



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 142 OF 2007

DINIZ HOLDINGS LIMITED.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 16th March 2007, amended on 31st July 2014, and filed in court on 15th August 2014. The Plaintiff is seeking for judgment against the Defendant and seeks for the following orders:-

(a) *A permanent injunction issue to bar the Defendant from disconnecting its power supply due to the non-payment of the December 2006, bill which is inclusive of the impugned units;*

(b) *A permanent injunction issue to bar the Defendant from imposing the debit running from May 1998 to March 2004, on the Plaintiff;*

(c) *Damages for breach of contract;*

(d) *Interest on (c) above at court rates from the date of filing suit until payment in full;*

(e) *Costs of the suit and interest thereon.*

2. The Plaintiff avers that, on or about May 1998, it applied to the Defendant, to be supplied with electric power to its premises on Plot No. 10854/39. The Defendant set a number of pre-conditions which the Plaintiff duly met, giving rise to the execution of a binding contract of supply between the parties. Subsequently, the Defendant installed a transformer and a meter reading for the consumption units. The Defendant then supplied the electric power and billed the Plaintiff continuously and the bills were paid.

3. It is averred that the Defendant subsequently wrote to the Plaintiff a letter dated 26th March 2004, which the Plaintiff alleges was received three years later on 23rd January 2007. The Defendant allegedly purported to have conducted an inspection on the Plaintiff's power installation system and found that, the Plaintiff's consumption was beyond capacity ratio of the transformer installed. The letter indicated that the Defendant would make adjustment in their records to reflect these findings. In particular, it indicated that, it would make the necessary adjustment to recover the amounts undercharged from May 1998, and that the adjustment would take effect from December 2006.

4. The Plaintiff avers that, the Defendant's actions amounts to a breach of contract, for the reasons that, the purported inspection and verification were conducted seven (7) years after the installation of power and after the Defendant's agents had issued it with a compliance certificate. Further, by unilaterally imposing a sum of Kshs. 13,718,720.26 on its bill, demanding immediate payment and using threats to disconnect the power if payment of the said sum was not made, the Defendant is in breach of contract.

5. It is further argued that, the Defendant is acting unfairly by using its privileged position as the only national power supplier to demand sums not due under the contract and in total disregard to the contract between the parties.

6. However the Defendant filed a statement of defence dated 18th April 2007, in response to the Plaintiff's claim, and generally denied all the averments therein and in particular; the allegation that the Plaintiff applied to be supplied with electric power on its premises, and/or a contract of supply of power was entered into.

7. The Defendant also denied the allegation that the Plaintiff has continually paid the bills and denied knowledge of a letter dated 26th March 2004. Finally, the Defendant denied that it is in breach of any contract and/or alleged acts of negligence attributed to it and/or its agents. The loss or damage allegedly suffered by the Plaintiff was denied. It was averred that the Plaintiff's claim does not disclose a cause of action and the Defendant indicated that it would make an application for the defence to be dismissed or struck out.

8. However the Plaintiff filed a reply to the defence, and maintained that, there was a contract between the parties as evidenced the customer's account number 2035074-01, allocated to it by the Defendant. That it is through this account, it made payment for the bills issued. The Plaintiff termed the Defendant's statement of defence as a sham, without basis, frivolous, vexatious, bad in law, misconceived, defective, deficient of material and vital particulars, and eligible to be struck out with costs.

9. At the hearing of the suit on 20th June 2016, the Plaintiff called its Chief Accountant one witness Catherine Nduta Mburu, who generally reiterated pleadings in the Plaintiff's case as summarized above. In a nutshell, she testified that, the Plaintiff received the electricity bill for the month of December 2006, and the same was forwarded to her office for payment. Upon perusal thereof, she noted that, the Defendant had unilaterally imposed a sum of Kshs. 11,813,434.04, plus an additional erroneous sum of Kshs. 1,905,286.40, termed as "an estimated figure" on the bill and demanded for immediate payment thereof.

10. However, the Plaintiff did not pay the said erroneous amount but opted to continue paying its monthly bill. As a result thereof, the Defendant disconnected the power supply, necessitating the filing of this suit.

11. It is noteworthy that, the suit was filed simultaneously with a notice of motion application dated 18th May 2007, wherein the Plaintiff was seeking for orders, inter alia; that the Defendant restores the supply of power. Subsequently, the Application was heard inter-parties, and the court ordered the supply of power be recommended on condition that the Plaintiff files an undertaking as to damages and continuous to pay the undisputed bills at Kshs. Three Hundred Thousand (Kshs. 300,000) per month. That was done on 23rd May 2009. However although the Defendant lodged a notice of appeal against the ruling it was subsequently withdrawn following negotiations between the parties.

12. The Defendant's case on the other hand, was heard on 1st December 2012, whereby Mr. Francis M. Waiganjo, a Third Assistant Superintendent, in charge of large power section of the Defendant's company, testified that, in the month of May 1998, the Plaintiff sought and signed a contract with the Defendant for supply of electric power. Subsequently, in the month of March 2004, he visited the Plaintiff's premises for purposes of meter inspection and discovered that the meter installed was of ratio 100/5, while the associated current transformers were of the ratio 300/5. The ratio of both the current transformers and the meter installation was supposed to be the same and in case they were different, a multiplier/multiplying factor should be put in the billing system. Therefore, the Plaintiff's multiplier should have been equal to 3.

13. Thus, the Plaintiff had been undercharged from May 1998, when power was installed to March 2004, at the time of inspection giving rise to total under charge amounting to Kshs. 13,178,720.26. That the sum was computed and sent to the Customer Service Manager, under cover of a report dated 14th April 2005 and finally to the Plaintiff.

14. After the formal hearing of the matter, the parties filed their respective submissions. The Plaintiff raised the following issues in the submissions for determination:-

(a) Whether the Defendant was in breach of the power supply contract and/or been negligent in its duties?

(b) Whether as a consequence, the Defendant is estopped from levying a backdated billing on the Plaintiff?

(c) Whether the Plaintiff is entitled to the relief's sought?

(d) What order should be issued as to costs?

15. The Defendant on its part raised the following issues for determination:

(a) Whether the Defendant's adjustment of the billing ratio was in breach of the power supply contract?

(b) Whether the Defendant has been negligent in carrying out its duties to ensure the smooth running of the power supply contract?

(c) Whether the Plaintiff is entitled to the reliefs sought?

16. However, I note that, on 11th October 2010, the parties filed a joint list of agreed issues for determination dated 21st September 2010, which states as follows:

(a) Whether the Plaintiff made an application to the Defendant in May 1998, for supply of power, and if yes, whether the Defendant set out certain pre-conditions which were met by the Plaintiff?

(b) Whether the parties entered into a binding power supply contract on or about May 1998, and if yes, whether the Plaintiff has at all times performed its obligations under the power supply contract?

(c) Whether the Defendant conducted an inspection on the Plaintiff's power installation system and its findings?

(d) Whether the defendant was in breach of power supply contract and/or been negligent in its duties, and if so, whether the Plaintiff has suffered loss and damage as a result of that breach and to what extent?

(e) Whether the Plaintiff is entitled to reliefs sought?

(f) Who is entitled to costs?

16. I shall be guided by the issues filed jointly by the parties. As regards the first issue, I find that the Plaintiff has provided a copy of the power supply agreement dated 24th November 1997, as evidence that it applied for power supply. In addition, it has also produced a letter of the same date addressed to Defendant forwarding; a cheque no.754208 for Kshs 1,773,461.00 (as per the Defendant's letter reference no 703031244/LAO/rm), a supply agreement duly filed in duplicate, a bank guarantee as requested in the sum of Kshs 380,000 and the Plaintiff's company's Pin number.

17. The Defendant responded to this letter vide a letter dated 1st December 1997, acknowledging receipt of the aforesaid letter, the cheque and bank guarantee (in relation to the supply of electricity to plot no. 10854/39 Moi South Lake Naivasha). The Defendant further stated that, it was seeking for way leaves approval from the owners of the plot along which the power lines would pass. It is therefore clear that, the Defendant had accepted the Plaintiff's request for power supply.

18. The Plaintiff also produced a receipt issued by the Defendant for the sum of Kshs 1,773,461 as evidence of an agreement to supply power to it. All these documents prove that, indeed the Plaintiff applied for power supply and the Defendants approved the application and supplied the power. Therefore the averments under paragraph 3 of the statement of defence to the effect that, at no time did the Plaintiff apply to be supplied with power nor the Defendant agreed to supply the power are untruthful and a mere denial.

19. The Plaintiff has also produced a bundle electricity bills at pages 5 to 168 of its bundle of documents. The first bill at page 5 was issued on 21st August 1998 and the last on page 167 was issued on 24th August 2011. This is further evidence that the parties were in the contractual relationship for of supply and consumption of electricity. Once again the Defendant's averment under paragraph 5 of the defence that the Plaintiff has not continually paid its bills is rebutted by the aforesaid evidence.

20. The question that arises is, whether each party performed its contractual obligation. The bill under dispute is produced at page 168 of the bundle of documents. It was issued on 28th December 2006, in the sum of Kshs 13,959,202.40. In this regard, the Defendant submitted that the Plaintiff was undercharged since May 1998, when power was installed to March 2004, when the Defendant discovered the error and informed the Plaintiff of its intention to recover the lost revenue. It denied that it was negligent in performance of its contractual obligation.

21. However, the Plaintiff argued that the Defendant is the sole supplier of electric power and regularly inspected and read the meter since installation in 1998 and yet it did not detect any defects in the level of consumption until more than 6 years after installation in March, 2004. Even then, the Defendant did nothing about the results until 3 years later in 2007. Further, that, a mismatch where the meter installed and the current transformer are not the same ratio, is not only foreseeable but also probable and could be avoided by the Defendant and its agents had they performed their work carefully. The Plaintiff argued that, this was not an act of inadvertence but an act of negligence.

22. The Plaintiff submitted that the Defendant's actions are out rightly an indication that it made a representation which the Plaintiff acted upon as a true representation to its detriment. Therefore, the Defendant is estopped from denying the facts as presented by its conduct.

23. The Plaintiff relied on the case of; Muti- vs Finance Corporation and Another (2004) EA 182 where it was held that:-

“if a man either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in that way, in the belief of such a state of facts, to the damage of he who so believes and acts, the first is estopped from denying the existence of such a state of facts. If a man so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act upon it in a particular way to his damage the first is estopped from denying the facts as were presented.”

24. However, the Defendant argued that the doctrine of estoppel cannot apply in the circumstances herein and referred to the Black's Law Dictionary which defines promissory estoppel as:-

“The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promise to rely on the promise and if the promise did actually rely on the promise to his or her detriment.”

25. Further, the promissory estoppel has also been described as having four elements or ingredients which the Plaintiff must prove in its claim if it relies on it:-

a) That there was a promise

b) That the promise was reasonably relied upon

c) That it resulted in legal detriment to the promisee

d) That justice requires enforcement of the promise

26. The Defendant submitted that in the instant case, no estoppel arose by the discovery of an error in the meter installation on the Plaintiff's premises. The Defendant also submitted that, it is not the case that anyone who suffers harm as a result of another's carelessness can sue. The tort of negligence requires more than 'heedless or careless conduct' and that the burden is on the Plaintiff to prove negligence. That on its part, the person who has suffered an injury must establish the following:-

a) *That the Defendant owed him a duty to take care to protect him from the kind of injury suffered;*

b) *That the Defendant was in breach of that duty;*

c) *That it was the defendant's breach that caused the Plaintiff's injury.*

27. Thus the duty, breach and causation must all be established in every successful claim in negligence. Even then, it is trite law that a person, who asserts, must prove the assertion. It is not for the person denying to prove (ei incumbit probatio qui dicit negat). Therefore the Plaintiff must prove negligence against the Defendant. The Defendant relied on the case of; Muthuku vs Kenya Cargo services Ltd (Civil Appeal No. 94 of 1990) [1991] KLR 464, where the court of Appeal held that, it was for the Appellant to prove upon a balance of probability, one of the forms of negligence against the Respondent.

28. The Defendant further argued that the Plaintiff has defaulted on the contract and thus cannot take advantage of its own wrong. Reliance was placed in the case of Alghussein Establishment vs Eton College (1991) 1 All ER where the court held as follows:

"The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach...."

29. That the contract is still in existence and there is no remotest suggestion of coercion, fraud or undue influence in regard to the terms of the contract, nor breach of the same occasioned by the Defendant. Therefore, the Plaintiff has failed to discharge the burden of avoiding the contract as the court of Appeal held in the case of; National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR; that;

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

30. In my considered opinion, the Defendants were under a contractual duty to supply and install the property instruments for power reading and send the Plaintiff correct bills as and when they fell due. That was not done. The Defendants have admitted that there was a problem in the meter and transformer installed. That mistake attributed purely to the Defendant and not the Plaintiff. For it to have taken the Defendant six (6) years to discover the mistake and even after discovering the mistake, it took them another three (3) years to notify the Plaintiff, is a clear indication that the Defendants were negligent. I note from the ruling delivered herein on 19th June 2007, that the Court found the Defendants in disconnecting the electricity supply to the Plaintiff's premises on 17th May 2007, did so contrary to the provisions of Section 66(1) and (2) of the Electric Power Act.

31. However, the Plaintiffs were also under a contractual duty to pay for the power supplied and consumed. The fact that the Defendants may have been negligent, does not absolve them. In this regard I find that, two principles of Equity apply herein. That "he who comes to equity must go with clean hands" and "equity looks at that done which ought to have been done". Therefore the Defendant cannot lay blame on the Plaintiff when their hands are not clean and the Plaintiff cannot escape liability for power consumed and not paid for.

32. The final issue to consider is whether the Plaintiff is entitled to the prayers sought. The first prayer is for a permanent injunction to restrain the Defendant from disconnecting the power based on the disputed bill. In the ruling referred to herein, the Court prayer allowed 5 of the application, whereby Plaintiff was granted temporary mandatory injunction on condition that the Plaintiff filed damages within three (3) days of the order and that the Plaintiff do pay the Defendant a sum of Kshs 300,000 per month on account of undisputed bills as and when the same are rendered until determination of the suit or further orders.

33. In that regard, I find that, a permanent injunction to bar the Defendant from disconnecting the supply is deserved on the basis of the facts herein. That leads me to the second prayer that the Defendants be permanently restrained from imposing on the Plaintiff the debit running from May 1998 to March 2004. I have held that the Defendant was negligent at the same time the Plaintiff is duty bound to pay for power consumed. The subject bill is of a sum of Kshs 11,813,434.05 plus additional sum of Kshs 1,905,286.40. I have looked at the Defendant's documents produced and in the letter dated 26th March 2004, they inform the Plaintiff of the discrepancy discovered in the ratio of the meter and associated current in the transformer. The letter stated that the bill for the month of March 2004, had been adjusted to reflect true consumption and that the previous bills would be revised with effect May 1998. The Plaintiff was advised to get in touch with Defendant if it had any doubt. There is no evidence the Plaintiff did that. From the Plaintiff's documents produced in Court, the first time the Plaintiff contacted the Defendant was through letter dated 29th March 2009, (which relates to payment of electricity bill) and long after the Court order. They too did not act immediately.

34. Be that as it were, the Defendant has produced a computation of bill consumption allegedly for the period of May 1998 to February 2004. However, a perusal of the same reveals the records provided are for the period from July 1998 to February 2004. Therefore the data for the months of May and June 1998 and March 2004 have not been produced. The total of the bills provided is Kshs. 13,718,720.26. This figure is also reflected in the letter to the Plaintiff dated 14th April 2005, referenced; rebilling of accounts. I note that, the figure of Kshs. 13,718,720.26 includes Kshs. 1,905,286.22 as VAT and Kshs 1,213,337.27 as fuel charges.

35. In that regard, I find that first and foremost, had the Defendant been diligent in their performance of their duty, the figure of Kshs

1,213,337.27 above would not have arisen. Therefore that figure Kshs 1,213,337.27 should be deducted from the figure of Kshs. 13,718,720.26, giving rise to a figure of Kshs. 12,505,282.99. That should be the figure in dispute. Having found that both parties are liable as indicated herein, and doing the best that I can, and in the interest of justice, I order that each party meets 50% of the said sum which translates to Kshs. 6,252,641.95.

36. Having also taken into account that, it took the Defendant six (6) years to discover the mistake and three (3) to notify the Plaintiff of the disputed bill, it is in the interest of justice that the Plaintiff be given adequate time within which to pay the said sum of money alongside their monthly bills. I therefore give the Plaintiff a period of forty eight (48) months to repay the said sum, with effect from 1st April 2009 until payment in full.

37. Finally, the Plaintiff prayed for general damages. I have considered the circumstances of this case, the evidence herein and I notice that the Plaintiff's power was disconnected on 17th May 2007. The Plaintiff had been notified of the disputed bill and the error in the ratios in the letter dated 26th March 2004. The Plaintiff's witness testified that they received the disputed electricity bill in the month of December 2006. They did not do anything until, the electricity was disconnected. The Plaintiff only filed the notice of motion seeking for orders to bar the Defendant from disconnecting their power on 21st May 2007. This is four days after the power was disconnected. The Plaintiff cannot therefore plead that they suffered loss when they had adequate knowledge about the disputed bill and did not do anything.

38. Even then, the power was disconnected for three (3) days; they are not seeking for any specific loss and/or special damages for the same. In their submissions, they say that, they were not able to mitigate the damage that occurred as a result of the disconnection which occurred, albeit due to the disputed bill that was done without prior notice. I have already found they had notice of the disputed bill. I therefore find no case evidence to grant an order for general damages for breach of contract. If anything, I find the Defendants were negligent and not liable for breach of contract.

39. Finally, if the Plaintiff fails to service the arrears, the Defendant be at liberty to proceed. Proceeding to recover it and in view of the fact that each party has partially won and lost, I order that each party meets its own costs.

40. Those then are the orders of the Court.

Dated, delivered and signed in an open court this 27th day of February 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Kemboi for the Plaintiff

Ms. Muiruri for the Defendant

DennisCourt Assistant