



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL DIVISION

CIVIL CASE NO. 220 OF 2012

LAWINA COMPANY LIMITEDPLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY..... DEFENDANT

JUDGMENT

1. This suit was instituted through a plaint dated 20th June 2012 and amended on 20th March 2014. The Plaintiff sought among others damages as a result of two incidents of fire that occurred on its piece of land. The Defendant filed its Defence on 18th July 2012. The Plaintiff thereafter filed its Reply to Defence dated 31st July 2012.

2. The case went to trial in 2017 when both the Plaintiff and the Defendant closed their respective cases. Thereafter the trial file could not be traced necessitating the Deputy Registrar to issue a certificate of loss. Subsequently parties consented to have the file reconstructed and the case to start de novo. The case restarted in January 2021 culminating in this judgment.

The Plaintiff's case

3. According to the amended plaint, and pursuant to a ruling dated 18th March 2014 issued by Mshila J, the Plaintiff stated that it is the registered owner of Land Reference Number 9543/3 situated in Lengenet location, Rongai Division, Nakuru County and the same measures approximately 235 acres. The Plaintiff's director exhibited a certificate of incorporation (P.Exhibit 1) demonstrating ownership of the suit land.

4. It is the Plaintiff's case that on the 15th day of February 2012, one of the electricity poles carrying high voltage lines along its property fell down and started a fire which destroyed a portion of about 86 acres of Rhodes Grass together with fencing posts, droppers, chain links and barbed wire. The Plaintiff particularised the loss and damage in this fire as follows:-

Loss of Pasture	Kshs.5,160,000
Fencing Posts	Kshs.18,400
Droppers	Kshs.75,000
Chain Links	Kshs.65,000
Barbed Wires	Kshs.22,400
Revenue foregone on pasture	Kshs.15,480,000
Lost income on milk production	Kshs.25,600

5. That further on 12th March 2012, a Transformer blew up and the resultant sparks started a fire which destroyed 2 acres of Rhodes Grass. Particulars of loss and damage in this fire were:-

Loss of Pasture	Kshs.60,000
Fencing Posts	Kshs.26,200
Revenue foregone on pasture	Kshs.240,000

The grand total loss that the Plaintiff claimed from the Defendant is Kshs.21,172,600.

6. The Plaintiff stated that the destroyed pasture could have been harvested economically for three years being 2012, 2013 and 2014. The Plaintiff reported the two fire incidents to the local administration office and at Rongai Police Station. The Plaintiff also commissioned the preparation of Reports of the loss arising from the fires.

7. The Plaintiff stated that the Defendant had a statutory duty under section 52 of the Energy Act to maintain in a state of good repair the poles supplying the electricity lines and had a duty, in case of breach to make prompt and adequate compensation for the loss it suffered as a result of the two fires.

8. The Plaintiff stated that the Defendant's negligence in handling of the electricity poles resulted in damage of the Plaintiff's property, which damage the Defendant had failed to make good. The Plaintiff prayed for:-

(a) A declaration that the defendant has breached its statutory duties under the provisions of the Energy Act which breach has caused loss and damage to the Plaintiff and the Defendant is therefore under a duty to compensate the Plaintiff.

(b) Damages in the sum of **Kshs.21,172,600** with interest thereon from the date of filing suit.

(c) Damages for consequential loss.

(d) General damages for negligence and breach of statutory duty.

(e) Interest on (c) and (d) above at court rates.

(f) Costs of this suit and interest thereon.

(g) Any other relief that his honourable court will deem fit and just to grant.

9. The Plaintiff produced the following documents in support of its case:-

a. The Certificate of Title for the suit land as **Exhibit 1**

b. Photographs as **Exhibit 2**

c. Report of the fire by the Chief as **Exhibit 3**

d. Demand letter and ensuing correspondence with the Defendant and the Defendant's Insurer as **Exhibit 4**

e. Receipt books for 2010, 2011 and 2012 showing the sale proceeds from the sale of Rhodes grass as **Exhibit 5**

f. Statement of Supplier Balance Detail for Milk sold to Ilara from December 2010 to June 2012 as **Exhibit 6**

g. Letter from Kenya Seed Company as **Exhibit 7**

h. Authority to Act from Lawina Company Limited as **Exhibit 8**

i. Formal Notice of the fire damage made to KPLC, Nakuru Regional Office as **Exhibit 9**

j. Agricultural Officer's Report as **Exhibit 10**

k. Report dated 13th March 2012 as **Exhibit 11**.

Defendant's case

10. The Defendant filed its defence on 18th July 2012 denying all the allegations in the plaint. While admitting that it had installed electricity poles along the Plaintiff's property, the defendant denied that the electricity poles were of high voltage as alleged by the Plaintiff or that the poles fell and started a fire which damaged the Plaintiff's property. Further, the Defendant categorically stated that it had no statutory duty to make compensation to the Plaintiff for loss or damage of any electric supply line or by reason of any defect in the electric supply line. It denied the particulars of negligence and breach of statutory duty. The Defendant further attributed negligence to the Plaintiff

which it particularised as:-

- (a) Failing to take all necessary steps to avert the loss and/or damage.
- (b) Exposing his property to the risk of damage which it knew or ought to have known.
- (c) Failing to allow the Defendant access to his property for purposes of inspecting the electricity poles.
- (d) Failing to ensure that there was a farm manager in site to alert the Plaintiff of any damage at the soonest to avoid grievous loss.
- (e) Failing to ensure that the electricity poles were properly rooted to the ground to ensure that none would be easily blown away by harsh winds.
- (f) Failing to take any or any adequate precaution for the safety of his property.
- (g) Allowing the Defendant to install an electricity pole right at the proximity of its property and not taking safety precautions on the same.

11. The Defendant called one witness, Mr. Livingstone Kipyegon, a risk and loss adjuster with McLarens Young International. The witness produced a Report that was marked as **Defence Exhibit 1**. It is the Defendant's case that a site visit to the farm showed that there was a fire caused by electrical sparks from a fallen overhead 11KV feeder conductors and that the said pole had been replaced by the Defendant. The Defendant estimated the total loss at Kshs.2,694,040/=.

12. It is the Defendant's case that the claim for loss of pasture is a special damage and that it is trite law that special damages must not only be specifically pleaded, they must also be specifically proved. The Defendant has relied on the cases of **NSSF Board of Trustees Vs Sifa International Ltd (2016) eKLR, Macharian & Waiguru Vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd Vs Mordekai Mwanga Nandwa KSM CACA 179 of 1995** to support their submissions.

13. Regarding the fire that occurred on 12th March 2012, the Defendant submits that there is no evidence submitted before the court to show that the said fire affected the Plaintiff's grass at all. That further, during their site visit to the farm on 12th March 2012, they established that another fire had just burnt a small section of the farm adjacent to the Defendant's transformer and not the Plaintiff's farm. As such the Defendant urge this court to disallow and dismiss the Plaintiff's claim for Kshs.326,200.

14. I have carefully perused the Amended Plaint dated 26th March 2014, the Plaintiff's witness statement dated 20th June 2012, the Plaintiff's bundle of documents dated 20th June 2012, the Defence dated 13th July 2012, the Reply to Defence dated 31st July 2012, the Defendant's bundle of documents dated 25th May 2016, the Plaintiff's Written submissions dated 19th February 2021, the Defendant's Written Submissions and accompanying case law dated 7th May 2021, and; the Plaintiff's supplementary submissions dated 2nd June 2021.

15. It is not in dispute that fire broke out on the Plaintiff's farm on 15th February 2012 and 12th March 2012 located in Lengenet location, Rongai Division, Nakuru County. It is also not in dispute that the said fires caused damage to the Plaintiff's farm, the said damage being the basis of this suit. The only issues remaining for determination are:-

(i) Whether the fires were attributable to negligence on the part of the Defendant.

(ii) Whether the Defendant bore a statutory duty to compensate the Plaintiff.

(iii) What if any, was the quantum of damages

(i) Whether the fires were attributable to negligence on the part of the Defendant.

16. Peter Lagat (PW1) testified that the fire broke out on the afternoon of 15th February 2012. He further testified that the Kenya Power transmission pole fell and caused the fire. PW1 produced a bundle of photographs as P. Exhibit 2 that showed the Defendant's wires visibly lying on the ground. Another photograph shows a lorry belonging to the Defendant with workers on it. PW1 explained that the photographs depicts the Defendant's personnel responding to replace the electricity pole after the Plaintiff had reported the fire at its office. PW 1 also testified that there was another fire that occurred on 12th March 2012 and that there was a representative from the Defendant who was sent to assess the damage. Upon cross examination, PW1 testified that it was obvious that the electric wires caused the fire. PW1 disputed the suggestion by the Defendant that the fire could have been started by someone.

17. The Defendant's witness, Livingston Kipyegon (DW1) testified that he is a Loss Adjustor with McLarens Young International. He testified on behalf of Mr Bernard Okello, the expert who had visited the farm and prepared the Report and who had left the company by the time of the trial. It is noted that McLarens Young International were engaged to investigate the Plaintiff's claim by APA Insurance Company Limited who were the Defendant's insurers. DW1 stated his qualification and experience to the court which qualified him as an expert.

18. The Court has expressed itself on the issue of expert evidence in the case of **Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another (2016) eKLR**, stated that:-

“The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.

Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the court’s knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of experts is to give their opinion based on analysis of the available evidence. The court is not bound by that opinion, but it can take into consideration in determining the facts in issue. Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then rigidly judged with a mathematical precision.

Secondly, a Judge must not consider expert evidence in a vacuum. It should therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of experts, before making any findings of fact, even provisional ones.

A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine the expert’s testimony in terms of rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd v. Minorities Finance Ltd and Another, Jacob J observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons given for it. The judge pithily commented “if the reasons stand up the opinion does, if not, not”. A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.”

19. The expert report produced as D. Exhibit 1 stated that the site visit was carried out on 13th march 2012. It was noted in the report that the insured’s (Defendant’s) overhead 11kV feeder was installed along the edge of the ill-fated land. It was also noted that there was a newly replaced utility pole within the area of the incident. At the time of the visit, they stated that they found another fire had burnt a small section of the farm. This confirms the fact that another fire had occurred as claimed by the Plaintiff on 15th February 2012. The Report stated that they found the insured’s (Defendant’s) overhead conductors sagging and clashing when swayed by strong winds. During the site inspection, they took note of the wind direction and that concurred with the evidence indicating that the fire spread was from the eastern side of the farm, where the power line was passing to the western edge of the farm.

20. The Report further stated that the expert interviewed the insured’s (KPLC’s) engineer, Mr Lawrence Kome, who attended the site and indicated that the feeder line tripped at around 1.30 pm and when they attended the farm in the evening, conductors were found on the ground together with the pole. The engineer went on to say that he could not establish why the pole had fallen. According to the Report, the investigations revealed that the 11kV feeder pole and falling of the conductors to the ground is likely to have caused the conductors to come into contact with the dry grass leading to sparking. The resulting electrical sparks could ignite any dry material/grass underneath and start the fire.

21. In his oral evidence, DW1 summarised the report and stated that the Insured’s Chief Engineer had issued an incident report confirming that the incident was reported to the emergency office. On attendance, the insured’s engineers found a High Tension (HT) power pole had fallen. They isolated the power line and replaced the pole. The Report further stated that it was not disputable that the insured’s 11kV overhead conductors and the electricity pole fell on the claimant’s pasture/grass land on the subject day and time. He stated that that was the likely cause of the fire outbreak. When DW1 was cross- examined, he stated that the fire started from the overhead conductors belonging to the Defendant.

22. I observe that the Defendant denied the existence of the two fires in its Defence dated 13th July 2012. I further note that the issue of the cause of the fires was not addressed by the Defendant in its written submissions. The Defendant’s expert report is also silent on the cause of the fire that occurred on 12th March 2012. However as stated above, the Defendant’s own expert Report stated that upon a site visit that was conducted on 13th March 2012, the assessors found that another fire had burnt a small section of the farm. The reference of evidence of another fire makes this court conclude that there were indeed two fire incidents on the Plaintiff’s land.

23. PW1 testified that there was a fire that occurred on 12th March 2012. PW1 further stated that there was a representative from the Defendant who went round and saw the Defendant’s Transformer spitting fire. PW1 produced photographs showing a Transformer and a power house. This fact was unchallenged by the Defendant during cross examination. PW2 confirmed through his testimony that fire broke out on 12th March 2012.

24. After considering the evidence before me and the Defendant’s Expert Report dated 17th May 2012, I find that the fire that occurred on 15th February 2012 was caused by the Defendant’s pole and 11kV overhead conductors which fell. This caused sparks on the dry pasture leading to the fire outbreak.

25. From the evidence above, I find that the Plaintiff has proved on a balance of probability that the Defendant's electric poles caused two incidents of fire on the Plaintiff's land on 15th February 2012 and 12th March 2012 respectively.

26. Negligence is defined in the Black's Law Dictionary, 10th Edition as:

***“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. . . . The elements necessary to recover damages for negligence are (1) the existence of a duty on part of the defendant to protect the plaintiff from the injury complained of, and (2) an injury to the plaintiff from the defendant's failure.*”**

27. Negligence is a specific tort that comes from the common law jurisprudence. In a claim of negligence, the Plaintiff ought to establish that the Defendant owed him a duty of care, that there was a breach of the duty of care and as a result of that breach, the Plaintiff suffered damages. The principles involved in a claim of negligence were established in the case of **Donoghue Vs Stevenson (1932) UKHL 100**, where it was held:-

“The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty.”

28. Before a claim can succeed in an action for negligence, the damages alleged must be recognized by law. In the case of **Anastassios Thomos Vs Occidental Insurance Company Limited (2017)**, the High Court held that:-

“When it comes to remoteness of damages, the court ought to determine whether there was sufficient cause or proximate connection between the defendant's negligence and the damages suffered by the Plaintiff that is recognisable as a matter of policy that the Defendant should pay the damages.”

29. In the case of **Cotecna Inspection S.A Vs Hems Group Trading Company Limited (2007) eKLR**, the Court of Appeal held 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 the offending party and the loss suffered by the offended party. I do agree with both learned counsels 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. It underlines the doctrine of remoteness of damages.”

30. The Plaintiff must show that the damages suffered are as a result from the Defendant's negligence. Without proof of causation, negligence cannot be actionable and/or sustainable. This was addressed by Visram J (as he as then) in the case of **Elijah Ole Kool Vs George Ikonya Thuo (2001) eKLR**, where he stated:-

“When will an act or omission be said to be the cause of the Plaintiff's injuries” a defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff's injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.”

31. In the case of **Anastassios Thomos (supra)**, Njuguna J stated that:-

“In the work of Charles worth & Peray on Negligence, 7th Edition, it is state as follows:-

“Evidence of causation must be given on behalf of the plaintiff. Before a case can be considered, either direct or circumstantial evidence must be called on behalf of the plaintiff. Whatever evidence is so called, it must tend to show how the accident happened and how, as a result, he sustained his personal injuries or suffered his damage. Such evidence also must show that on a balance of probabilities, the most likely cause of the damage was the negligence or breach of duty of the defendant, his servant or agent and not solely the negligence of some other person. If he fails to establish that the defendant caused the harm, of which he complains, or some part of it, then his action will fail. Such a failure will result whether this happens to be expressed in terms of lack of result or for reasons of remoteness.

It is a question of law, whether the evidence adduced allows a reasonable finding of causation, but it is a question of fact, whether any particular head of damages is so caused by a defendant's negligence or breach of duty.”

32. The Plaintiff particularized negligence on part of the Defendant. That it was within the Defendant's knowledge that the Plaintiff stood to incur loss should there be a fault in the power lines; the defendant breached its statutory duty to ensure the supply of electricity does not cause injury to the plaintiff; and that the defendant maintained defective and malfunctioning transformers.

33. As already shown in this judgment, a report produced by the Defendant and marked as D. Exhibit 1 stated that the fire was caused by the breakage of the 11kV feeder pole and falling of the conductors to the ground. This then resulted in sparking which they believed could ignite any dry material/grass underneath and start a fire.

34. The Defendant owns and operates the electricity transmission and distribution system in Kenya and it is incumbent upon it to ensure that the said transmission and distribution system is maintained in good condition. This is the very essence of duty of care to it millions of customers who are the consumers of electricity. In the case of **Kenya Power and Lighting Company Limited Vs Joseph Khaemba Njora (2015) eKLR**, the Court stated that:-

“there can be no question that the appellant (KPLC) has the responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly maintained to prevent accidents.”

35. Further in **Kenya Power and Lighting Company Limited Vs James Muli Kyalo and Another (2020) eKLR**, the Court while discussing Kenya Power and Lighting Company’s duties stated:-

“The appellant’s responsibility, as far as the duty to maintain electric supply lines is concerned, is a matter of statutory obligation under the Energy Act, 2006. Section 51 required the appellant as licensee, or any person authorised by it, from time to time as it becomes necessary, to enter land on which electric supply lines are laid, for the purpose of inspecting or repairing lines, or removing lines where such electric supply lines are no longer required.”

36. In this case, I have already found that the Defendant’s power lines were installed along the edge of the Plaintiff’s land. The evidence clearly demonstrates a nexus between the action complained of and the damage suffered. The Plaintiff’s land was damaged as a result of fire that broke out. The damages are recognisable by the law and causation has already been established thereby sustaining the tort of negligence.

37. From the foregoing, it is clear that the defendant bore a duty of care towards the Plaintiff and that it suffered loss as a result of the omission of that duty by the Defendant. It is my finding that both fires were attributable to the Defendant’s negligence. I hold the Defendant wholly liable.

(ii) Whether the Defendant bore a statutory duty to compensate the Plaintiff.

38. The Energy Act No. 12 of 2006 was repealed by Energy Act No. 1 of 2019 which commenced on 28th March 2019. Section 224 (2) (a) of the Energy Act No. 1 of 2019 provides that:

(2) Notwithstanding the provisions of sub section (1)-

(a) Anything done under the provisions of the Energy Act, or by the Minister or by the Cabinet Secretary under the provisions of the Energy Act (No. 12 of 2006), the Kenya Nuclear Electricity Board Order (L.N. 131/2012) and the Geothermal Resources Act (No. 12 of 1982), before the commencement of this Act shall be deemed to have been done under the provisions of this Act.

39. My understanding of the above section is that the repeal of the Energy Act No. 12 of 2006 does not invalidate actions or anything done under the provisions of the repealed Act unless it is specifically revoked by the new Act i.e. the Energy Act No, 1 of 2019. That therefore means the provisions of the old Energy Act apply in this case.

40. Section 52 of the Energy Act No. 12 of 2006 which the Plaintiff cited provides as follows:-

The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of nay power or authority conferred by this Act or by any irregularity trespass or other wrongful proceeding in the execution of this Act, or by loss or damage or breaking of any electric supply line or by reason of nay defect in any electric supply line.

41. The Defendant did not submit on the issue of its statutory duty under Section 52 of the Energy Act, No. 12 of 2006 but I note from their Defence that they denied having any statutory duty to make compensation to the owner or occupier for damages or loss caused by the breaking of nay electric supply line.

42. It is clear to me that Section 52 of the Energy Act No. 12 of 2006 applies where it is proved that the damage or loss suffered was caused by the exercise or use of any power conferred by the Act or by breaking of any electric supply line. Once these are proved, then it becomes a case of strict liability. I agree with the decision in **Kenya Power & Lighting Company Vs Umaz Ali Swaleh (2017) eKLR, Civil Appeal No. 240 of 2009**, where the Court held that:-

“..... under Section 52 of the Energy Act, a licensee, in this case the Appellant is obligated to make compensation for any loss or damage occasioned by reason of execution of its duties and mandate under the Act or by reason of any defect in any electrical supply line. I read and understand this provision to put some strict liability upon the Appellant as a licensee for purposes of supplying and maintain electric power supply lines. There was sufficient evidence that an electric wire snapped and fell to the ground and thereby pausing the fatal danger ultimately visited upon the deceased. Knowing the danger that a defective electric cable or line pose to any human being and property, there is a duty of care owed to Kenyans by the Appellant to maintain and keep secured all electric transmission lines and infrastructure so that accidents are avoided. In Joseph Kiptonui vs. KPLC, Hon. Asike Makhandia, as he then was, held and said:

“..... Kenya Power & Lighting Co. owed to the plaintiff and every Kenyan a duty of care where it happens to have power lines. Further electric power is a dangerous commodity and if not properly secured can be a danger to society.”

Same sentiments were expressed by GBM Kariuki J, in KPLC vs. Joseph Khaembe Njuria to the effect that the Appellant, has a responsibility to ensure that the power infrastructure it has installed in the country for the purpose of electrification is properly maintained to prevent accidents. I find the foregoing decisions to be well founded in support of my finding that the Appellant had a duty of care to ensure that its power supply infrastructure was kept in good repair and condition to avoid being a risk to the general public including the deceased minor.”

43. From the evidence adduced before the court, it is clear that the defendant’s overhead 11kV feeder pole and the conductors which fell to the ground, and sparks from the transformer which blew up caused the fire. The Defendant as the sole distributor and supplier of electric power in Kenya is therefore strictly liable. I agree with the sentiments of Mabeya J who in the case of **AMK (suing as the mother and friend of JMK-Minor) Vs Kenya Power & Lighting Company Limited (2020)eKLR**, held that:-

“The defendant is the sole installer, distributor and supplier of electric energy in Kenya. It has a statutory duty of supervising, inspecting and maintaining its electric installations under Section 52 of the Energy Act. This calls for a higher degree of vigilance on its part in order to avert accidents.”

44. It is my conclusive finding that strict liability attaches to the Defendant and it bears a statutory duty to compensate the Plaintiff in this case.

Quantum of damages.

45. The damages sought by the Plaintiff are in their very nature Special Damages. It is trite law that Special Damages must be specifically pleaded and proved. See **National Social Security Fund Board of Trustees Vs. Sifa International Limited (2016) eKLR**.

46. PW1 testified that after the occurrence of the fires, he reported to the Government through the Ministry of Agriculture. The Plaintiff commissioned the preparation of a report of loss arising from the fire which report was done by an agricultural officer. Percy Kipchumba Chelal (PW2) an expert who works with the Ministry of Agriculture as an agricultural officer testified that he visited the land and prepared a report. He produced two Reports as P. Exhibit 10 and 11. PW2 further testified that he tabulated the loss and stated that the prices indicated were dictated by supply and demand. The Defendant submitted that DW1 investigated the claim by the Plaintiff and came up with a Report on the extent of the loss suffered by the Plaintiff.

47. I now consider the damages under various headings as stated below in respect of the fire which occurred on the 15th day of February 2012:

i. Pasture Loss.

48. PW2 testified that he visited the site and drew the map using GPS. It was his testimony that 70 acres of the land was completely burnt and 16 acres were partially burnt. This made the total area of damage to be 86 acres. The report by PW2 stated that the pasture was economically viable for 4 years. That one acre of the farm produced 400 bales per year if two cuttings are done per year. PW2 testified that two cuttings had been done in 2011 and this was the first cutting in 2012. The Report further states that the average cost of one grass bale is Kshs.150. Therefore the total cost of pasture loss for the year 2012 as per the Plaintiff is Kshs.5,160,000.

49. PW1 stated that it used the price of Kshs.150 because grass is sold according to seasons. In the dry season, the demand is higher and so is the price. PW1 produced two receipts (Exhibit 5) that showed the price of Kshs.120 per bale. The same receipts also showed that it sold 500 bales. PW1 testified that the 400 bales that the Plaintiff claims is an estimate and an average. He further testified that the number is sometimes lower.

50. The Plaintiff submitted that PW1’s testimony on the loss of 86 acres of Rhodes grass was supported by PW2’s report and expert testimony. That the total area that was completely burnt by the fire was 70 acres and an additional 16 acres that were partially damaged. The Plaintiff further submitted that it adduced several documents and records as proof of the claim for pasture loss. That the amount of Kshs.5,160,000 was not an estimate as it was clearly computed by the Agricultural Field Officer.

51. The Plaintiff submitted that the Defendant was wrong in claiming that the amount demanded is subject to deductions by the company for inputs and other administrative costs. It submitted that the case which the Defendant relied on i.e. **Kenya Power and Lighting Company Ltd Vs Diana Achieng Ogunyo (2012) eKLR**, did not apply because in that case both the Respondent and the Agricultural Officer admitted in their testimonies that the amount was subject to deductions.

52. The Loss Adjuster’s Report (D. Exhibit 1) stated that upon site inspection, the assessors confirmed that 48 acres of the land was burnt. However, the areas indicated as ‘sooted’ were normal and unaffected by the fire. They stated that they based their assessment on the area physically affected by the fire. On computing the loss, the assessors used the Plaintiff’s price and quantity of bales and this brought the loss to Kshs.2,880,000. The Report further states that the fire incident occurred when some of the grass/pasture had been harvested. It was not clear how much grass had been collected before the fire. They therefore proposed a reduction of 10% to cater for overstatement, bringing the total loss assessed to Kshs.2,592,000.

53. The Defendant submitted that this was a special damage which must be specifically pleaded and proved. It was their submission that the Plaintiff had not presented any evidence to specifically prove the claim for pasture loss and that the amount claimed could not be ascertained. Additionally, that the number of bales (400) and the price of Kshs.150 per bale were speculative. It was the Defendant’s further submission that the Plaintiff merely threw figures at the court without any credible evidence in support thereof and expected the court to award them. It relied on the case of **Capital Fish Kenya Limited Vs Kenya Power & Lighting Company Limited (2016) eKLR**

54. From the foregoing, it is clear to this court that the dispute under this head is the acreage of the land that was burnt. The two expert reports came to different conclusions in terms of the acreage destroyed by the fire. A look at the PW2's Report reveals that the total area destroyed was 70 acres. It is salient to note that PW2 did not add the 16 acres of sooted land in his computation. On the other hand, DW1's Report reveals the total area destroyed was 48 acres. PW2 testified that 70 acres were completely burnt and 16 acres were partially burnt.

55. From the above, I am persuaded by PW2's Report dated 17th February 2012 that approximated 70 acres as the area destroyed by the fire. The grass on the 16 acres that were partially burnt would re-grow. I also agree with the finding of 400 bales for two cuttings and the price of Kshs.150 per bale as a fair estimate which has been proven by PW1's past sales through exhibit 5.

56. The Adjustor's Report called for a 10% deduction from the assessed loss to cater for overstatement. The reason for this according to the DW1's Report was that the fire incident occurred when some of the grass had been harvested. The Plaintiff claimed that it was to be the first cutting of 2012. The Defendant has not attached any evidence to show that some grass had been harvested. This court therefore declines to grant the 10% deduction from the assessed loss.

57. In light of the above, I assess the loss of pasture as follows:-

$$70 \text{ acres} \times 400 \text{ bales/acre} \times \text{Kshs.150/bale} = \text{Kshs.4,200,000}$$

ii. Fencing Posts.

58. PW2's Report dated 17th February 2012 computed the damaged fencing posts at 92. PW2 testified that the price of each post was Kshs.200 and that he got the prices from stockists in Rongai. D. Exhibit 1 being the Loss Adjuster's Report stated that the assessors confirmed that the fire did not burn any fencing post to completion. That a few of them were partially affected by the fire. The assessor proposed to allow 40 posts at Kshs.200 each and that would bring the loss to Kshs.8,000.

59. I have considered the respective submissions on this head. I note that the numbers arrived at by both parties are both estimates. The fact is that there was fire on the farm and as DW1's Report has admitted, fencing posts were damaged. The Plaintiff through their witnesses had used 86 acres as damaged land. This would then mean that this was the basis of the 92 posts because the land was fenced. This court has determined 70 as the acres of the Plaintiff's land damaged by the fire. Both the Plaintiff's and Defendant's expert reports use Kshs.200 as the price per fencing post.

60. In light of the above and using 70 acres of burnt land as the basis in determining the estimated number of fencing posts, this court finds 75 as a fair estimate of the damaged posts. Accordingly, I assess the loss in regards to the damaged fencing posts to:-

$$75 \text{ posts} \times \text{Kshs.200} = \text{Kshs.15,000.}$$

iii. Droppers

61. PW2's Report dated 17th February 2012 computed the damaged Droppers at 15,100 costing Kshs.75,000. PW2 testified that the price of each post was Kshs.5 and that he got the prices from stockists in Rongai Division. D. Exhibit 1 being the Loss Adjuster's Report stated that a section of the Droppers were affected especially on the lower sections. They noted that the Droppers were approximately 70 between fencing posts spaced 2.5m apart. The assessors confirmed that a section of the fence measuring 86m was damaged and this would accommodate 2408 droppers. That market enquiries confirmed the cost of each dropper to be Kshs.5. The loss was then assessed at Kshs.12,040.

62. PW2 determined the number of damaged Droppers to be 15,100. The Report does not give an explanation or reasoning used in arriving at the said figure. The Loss Adjuster's Report on the other hand detailed the process by which they arrived at the number 2408.

63. I find 6000 as a fair estimate of the damaged Droppers. Accordingly, I would allow compensation for the loss of droppers as follows:-

$$6,000 \text{ Droppers} \times \text{Kshs.5} = \text{Kshs.30,000.}$$

iv. Chain Links

64. PW2's Report dated 17th February 2012 computed the damaged chain links at 25 pieces and that each cost Kshs.2,600. The Plaintiff submitted that the assessment was done by an experienced officer who upon inquiring upon the prices of the listed items from stockists, ascertained the prices of the items. The Plaintiff further submitted that the calculations were reasonable and justifiable and that they were also supported by the Defendant's Loss Adjuster's Report.

65. D. Exhibit 1 being the Loss Adjuster's Report stated that they confirmed that the fire did not affect the chain link for fastening the Droppers or the strands of barbed wire. That although some these wires were not directly affected some sections may break in the process of repairing the damaged fence and therefore would require replacement. The Report contained a proposal to allow for 10 pieces of chain link at Kshs.26,000.

66. I note that the numbers arrived at by both parties are estimates. The Plaintiff through their witnesses had used 86 acres as damaged land. This would then mean that this was the basis of the 25 pieces of Chain links arrived at. PW2's Report had indicated that 70 acres of the land was damaged which this court agreed with. There was no dispute in regards to the price of each Chain Link.

67. In light of the above and using 70 acres of burnt land as the basis in determining the estimated number of damaged Chain Links, this

court finds 20 as a fair estimate of the damaged Chain Links. Accordingly, I assess the loss in regards to the damaged Chain links to:-

$$20 \text{ pieces} \times \text{Kshs.}2,600 = \underline{\text{Kshs.}52,000.}$$

v. Barbed Wire.

68. PW2's Report dated 17th February 2012 computed the damaged barbed wire at 4 rolls and that each cost Kshs.5,600. The Report does not give an explanation or reason as to how they arrived at 25 pieces of damaged barbed wire.

69. The Plaintiff submitted that the assessment was done by an experienced officer who upon inquiring upon the prices of the listed items from stockists, ascertained the prices of the items. The Plaintiff further submitted that the calculations were reasonable and justifiable and that they were also supported by the Defendant's Loss Adjuster's Report.

70. D. Exhibit 1 being the Loss Adjuster's Report stated that they confirmed that the fire did not affect the chain link for fastening the Droppers or the strands of barbed wire. That although some these wires were not directly affected some sections may break in the process of repairing the damaged fence and therefore would require replacement. The Report contained a proposal to allow for one roll of barbed wire assessed at Kshs.5,600.

71. This court finds 5 rolls as a fair estimate of the damaged barbed wire. Accordingly, I assess the loss in regards to the damaged barbed wire to:-

$$5 \text{ Rolls} \times \text{Kshs.}5,600 = \underline{\text{Kshs.}28,000.}$$

vi. Revenue Foregone on Pasture

72. The Plaintiff submitted that it clearly showed through the evidence of PW1 and PW2 that it suffered revenue loss on the pasture since it had only harvested for one year while the Rhodes Grass had an economic life span of 4 years. PW1 stated that the grass had been harvested in 2011 and that in 2012 they were doing the first cutting which was destroyed. As a result, the Plaintiff lost that harvest, the second one for 2012, 2013 and 2014 hence the loss of 3 years.

73. PW1's Report stated that the destroyed pasture could have been harvested in the year 2013 and 2014 economically. Therefore, the revenue foregone is for two years.

74. The Plaintiff submitted that the revenue foregone calculated by the defendant (Kshs.5,160,000) was for one year. The Plaintiff submitted that the revenue foregone is for 3 years since the grass was viable for 4 years, but was only harvested for 1 year.

75. It was the submission of the Plaintiff that the defendant sought advice from an animal production officer instead of a crop production officer. It was the Plaintiff's further submission that they relied on the opinion and information of a crop specialist who stated that Rhodes grass is not a natural pasture and needed to be established by preparing land properly, sowing seedlings and weeding. That he was clear that the fire consumed all the grass and there would be no re-generation of Rhodes grass and as such there was no possibility of the grass growing again since the grass was burnt from the roots.

76. The Defendant submitted that the figures of 400 bales per acre and Kshs.150 per bale were speculative. The Defendant further submitted that it was necessary that receipts, invoices and audited accounts ought to have been presented to demonstrate that the farm because of previous farming experience could have made Kshs.5,160,000. It was its submission that no evidence was availed to the court. They urged the court to dismiss the claim.

77. I find that the Plaintiff has proved that it made sales from the sale of hay for the year 2010, 2011 and an incomplete 2012. The Plaintiff produced cash sale receipts as P. Exhibit 5. I also find from the expert evidence adduced showed that the grass was viable for 4 years and the destroyed pasture could have been economically viable for 2 more years i.e. 2013 and 2014. The 3rd year is not allowed as the Plaintiff ought to have mitigated the loss by then by either replanting the grass or putting the land to some other economic use.

78. In light of the above, I assess the revenue foregone as follows:-

$$70 \text{ acres} \times 400 \text{ bales} \times \text{Kshs.}150 \times 2 \text{ years} = \underline{\text{Kshs.}8,400,000.}$$

vii. Lost income on milk production.

79. The Plaintiff claimed a loss of 800 litres of milk. PW1 testified that the figure of Kshs.32 per litre was an average price. The Plaintiff confirmed that it had no document to show the projected milk loss.

80. The Plaintiff submitted that the grass was not only grown for commercial purposes but was also used in feeding the cattle which in turn produced milk sold to Ilara Dairies (Gogar Farm Limited). That the cows produced 800 litres a day and this was supported by copies of the Supplier Balance Detail for milk delivered from December 2010 to June 2012 to Gogar Farm Limited (Exhibit 6). It was the Plaintiff's further submission that when the grass was burnt, the cattle lacked grass to feed which in turn led to low production of milk. That the grass was badly burnt and other parts covered in soot and the same could not be consumed by cattle.

81. DW1's Report stated that they requested the Plaintiff to provide them with milk production and sale receipts to confirm the loss but it

was not availed. It further stated that their inspection revealed that the fire did not affect the entire grass land. That a larger section of the farm was intact and planted with grass. The Report further stated that the Plaintiff has a large hay store, where dry hay is stacked for sale and feeding cows. The assessor stated that they confirmed that hay was available in the store and no evidence suggested any lack of pasture for the cows.

82. I agree with the Defendant's submission that the fire did not affect the entire grass land. A section of the farm remained intact with some grass. Peter Kipyegon Lagat (PW1) admitted in cross-examination that he had ploughed and planted grass again. In addition, he testified that he had some hay in the store. I find that this would mitigate any loss in terms of feeding his cows. Further, as I have already allowed the claim for lost pasture, this claim would amount to double compensation. Therefore, the claim for lost income on milk production fails and is dismissed.

83. For the fire that occurred on 12th March 2012, the loss was tabulated as follows:-

a. Pasture Loss

84. In this incident, which I have already found proven, the Plaintiff claimed that the fire destroyed 2 acres of pasture. PW2 produced his report as P. Exhibit 11. PW2 stated that he ascertained the acreage scientifically using a GPRS tool.

85. The Defendant submitted that the Plaintiff did not suffer any loss from that fire as the fire only burnt the area around the transformer. The Defendant further submitted that PW2 did not draw a sketch map to show and/or demonstrate the area burnt by the second fire and/or take any photos to demonstrate that the second fire had destroyed the Plaintiff's grass. It is salient to note that the DW1's report is solely about the fire that occurred on 15th February 2012.

86. The Defendant did not provide any detailed report detailing any investigation and determination of the cause of the fire and the possible estimation of the area damaged by the fire. It only stated that the assessors had discovered another fire that had burnt down a small section of the farm adjacent to the Defendant's transformer. In the circumstances, the court is left to rely on the PW2's report dated 13th March 2012 which has not been controverted by another report.

87. The court rejects the Defendant's submission that the Plaintiff did not attach any photographs to demonstrate that the second fire had destroyed the Plaintiff's grass. A look at P. Exhibit 2 reveals pictures of a damaged transformer and burnt grass beneath it. PW2's Report stated that the area destroyed was 2 acres. Upon cross examination, PW2 stated that he measured the 2 acres using a tape measure. The Defendant did not challenge the acreage measured by the Plaintiff's witness.

88. PW2's Report stated that at the time of this fire, one cutting had been done, this therefore means the estimates number of bales produced would have been 200. In light of the above, I uphold the Plaintiff's claim for loss of pasture as follows:-

2 acres X 200 bales X Kshs.150 = Kshs.60,000

b. Fencing Posts

89. The Plaintiff claimed that the 1st fire damaged 86 acres of the land with a corresponding 92 damaged fencing posts. The Plaintiff further claims that the 2nd fire damaged 2 acres with a corresponding 131 damaged fencing posts. This estimation cannot be right. In the absence of an explanation on the disparity, this court finds the Plaintiff's claim for 131 fencing posts exaggerated.

90. In light of the above, the court can only allow 10 posts as follows:-

10 posts X Kshs.200 = Kshs.2,000

c. Revenue Foregone on Pasture.

91. Having determined that the area destroyed by the second fire was 2 acres and, considering the fact that the destroyed pasture could have been harvested for the remaining two years i.e. 2013 and 2014, I agree with the calculations contained PW2's Report dated 13th March 2012.

92. In light of the above, I assess the revenue foregone on pasture as follows:-

2 acres X 400 bales X Kshs.150 X 2 years = Kshs.240,000

93. The loss therefore is computed as follows:-

Loss arising from the fire incident of 15th February 2012

(i) Pasture Loss	4,200,000
(ii) Fencing posts	15,000
(i) Droppers	30,000

(ii) Chain Links	52,000
(iii) Barbed wire	28,000
(iv) Revenue on foregone Pasture	8,400,000
(v) Lost income on milk production	0

Loss arising from the fire incident of 12th March 2012

(i) Pasture loss	60,000
(ii) Fencing posts	2,000
(iii) Revenue on foregone pasture	240,000
Sub total	13,027,000

94. As I end this judgment, I thank the parties and their counsel for their patience. The delay in concluding this matter, which is regrettable, was occasioned by factors beyond the control of the court.

95. In the upshot, I make the following orders:-

(i) A Declaration be and is hereby issued declaring that the Defendant breached its statutory duties under the provisions of the Energy Act which breach has caused loss and damage to the Plaintiff and the Defendant is therefore under a duty to compensate the Plaintiff.

(ii) The Defendant shall compensate the Plaintiff damages in the sum of Thirteen million and twenty seven thousand shillings (Kshs.13,027,000).

(iii) The plaintiff is awarded general damages of Five hundred thousand (Kshs.500,000).

(iv) The Plaintiff shall have costs of the suit and interest on (iii) and (iv) at court rates until payment in full.

96. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 11TH DAY OF AUGUST, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment virtually delivered in the presence of Mr. M.D. Mwaura for the Plaintiff, Mr. Juma for the Defendant and Kiprotich (Court Assistant).