



**Ganjoni Towers Limited v Kenya Power & Lighting Company Limited (Civil Suit 35 of 2018) [2023] KEHC 21706 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21706 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 35 OF 2018  
OA SEWE, J  
AUGUST 4, 2023**

**BETWEEN**

**GANJONI TOWERS LIMITED ..... PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

- 1 The plaintiff, Ganjoni Towers Limited, a limited liability company incorporated in Kenya, filed this suit on 22<sup>nd</sup> May 2018 against the Kenya Power & Lighting Company Limited vide its Plaint of even date. The plaintiff's cause of action was that it was in the process of developing a 16-storey building on the property known as MOMBASA/BLOCK XXI/295 (hereinafter, "the suit property") when, on the 3<sup>rd</sup> April 2017 at around 12.30 pm, fire broke out at the suit property, thereby halting the development.
- 2 The plaintiff pleaded, at paragraph 6 of its Plaint that the fire razed the basement of the building and then spread to the neighbouring plots, namely, Plots No. 295/XX Plot No. 294/XX/MI, Plot No. 56/XXI/MI and Plot No. 423/XX/MI. The plaintiff averred that it took the concerted efforts of the Mombasa County Government Fire Brigade, the Kenya Ports Authority Fire Brigade and its agents to contain the fire at around 5.00 p.m. It blamed the defendant for the delay in containing the inferno and the resultant damage caused.
- 3 The plaintiff further stated that, after the County Government of Mombasa halted the construction and development of the suit property vide its letter dated 4<sup>th</sup> March 2017, it appointed the firm of Yakub & Associates, Utmost Engineering Consultants and Gichuhi & Associates, who are engineers and quantity surveyors, respectively, to assess the damage to the suit property and prepare comprehensive reports thereon. It averred that the report prepared by Yakub & Associates revealed that an electric fault attributed to an overload and an unstable current was the cause of the fire; and that the report by Mombasa County Government Fire and Ambulance Services similarly pointed to a faulty electric regulator device on the main intake switch as the cause of the fire.



- 4 On account of the foregoing, the plaintiff filed this suit against the defendant for compensation and alleged the following Particulars of Negligence at paragraph 14 of the Plaint:
- (a) Failing to maintain and service the electric regulator device on the main intake switch;
  - (b) Failing to put precautionary measures in place to control and regulate overload and unstable currents;
  - (c) Failing to dispatch an emergency response team to disconnect power supply despite notice of the fire;
  - (d) Failing to take precautions to ensure the safety of adjacent buildings;
  - (e) Failing to replace and maintain power cables;
  - (f) Failing to replace and maintain a proper fuse.
- 5 By way of special damages, the plaintiff put in a claim for Kshs. 44,544,986/= computed as follows:
- (a) Destruction on Plot No. 295/XX/MI - Kshs. 40,679,286/=
  - (b) Destruction on Plot No. 294/XX/MI - Kshs. 2,662,200/=
  - (c) Destruction on Plot No. 56/XXI/MI - Kshs. 34,800/=
  - (d) Destruction on Plot No. 423/XX/MI - Kshs. 1,168,700/=
- 6 Thus, the plaintiff prayed for the following reliefs against the defendant:
- (a) general damages for negligence;
  - (b) special damages of Kshs. 40,679,286/=;
  - (c) A declaration that the plaintiff was not responsible for the fire on Mombasa/Block XXI/295;
  - (d) An order directing the plaintiff to indemnify the proprietors of Plot No. 294/XX/MI, Plot No. 56/XXI/MI and Plot No. 423/XX/MI in the sum of Kshs. 3,865,700/=;
  - (e) Interest on b above till payment in full;
  - (f) The costs of the suit and interest thereon.
- 7 The claim was resisted by the defendant vide its Statement of Defence dated 7<sup>th</sup> August 2018. The Defence was thereafter amended on 14<sup>th</sup> August 2018. The defendant denied the plaintiff's allegations, particularly the allegations set out in paragraphs 3 to 19 of the Plaint. In the alternative, the defendant averred that if the subject building was indeed connected to electric power, which it denied, then it was connected to a single temporary single phase supply for purposes of construction to one Ramesh Chandra D. Shah vide Contract/Account No. 0404828-01 and not the plaintiff herein. Hence, the defendant's assertion was that it is a total stranger to the plaintiff and never supplied electric power to the plaintiff in regard to Plot No. MOMBASA/BLICK XXI/295 as alleged or at all.
- 8 Further to the foregoing, the defendant asserted that if any fire occurred on Plot No. MOMBASA BLOCK XXI/295 as alleged, then it begun after the meter box and within the customer's jurisdiction and was caused by the reckless, dangerous, willful and intentional acts and omissions on the part of the customer and/or the plaintiff. In this regard, a set of Particulars of Negligence were supplied by the defendant at paragraph 7 of the Amended Defence. The defendant added that the responsibility of extinguishing the fire within Mombasa County lies upon the Mombasa County Fire Brigade and



that if the construction was halted, it was halted by the County Government of Mombasa in its sole discretion and judgment for which the defendant is not to blame.

- 9 The defendant further asserted that, if any fire occurred on the suit property as alleged, then the fire was localized to the suit property; and therefore it denied that the fire escaped and affected the neighbouring plots. In the alternative, the defendant averred that, if the fire spread as alleged then it was because the plaintiff had knowingly stored flammable materials in the premises. The defendant further asserted that the plaintiff has no legal capacity to file this suit for and on behalf of its neighbours or claim general or special damages on their behalf as alleged in paragraphs 15(b), c and d and 18 of the Plaint. Accordingly, the defendant prayed that the plaintiff's suit be dismissed with costs.
- 10 In support of the plaintiff's case, six witnesses testified herein; the first of them being Sammy Kamuio Makuri (PW1). He testified that he is one of the directors of the plaintiff company. He adopted his witness statement dated 22<sup>nd</sup> March 2018 in which he stated that the plaintiff purchased the suit property sometime in April 2014; and that on it stood a house with a single-phase power connection registered in the name of the previous owner. He produced a copy of the Sale Agreement, Certificate of Lease and a power meter statement as exhibits herein.
- 11 PW1 further told the Court that, pursuant to the objects of the plaintiff company, it engaged the services of a contractor and lawfully commenced the construction of a 16-storey residential apartment building on the suit property. He testified that the construction continued unhindered up until the 3<sup>rd</sup> April 2017 when fire broke out at the basement of the building at about 12.30 p.m.; and that, when he went to the scene he found the Mombasa County Government Fire Brigade Services, the Kenya Ports Authority Fire Brigade Services and his agents working together to contain the fire. PW1 pointed out that, owing to the complexity of the fire rescue operation, the defendant was called in with a request to disconnect the power supply, but failed to respond to the appeal; such that, by 5.00 p.m. when the fire was contained, it had razed construction materials, caused loss and damage to the building and spread to two adjacent plots.
- 12 It was also the testimony of PW1 that, upon receiving a letter dated 4<sup>th</sup> April 2017 from the County Government of Mombasa stopping further construction of the residential apartments following the fire incident, the plaintiff retained the services of registered engineers and quantity surveyors, Yakub & Associates, Utmost Consultants and Gichuhi and Associates to furnish it with comprehensive reports pertaining to the fire incident. He consequently ascertained, from the report prepared by Yakub & Associates, that the cause of the fire was an overload on the power cable. He added that the report from the Mombasa County Fire Brigade also attributed the fire to the failure of an electric regulator device on the main intake switch. The reports formed part of the plaintiff's List and Bundle of Documents (at pages 32, 49 and 66) and were duly produced herein as exhibits.
- 13 PW1 also mentioned that, on 26<sup>th</sup> September 2017, he received a letter from CIC General Insurance Limited (hereinafter, "CIC") exonerating the plaintiff's developer from the loss cause by the fire. He added that the owners of the adjoining plots had also evinced their intention to sue the plaintiff for their losses as shown by the demand letter issued on their behalf by the firm of M/s Ndegwa, Katisya & Sionik Advocates dated 16<sup>th</sup> May 2017. He produced the letter along with the plaintiff's other documents, save for the reports, as a bundle, and they were marked as the Plaintiff's Exhibit 1.
- 14 The plaintiff then called Elvis Otieno Onyango (PW2), an electrical designer and site supervisor for Yakub & Associates. He similarly adopted his witness statement dated 29<sup>th</sup> September 2021 as part of his evidence. He confirmed that they were engaged by the plaintiff as the consulting electrical and mechanical engineers; and that he was the site supervisor for the Ganjoni Towers Ltd construction project. In that capacity Yakub & Associates was asked to prepare a report following the fire incident



- that occurred on site on 3<sup>rd</sup> April 2017. He further stated that he visited the site on 7<sup>th</sup> April 2017 and carried out an inspection of the building. He thereafter prepared a report dated 12<sup>th</sup> April 2017.
- 15 According to PW2, the fire was more concentrated at the basement and the ground floor. He also observed that the property had two power supply connections with separate meters; one a three-phase line of 25mm<sup>2</sup> x 4 core cables and the other a single phase 16mm<sup>2</sup> armoured cable which was connected to intake panel meter-board. He further noted that the single phase cable incoming into the building, KPLC's cut out and the consumer unit main switch were all affected by the fire. He further stated that a closer observation revealed a power overload which burnt one of the fuses, thereby destroying the earth connection. Thus, he came to the conclusion that the cause of the fire was an electrical fault due to overload and unstable current passing through the 16mm<sup>2</sup> cable. He produced his report as the Plaintiff's Exhibit 2.
- 16 Eng. Joseph Wainaina Muraya (PW3) was the plaintiff's third witness. He adopted his witness statement filed on 29<sup>th</sup> September 2021. He testified that after the fire incident his firm, Utmost Engineering Consultants Limited, was commissioned by the plaintiff to prepare an integrity report on the structure and recommend its rehabilitation. He proceeded accordingly and inspected the structure and carried out appropriate in situ integrity tests to determine the strength of the concrete after the fire. He thereafter prepared a report dated 20<sup>th</sup> April 2017, which he produced herein as the Plaintiff's Exhibit 9. He pointed out that, in his report he recommended measures to be taken to bring the structure to the required standards; and that his report was used by the quantity surveyors to ascertain the cost of the damage. PW3 also confirmed that the measures proposed by Utmost Engineering Consultants Ltd were all done by the plaintiff.
- 17 The plaintiff also called Francis Gichuhi Mwaniki (PW4), a Quantity Surveyor practicing as Gichuhi & Associates, as one of its witnesses. He adopted his witness statement filed on 2<sup>nd</sup> March 2022. His evidence was that upon receiving instructions from the plaintiff, he went to the site with his assistant and conducted his valuation of the damages caused by the fire incident of 3<sup>rd</sup> April 2017. In his assessment the damages were valued at Kshs. 40,679,286/=. He further testified that he carried out valuation of the damage caused to the neighbouring properties, namely Plot No. 294/XX/MI at Kshs. 2,662,200/=, Plot No. 56/XXI/MI at Kshs. 34,800/= and Plot No. 423/XX/MI at Kshs. 1,168,700/= and thereafter prepared separate reports for each property, which he produced as the Plaintiff's Exhibits 10A, 10B, 10C and 10D, respectively. PW4 confirmed that he relied on the report prepared by the structural engineer, Utmost Consulting Engineers, in coming up with his estimates.
- 18 Harrison Rai Kengo (PW5) was working at the material time as a Fire Officer for the County Government of Mombasa but had retired by the time his evidence was taken. He adopted his witness statement filed on 2<sup>nd</sup> March 2022, in which he stated that on the 3<sup>rd</sup> April 2017, they were alerted of a fire incident at Ganjoni area and promptly attended to the report with other officers. He explained that they could not use water to extinguish the fire because the fire was, in their observation, due to an electrical fault. He accordingly gave directions to their control room for the Kenya Power to be notified so as to have the power supply to the property disconnected; but that the Kenya Power did not respond immediately. His evidence was that they later managed to control the fire only after the Kenya Power team disconnected the power; and that it took them about 5 hours. He later prepared a report dated 7<sup>th</sup> April 2017 which he produced before the Court as the Plaintiff's Exhibit 11. In his estimation, the loss to the plaintiff was about Kshs. 40,679,286/=. He likewise prepared estimates for the loss incurred by the neighbouring property owners.
- 19 The last witness for the plaintiff was Mark Aliero Mugasia (PW6), a project manager with Gichuhi & Associates. He adopted his witness statement filed on 29<sup>th</sup> September 2021. His evidence was in



- corroboration of the testimony of PW4 that their firm was instructed to conduct a survey of the plaintiff's property and ascertain the extent of the damage by fire; including damage to the materials and equipment on site. He further confirmed that the instructions included an assessment of the damage to the neighbouring properties that were affected by the inferno.
- 20 On behalf of the defendant, evidence was led from Kigo Kariuki (DW1), a risk consultant and a fire engineer practicing as such in the company known as Safety Surveyors Ltd. His evidence was that he was given instructions on 28<sup>th</sup> April 2017 by CIC to conduct investigations into the fire incident that occurred at the plaintiff's property on 4<sup>th</sup> March 2017. He visited the scene and inspected the entire building from the basement to the 14<sup>th</sup> floor. He also visited the adjacent properties that were affected by the fire. From his observations he concluded that the fire started from the basement and spread to the first floor of the building.
- 21 DW1 explained each of the photographs he took at the scene to support his conclusions. He produced his report and the photographs as Defence Exhibits 1A and 1B, respectively. He explained that he identified the seat of fire to be at Compartment D of the basement on the basis of his observations. DW1 conceded that he did not establish the cause of the fire. He however refuted the plaintiff's assertion that the cause of the fire was an electrical fault at the meter board,
- 22 The defendant also called one of its employees, Ezra Chweya Oyunge (DW2), as its witness. DW2, an electrical engineer who was then based at the defendant's Mbaraki Depot, told the Court that he was on duty on 3<sup>rd</sup> April 2017 when a fire report was made on his personal cellphone number. He testified that he immediately called the Regional Control Centre at Rabai with instructions to switch off the main line for the affected area. He then dispatched an emergency team to the site from Mbaraki. He also visited the scene to confirm that the affected structure had been duly isolated. He thereafter prepared his report dated 10<sup>th</sup> April 2017 which he produced herein as Defence Exhibit No. 2. He concluded his evidence by stating that the cause of the fire was unknown.
- 23 Upon directions being given for the filing of written submissions, learned counsel for the plaintiff, Mr. Makau, filed his written submissions on 20<sup>th</sup> January 2023. He provided a summary of the evidence presented herein by the parties and urged the Court to find, on the basis thereof, that the plaintiff had proved its case on a balance of probabilities. He submitted that the plaintiff had demonstrated that it had the requisite *locus standi* to bring this suit against the defendant, having purchased the suit property three years before the fire incident occurred. He made reference to the plaintiff's Certificate of Incorporation, Certificate of Lease and the Agreement of Sale together with electricity statements for the period 6<sup>th</sup> June 2016 to 6<sup>th</sup> June 2017 (marked Exhibits 4 to 7 in the plaintiff's Bundle) to augment its evidence in this regard.
- 24 On the cause of the fire, Mr. Makau submitted that there was credible evidence to demonstrate that the fire was identified as a Class C type of fire, namely electric fire caused by a power surge; and that this was why the fire fighters could not commence their work before disconnection of fire and isolation of the property by the Kenya Power technicians. He submitted that, from the evidence presented, it was plain that the defendant had neglected the single phase line and thereby compromised its integrity. He urged the Court to rely on the evidence of PW2 and PW3 in this regard and find that the plaintiff had made out a good case for purposes of Section 52 of the *Energy Act*, No. 12 of 2006.
- 25 Counsel also relied on the cases of Kenya Power & Lighting Co. Ltd v Umaz Ali Swaleh, [2017] eKLR, Joseph Kiptanui v Kenya Power & Lighting Co. Ltd [2010] eKLR and Kakamega Civil Appeal No. 68 of 2002: Kenya Power & Lighting Co. Ltd v Joseph Khaemba Njuria for the submission that, as the sole provider of electricity, the defendant has the responsibility to ensure that the power infrastructure installed in the country is properly maintained to prevent accidents; and that in the event of an accident



it is under strict liability to compensate the victims without proof of negligence. He added that in this case the plaintiff has gone ahead and proved negligence, particularly in terms of lack of maintenance of the single phase cable connection to the suit property and in the delay in responding to the fire report yet the scene was “...a stone throw away from the locus in quo...”

- 26 On general and special damages, Mr. Makau submitted that the plaintiff suffered anguish and pain on account of the loss; and that there was general harassment by the potential purchasers and tenants who had deposited their money for the development, some to rent and others to buy their units. He added that the plaintiff was equally harassed by the neighbours who were demanding compensation for their loss. He relied on the letter dated 16<sup>th</sup> May 2017 (at page 115 of the plaintiff’s Bundle of Documents) by Ndegwa Katisya & Sitonik Advocates in this regard. Thus, counsel submitted that the special damage claim for Kshs. 40,679,286/= has been sufficiently proved by the plaintiff and its witnesses and was accepted to be reasonable by DW1. On the authority of Mitchell Cotts (K) Ltd v Musa Freighters, Criminal Appeal No. 104 of 2006, Mr. Makau urged the Court to find that the plaintiff has made out a good case for the issuance of the orders prayed for in the Plaint, notwithstanding that specific receipts to justify the liquidated component of the claim were not availed.
- 27 On his part, Mr. Mogaka for the defendant relied on his written submissions dated 9<sup>th</sup> March 2023. He proposed the following issues for determination:
- (a) What was the cause of the fire incident on 3<sup>rd</sup> April 2017 that burnt the premises on MOMBASA/BLOC XXI/295 and the neighbouring premises?
  - (b) What was the extent of the loss and damage suffered?
  - (c) Who is liable for the losses incurred?
  - (d) What is the order as to costs?
- 28 As to the cause of the fire, Mr. Mogaka submitted that the burden of proof was on the plaintiff to prove the allegations of negligence set out at paragraphs 11 and 14 of its Plaint. He relied on Kiema Muthuku v Kenya Cargo Handling Services Limited [1991] 2 KAR 258 for the proposition that the plaintiff was under obligation to prove some negligence on the part of the defendant. Counsel pointed out, at paragraphs 8 to 14 of his written submissions, what he termed as inconsistencies in the evidence of PW1, PW2, PW3 and PW5 as to the cause of the fire. He consequently urged the Court to disregard the plaintiff’s assertions and believe the defendant’s contention that its installations were intact and safe and that no complaint was ever raised by the plaintiff prior to the fire incident on 3<sup>rd</sup> April 2017.
- 29 Mr. Mogaka also pointed out that there is conflicting evidence as to the whereabouts of PW1 when the fire started. He made reference to paragraph 6 of PW1’s statement, in which he stated that he arrived at the scene and found the fire brigade and his agents trying to contain the fire, and yet in his testimony before the Court he alleged to have been in the building at the time. On this account, counsel urged the Court to find PW1 to be an unreliable witness. Counsel also took issue with the contradictions in the plaintiff’s case as to the time taken for the defendant’s team to respond to the fire incident report and as to the seat of the fire. Thus, counsel urged the Court to find that the defendant had nothing to do with the apparent inception of the fire and its subsequent spread; and hence is not liable to the plaintiff at all.
- 30 On the extent of the loss, Mr. Mogaka took issue with the fact that the written construction contract between the plaintiff and the contractor, Samumu Construction Co. Ltd, was never produced. He therefore submitted that there was no basis for the plaintiff to claim Kshs. 4,500,000/= for 3 months’ delay as the Court cannot act on speculation or conjecture. He further submitted that since the plaintiff was in a position to produce receipts and invoices in proof of the special damage component of its



claim, it should be plain that the plaintiff failed to prove its case on special damages to the standard required. He accordingly urged for the dismissal of the plaintiff's suit with costs to the defendant. In the same vein, counsel urged the Court to find that, since the plaintiff does not hold any authority by way of a Power of Attorney to institute a claim on behalf of the owners of the adjacent properties, the claim in that regard should be dismissed with costs.

- 31 In the light of the foregoing summary of the pleadings filed by the parties, the evidence adduced in support thereof as well as the written submissions filed by learned counsel, there is no dispute that the plaintiff is the registered proprietor of all that property known as MOMBASA/BLOCK XXI/295 including the residential apartment building that was in the process of being erected thereon as of 3<sup>rd</sup> April 2017. There is further no dispute that, on the 3<sup>rd</sup> April 2017 at about 12.30 p.m. fire broke out in the suit property that extensively destroyed the basement, ground floor and the 1<sup>st</sup> floor in addition to construction materials and equipment. Thus, the issues for consideration and determination in this suit are:
- (a) What was the cause of the fire and whether the defendant is to blame therefor?
  - (b) What was the extent of the loss and damage suffered, and the quantum of damages payable?
  - (c) What order ought to be made on costs of the suit?

**A. On the cause of the fire and liability:**

- 32 As to the cause of the fire the plaintiff's basic evidence was that of PW1 who testified that the fire broke out at the basement of the building at about 12.30 p.m. on 3<sup>rd</sup> April 2017. As was pointed out by counsel for the defence, there was a discrepancy between his statement and his viva voce testimony in court as to whether he was at the scene when the fire broke out. Hence, while in his witness statement dated 22<sup>nd</sup> May 2018, he stated that, when he went to the scene he found the Mombasa County Government Fire Brigade Services, the Kenya Ports Authority Fire Brigade Services and his agents working together to contain the fire; in his evidence before the Court he stated that he was at the scene when the fire started; and that it was preceded by a loud bang.
- 33 In my consideration, since there is no dispute that the fire incident took place, that variance is not significant, granted that the plaintiff relied on the investigations done by Yakub & Associates which revealed that the cause of the fire was a power surge in the single phase line; thereby affecting the basement, ground floor and first floor of the building. Thus, in the report prepared by PW2, he concluded that:

“From the photographs and the foregoing observations, the cause of the fire was an electrical fault due to overload and unstable current passing through the 16mm<sup>2</sup> cable. The integrity of this cable is questionable and appropriate tests should be carried out to confirm its quality for service. K.P.L.C supply mains via this cable should be terminated and new fuses for the meter board be installed.”

- 34 It is significant that the same conclusion was reached by the Mombasa County Government Fire and Ambulance Services. In this regard, evidence was adduced by PW5 who attributed the fire to an electric regulator device on the main intake switch. He pointed out that when they were alerted of the fire incident at Ganjoni area, they promptly responded but could not use water to extinguish the fire because the fire was due to an electrical fault. PW5 explained that he had worked as a firefighter for 25 years and therefore knew all the different types of fire and how to combat them. He mentioned that fire emanating from electrical faults is categorized as Class C, which is the kind that cannot be extinguished



by water. He also noted that the fire had green flames and its smell was different from the other kinds of fire. He therefore told the Court they had to wait for the defendant's employees to disconnect the fire before they could commence their work.

35 It is manifest therefore that, on its part, the plaintiff supplied uncontroverted evidence in support of its allegations of negligence at paragraph 14 of its Plaintiff, namely, that the defendant:

- (a) Failed to maintain and service the electric regulator device on the main intake switch;
- (b) Failed to put precautionary measures in place to control and regulate overload and unstable currents;
- (c) Failed to promptly dispatch an emergency response team to disconnect power supply despite notice of the fire;
- (d) Failed to take precautions to ensure the safety of adjacent buildings;
- (e) Failed to replace and maintain power cables;
- (f) Failed to replace and maintain a proper fuse.

36 On the other hand, the defendant was unable to place its finger on the cause of the fire. It relied majorly on the evidence of DW1 who conceded that, although he identified the seat of fire to be in the basement's lift shaft, he was unable to ascertain the exact cause of the fire. Hence, DW2 resorted to conjecture by suggesting that there were signs of illegal tapping of fire; and that some people were seen smoking in the basement and could have thrown lit cigarette butts on a pile of timber products. None of these allegations were backed by any tangible evidence.

37 Sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya are explicit as to the burden of proof. They provide as follows: -

107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

38 Accordingly, in *Eastern Produce (K) Limited V Christopher Atiado Osiro* [2006] eKLR, it was held: -

“...It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of *Kiema Mutuku v. Kenya Cargo Hauling Services Ltd.* (1991) 2KAR 258, where it was held that “there is as yet no liability



without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”...

39 Similarly, in *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* [2010] eKLR, Hon. Ibrahim, J. (as he was then) allowed an appeal and quoted with approval the following passage from Charles Worth & Percy *On Negligence*, 9<sup>th</sup> edition at P. 387, on the burden of proof:

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such facts, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

40 Hence, having considered the pleadings filed by the parties and the evidence adduced in support thereof, I am satisfied that the plaintiff proved its allegations on a balance of probabilities, such that the evidential burden shifted to the defendant to prove its allegations of negligence against the plaintiff. None of those allegations was proved herein. The defendant had alleged that the plaintiff:

- (a) knowingly and intentionally overloaded the temporary single phase power supply;
- (b) failed to ensure that the cables and the wiring within the premises were in good and safe condition;
- (c) knowingly engaged the services of inexperienced wiring electricians;
- (d) knowingly stored flammable materials within the premises;
- (e) knowingly failed and/or neglected to report the alleged fire to the defendant’s emergency unit as required;
- (f) knowingly and intentionally used high voltage machinery within the premises and overloaded the single phase power supply;
- (g) Failed to report the start of the alleged fire to the Mombasa County Fire Brigade within the shortest time possible;
- (h) Failed to mitigate the spread of the alleged fire;
- (i) intentionally, willingly and/or knowingly caused the alleged fire.

41 None of the foregoing allegations were proved by the defendant. In the same vein, although the defendant asserted that the suit property was connected to a temporary single-phase power supply for the purposes of construction to one Ramesh Chandrwa D. Shah vide contract/Account 0404828-01 and therefore that the plaintiff was a stranger to them, that assertion was likewise untenable. Untenable because the plaintiff explained that it bought the property from a previous owner and continued to post-pay the bills as they came. They thereafter applied for and were supplied with a three-phase connection, which was installed by the defendant; a fact that was admitted by the defendant. If there was anything untoward in respect of the single phase connection the defendant would have intervened and discontinued the supply.

42 In the result, I am satisfied that the plaintiff has proved on a balance of probabilities that the cause of the fire was an electrical fault caused by the transmission of high voltage power on the single-phase



power line. Having so found the next question to pose is whether the defendant is liable to the plaintiff in the circumstances.

43 In the case of *Cotecna Inspection S.A v Hems Group Trading Company Limited* [2007] eKLR, the Court of Appeal held (Per Hon. Onyango-Otieno, JA) that: -

“...My analysis and evaluation of the evidence, a summary of which is given above, must only be confined to the question as to whether or not that breach of duty was the cause of the losses the respondent suffered and if so, whether the assessment of damages was properly carried out by the trial court. But first, the law. What are the principles to be applied when considering the nexus between the acts of an offending party and the loss suffered by the offended party? I do agree with both leaned counsel that there must be a link between the action complained of and the loss incurred. That to me goes without saying and is a matter of common sense...”

44 The Defendant owns and operates the electricity transmission and distribution system in Kenya. It is therefore incumbent upon it to ensure that the said transmission and distribution system is maintained in good condition. Hence, in *Kenya Power & Lighting Co. Ltd v Joseph Khaemba Njoria* [2005] eKLR, held: -

“...There can be no question that the Power Company has a responsibility to ensure that the power infrastructure it has installed in the country for the purpose of electrification is not only properly maintained to prevent accidents but also that illegal connections, when they occur, are detected and removed. Where as here an illegal connection is made openly and is visible to the public generally or is notorious, it cannot be a defence for the Power Company to say that the connection was illegal. It has a duty to the public to ensure that the installation it has made is not abused by unauthorized persons or illegal connections made that endanger the lives of the public...”

45 Moreover, Section 52 of the Energy Act provides: -

This Act shall not relieve the Corporation of the liability to pay compensation or damages to any person for an injury to that person, that person's property or any of the persons' interests caused by the exercise of the powers conferred on the Board by this Act or by any other written law or by the failure, whether wholly or partially, of any works.

46 Having found that the defendant was responsible for the over-voltage transmission of power that caused the fire, it is irrefutable that a nexus between the action complained of and the plaintiff's loss has been established; and that the defendant is under a statutory obligation to compensate the Plaintiff.

### **B. On quantum of damages:**

47 Needless to say that special damages must not only be specifically pleaded but also proved. The Court of Appeal made this point thus in *Herbert Hahn v Amrik Singh* [1985] eKLR:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”



48 The plaintiff asked for special damages in the total sum of Kshs. 44,544,986/=, contending that it had to undertake repairs for the damage to the suit property as well as to three neighbouring properties. In respect of the plaintiff's property, it claimed for special damages for the sum of Kshs. 40,609,286/= . The claim was hinged on the estimates provided by the structural engineer (PW3) and quantity surveyor's report as per the evidence of (PW4) and (PW6); and in particular the Site Report by Gichuhi & Associates dated 20<sup>th</sup> April 2017 (at page 49 to 53 of the plaintiff's Bundle of Documents). Thus, the plaintiff produced no receipts or vouchers to prove actual expenditure incurred on repairs.

49 Although this approach was faulted by counsel for the defendant, it is instructive that the defendant's own witness, namely DW1, expressly conceded that he visited and inspected the building and carried out his own valuation. In his report dated 25<sup>th</sup> July 2017, it adjusted the loss to Kshs. 35,068,850/=; such that the only difference between DW1's estimation and the plaintiff's is the VAT component of Kshs. 5,610,936/=. It is therefore my considered finding that, other than VAT and the 3 months' delay period accounting for Kshs. 4,500,000/= of the special damages claimed by the plaintiff for the suit property, the rest of the items, even though presented as estimates, represent an accurate picture of the plaintiff's loss.

50 In arriving at my conclusion, I have taken into account that PW4 was an expert witness; and therefore that his report is an acceptable guide in this instance. Indeed, in *Stephen Kinini Wang'onde v The Ark Limited* [2016] eKLR, discussed expert witnesses as hereunder: -

“...Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called. While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account.

51 I have likewise taken into account the position taken by the Court of Appeal in *Kenya Power and Lighting Company Limited v Mohamed Dahir Molole* [2022] eKLR, that: -

21. Contrary to appellant's tacit contention that special damages must be strictly proved and strict proof mean proof by documents, I do find that in the absence of receipts or such other documents, for any valid reason, any other cogent evidence suffices in proof of special damages. Special damages may be proved by means other than the production of receipts and documents in that the court can still consider and rely on any other cogent evidence adduced whether oral or documentary to decide whether special damages though pleaded were proved. In *Garissa Maize Millers Ltd v Attorney General & 3 Others*, [2016] eKLR, the court stated that; -

“Proof of special damages does not necessarily need to be on documents, but there has to be cogent evidence to establish that the loss quantified in terms of money has been established, and that the loss was visited upon the plaintiff by the defendant.”



22. Similarly in *Mitchell Cotts (K) Ltd v Musa Freighters*(2011) eKLR, the court expressed itself thus:

“... In the light of the above and in the circumstances we cannot fault the superior court which accepted the only evidence which was tendered to the court on the issue, the appellant having failed to give any evidence on the value of the tyres it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance tilting in favour of the respondent on the critical issue of the value of the uncollected tyres. The court did its best and cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court.”

- [52] As indicated herein above, PW1 conceded that he did not avail the contract between the plaintiff and Samumu Construction Co. Ltd. Accordingly, there was no way of confirming that the plaintiff was liable to pay liquidated damages for 3 months' delay in the construction on account of the fire. In this regard, the plaintiff prayed for Kshs. 4,500,000/= . I am in agreement that that amount was not justified and is therefore not due as a special damage item. In the same vein, I am not convinced that VAT of Kshs. 5,610,936/= an expense which is yet to be incurred, is payable. In this regard, I am persuaded by the position taken by Hon. Onguto, J. in *Pyramid Motors Limited v Langata Gardens Limited* [2015] eKLR in which VAT in a party and party bill of costs was disallowed. The Judge took the view that:

“...Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein.”

- [53] I also find instructive the following passage from D.B. Casson and I.H. Dennis, *Odgers: Principals of Pleading and Practice in Civil Actions in the High Court of Justice* at pp. 170 to 171, which was quoted with approval by the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment):

“Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote.”

- [54] Thus, while I am satisfied that the plaintiff is entitled to the sum of Kshs. 30,568,350/= as special damages for the loss suffered as a result of the fire incident that occurred on 3<sup>rd</sup> April 2017, the sums



of Kshs. 4,500,000/= for three months' delay in construction as well as Kshs. 5,610,936/= for VAT are not payable. Having so found, and given the nature of the items charged in the Site Report prepared by PW4, my considered view is that, by way of general damages, the plaintiff is entitled to a nominal sum only, for which an amount of Kshs. 100,000/= would suffice.

[55] As indicated herein above, the plaintiff pitched a claim on behalf of the proprietors of the adjacent plots, namely:

- (a) Destruction on Plot No. 294/XX/MI - 2, 662, 200.00
- (b) Destruction on Plot No. 56/XXI/MI - 34,800.00
- (c) Destruction on Plot No. 423/XX/MI - 1,168,700.00

[56] The claim was premised on the fact that the plaintiff had received a demand letter from the owner of Plot No. 294/XX/MI for the sum of Kshs. 20,706,000/= and that the owners of the other plots had threatened to sue it for their loss. Thus, when they employed Utmost Engineering Consultants and Gichuhi and Associates Quantity Surveyors to assess the damage occasioned to the suit property, they asked that the adjacent properties be inspected as well. Both PW4 and PW6 testified that they were instructed to survey and quantify the damage occasioned by the fire on Ganjoni Towers, the materials as well as the surrounding buildings which were Simba Apartments, Fish Dealers and Tikara Guest Inn. The reports dated 26<sup>th</sup> April, 2017 for the properties Plot No. 294/XX/MI; Plot No. 56/XXI/MI and Plot No. 423/XX/MI were produced herein as well.

[57] However, the fact remains that the plaintiff is not the registered owner of those properties; and in the absence of authority to sue on behalf of the registered owners, as is the case, it follows that the suit in that regard is incompetent for lack of locus standi.

### **C. On costs of the suit:**

[58] The proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya is explicit that costs follow the event; the event herein being that the plaintiff is the successful litigant herein. Hence, the plaintiff is entitled to costs of the suit, and I so find.

[59] In the result, judgment is hereby entered for the plaintiff against the defendant as follows:

- (a) Kshs. 100,000/= being general damages for negligence;
- (b) special damages of Kshs. 30,568,350/=;
- (c) Interest on a] and b] above at court rates from the date hereof till payment in full;
- (d) The costs of the suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4<sup>TH</sup> DAY OF AUGUST 2023**

**OLGA SEWE**

**JUDGE**

