians started repairs on the incoming powerline and completed work on February 28, 2012.
24. It was his evidence that the fire damaged the Generators set, Products comprising of masking tapes, Packaging material eg cartons and paper cores, building wall and roof, internal electric cabling and fluorescence tubes, rewinding machine, and wall clock.
25. He recalled three previous fire incidences in the factory whose source had been the pit area near the generator set where the Defendant's cables were connected to the Plaintiff's premises. The Plaintiff's staff had contained the fire with fire extinguishers and the Defendant's technicians would repair the wires at the pit.
26. PW 6 Onesmus Munyao who was a machine operator at the plaintiff company said there was a pit which was three meters from the building.
27. The defendant called two witnesses DW 1 Ronald Lukalo and DW 2 Kelly Kirugu Machoki
28. DW 1 adopted his witnesses statement dated 18/7/2019 as his evidence in chief. He stated in the said witness statement that he investigated the fire that broke out on 23/2/2012. Power was supplied via a service line laid underground.
29. The Plaintiff's damaged building was approximately 5 metres away from the generator and the pit, so it was not physically connected to the generator set. He explained that even if fire originated at the pit as alleged by the Plaintiff, there was nothing to conduct it to the generator set and thus the fire cannot be attributed to the Defendant. If fire originated from the generator set, it did not belong to the Defendant who was not involved in laying it in place.
30. It was also his evidence that he had not seen any complaint report in respect of the alleged earlier fire incidences at the Plaintiff's premises.
31. DW 1 works with KPLC as a technician. He said he visited the scene and prepared a report which he produced as an exhibit.
32. DW 2 also filed the report on page 106 of the defendant's bundle. DW 2 is a loss adjustor with General Adjustors Kenya Limited. He said he used figures supplied by the plaintiff to make his report.
33. I have considered the evidence on record. I find that it is the duty of the plaintiff to prove that the damage suffered was occasioned by the negligence of the defendant.
34. I find that there is no dispute that there was a fire at the plaintiff's premises on 23/2/2012 which caused damage.
35. The issues for determination are as follows;
 - i. Whether the defendant was liable in negligence for the damage.
 - ii. Whether the plaintiff's generator contributed to the fire.



- iii. What damage was suffered by the plaintiff?
- iv. Who pays the costs of this suit?
36. On the issue as to whether the defendant was liable in negligence for the damage, the plaintiff said the fire emanated from a pit where there were underground cables.
37. The plaintiff's witnesses said they heard an explosion and saw the fire which burnt part of the plaintiff's premises.
38. The plaintiff maintained that the fire was as a result of an electric fault.
39. The defendant's witnesses opposed this evidence and said the fire emanated from a generator belonging to the plaintiff.
40. DW 1 said the damaged building was approximately 3 metres away from the generator belonging to the plaintiff.
41. He said power was supplied to the building through a service line laid underground.
42. He said the service line was underground and the pit with the alleged power joint was a distance from the generator.
43. He said even if the fire originated from the pit as alleged, there was nothing to conduct the same from the pit to the generator that was a great distance from the pit.
44. DW1 said the subject damage cannot be attributed to the negligence of the defendant company.
45. DW2 said that the most probable cause of the fire was the generator and the defendant cannot be held liable.
46. Further DW1 said that for the fire spread from the pit to the building, there had to be a physical contact between the two.
47. DW1 said he did not have reports on the previous fire break outs that occurred on 1/11/2011 and 20/11/2011.
48. DW2 prepared a final quantum reports dated 23/7/2012. He assessed the quantum adjustment at 6,830,506.
49. He said the generator was connected to the plaintiff's building while the pit was a distance from the plaintiff's building.
50. I find that there is no dispute that there was a fire break out on 23/2/2012.
51. I also find that there is undisputed evidence that the premises were supplied with power from underground cables.
52. What is in dispute is that fire was due to an electric fault attributed to the negligence of the defendant.
53. The possibility that the generator would have caused the fire cannot be ruled out.
54. On the issue as to whether the plaintiff's generator contributed to the fire therefore, I find that it is possible that the fire would have been due to an electric fault but the generator contributed to the fire.
55. In the circumstances I apportion liability at 50:50% as between the plaintiff and the defendant.



56. On the issue as to what damage was suffered by the plaintiff, I find that the plaintiff pleaded and proved special damages as follows;

- i. Cost and labour of repairing the Building ksh 550,000.00
- ii. Cost of replacing the burnt generator set ksh 4,800,000.00
- iii. Cost of replacing the burnt rewinding Machine ksh 800,000.00
- iv. Value of burnt packaging materials ksh 600,000.00
- v. Value of burnt adhesive & masking tapes ksh 4,000,000.00
- vi. Loss adjusters fees for services rendered ksh 1,076,319.29

Total ksh 11,826,319.20

57. The defendants gave a report assessing damages at 6,830,506. I find that it is not clear how the defendant arrived at that figure.

58. I award special damages of ksh 11,823,319 subject to 50% liability =5,913,159.50.

59. On the issue of who pays the costs of the suit, I find the court has the discretion to award costs and in the current case I find that the defendant is liable to pay the costs of the suit.

60. Section 27 of the *Civil Procedure Act* provides as follows;

“27 Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

61. In- the case of *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 the court held as follows;

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

62. The plaintiff is accordingly awarded costs for the trouble it took to prosecute the claim.

63. Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of ksh 5,913,159.50 plus costs and interest from the date of filing suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF AUGUST, 2023.

.....



A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

