



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 57 OF 2010

ALLATRAZ LTD.....1ST PLAINTIFF

PLANHOTEL (K) LTD.....2ND PLAINTIFF

VERSUS

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

JUDGEMENT

1. This is a special damages claim. It is pleaded that the 1st Plaintiff, Allatraz Limited is the owner of Coconut Village Hotel and Malindi Beach Club which are tourist hotels located in Malindi. Both hotels are managed by Planhotel (K) Limited, the 1st Plaintiff's tenant.
2. It is also pleaded that at all material times and by an agreement entered between the plaintiffs and the Defendant, Kenya Power & Lighting Co. Ltd, the Defendant was the supplier and the plaintiffs the consumers of electric power supplied to the said hotels. Further, that it was an express and implied term of the agreement that the Defendant would maintain a supply of power at a consistent, regular and/or normal rate or quantity so as not to expose the plaintiffs' appliances to damage. It was alternatively pleaded that the Defendant was under a duty to maintain a regular and normal supply of power.
3. On or about 21st August, 2007 the Defendant's technicians went to the plaintiffs' premises with a view of fixing a new digital energy meter at the main distribution board situated at Coconut Village. In the process of fixing the same a short circuit occurred extensively damaging the board and harming the technicians.
4. The plaintiffs' case is that the cascading effects were that the board had to be replaced, the power supply was cut off, the hotel guests had to be moved to other hotels at the plaintiffs' expense and the plaintiffs lost considerable business and goodwill in the interim. As a consequence, the plaintiffs assert, they suffered substantial loss and damage.

5. It is the plaintiffs' case that the Defendant was wholly responsible for the damage as it was in breach of its duty of care.
6. It is the plaintiffs' case that the Defendant was negligent in that it failed to periodically check the distribution and supply of power to the plaintiffs; failing to employ competent staff; failing to adequately supervise the work of its staff; allowing the staff to embark on the assignment at dusk when visibility is affected; and failing to act with promptitude to rectify the error or failing to act at all.
7. As a result of the damage, the plaintiffs claim Kshs.14,708,898 made up of Kshs. 6,269,400 as loss of business from Malindi Beach Club, Kshs. 7,197,498 for loss of business from Coconut Village and Kshs. 1,242,000 as replacement costs for the electrical board. The plaintiffs also prayed for interest on the claimed amount at court rates from the date of filing suit until payment in full. Also prayed for are the costs of the suit.
8. Through a statement of defence dated 20th August, 2010 the Defendant made a total denial of the plaintiffs' claim only admitting the descriptive paragraphs of the plaint.
9. From the evidence adduced by the plaintiffs at the trial, and which evidence was not controverted by the defence, the story that emerges is that on 20th August, 2007 at about 5.30 p.m. the Defendant's employees went to the plaintiffs' Coconut Village hotel to install a new digital energy meter at the main electrical power distribution board. In the process there was a huge blow up resulting in disconnection of power supply to the hotel. The entire electrical board was damaged and the Defendant's employees were injured. PW1 Mwinyi Ali the plaintiffs' maintenance supervisor managed to restore power by ensuring the generator was operational.
10. PW1 told the court that he found the area in which the power distribution board was fixed in a total mess. The meter box was destroyed. Some breakers were struck and could not function any more. Some metals had also melted due to the short circuit.
11. PW3 Julius Ngala Mbindyo's evidence was that the hotel operated on a generator from 20th – 29th August, 2007 before they were forced to relocate their clients to their sister hotels after their neighbours complained of spending sleepless nights because of the noisy generator. His evidence was that 57 guests were moved from Coconut Village to Tropical Village whilst 12 guests were moved from Malindi Beach to Dream of Africa.
12. On the loss suffered by the plaintiffs, PW1 told the court that the board had to be replaced. He pointed to a warranty dated 27th August, 2007 as evidencing the cost incurred in replacing the board. PW1 also pointed to the invoices and receipts for fuel purchased for the generator as another cost incurred as a result of the incident.
13. PW4 David Spencer Russel a director with Mardee Loss Adjustment and Insurance Surveyors and a qualified chattel loss adjustor with the Chattel Institute of Loss Adjustors since 1980 told the court that he previously worked with Troplis and Harding International Limited which had been instructed by the 1st Plaintiff in 2009 to prepare a consequential loss claim following a problem with the electrical distribution board. His evidence was that the incident arose due to the alleged failure by the Defendant's employees. His testimony was that the booked guests had to be diverted to other facilities in a period of over two months as the affected hotels were unable to provide the quality of services required by the guests thus leading to loss of income over the period by the affected hotels.
14. PW4 prepared a report dated 22nd June, 2009 which he produced as an exhibit. He explained that in preparing the report, he took into

account the costs of sales and relied on documentation provided to him for the months of August, September and October, 2007. He further explained that he set out the income shortfall against the budget and then applied the respective rate of gross profit to each hotel. He concluded that the loss for Malindi Beach Club was Kshs. 6,269,400 and that for Coconut Village was Kshs. 7,197,498. He charged Kshs. 385,120 for his services.

15. The defence called a single witness, DW1 Nelson Gichu, a senior technician with the Defendant. He stated that he knew the 1st Plaintiff as a hotel which was supplied power by the Defendant. He relied upon his filed statement which in brief indicates that he visited the subject site on the material day. The power consumption at the hotel had gone up and there was need to upgrade the metering system. He went to the hotel to install a digital meter. At the site, he noted high leakage at the hotel's switch. The leakage was confirmed by one Anthony, the hotel's electrician, who was present during the installation. At the trial he stated that none of the persons in the plaintiffs' witness list dated 5th July, 2013 worked with him on the material day.

16. DW1 further stated that he was aware that the Defendant's meter reading team had visited the hotel on 21st April, 2007 and noted defects which included a dangerously exposed meter board, loose hanging wires, exposed and poorly terminated conductors and a substandard metering panel. His averment was that the Defendant notified the hotel of the said defects through a Defective Installation Notice dated 21st April, 2007. The hotel management was advised to get a qualified electrical contractor to rectify the defects and submit completion and test certificates to the Defendant for further tests and certification of the safety of the installation.

17. On the material date, DW1 noted that only the issue of the loose wires had been addressed. He therefore called the Defendant's emergency team requesting them to disconnect power supply to the hotel so that he could install the meter. After installing the meter the power was reconnected and he tested it and confirmed that it was working properly. It was then that he noted that one of the Current Transformers (CT) was not recording the power consumption. He therefore switched off the power supply, tested it and switched on the supply. It was then that the place suddenly burst into flames causing him injuries. He immediately disconnected the main breaker connecting the hotel and the Defendant's power lines. He sustained injuries and he was rushed to hospital where he was treated and discharged. He reported the incident to his supervisor.

18. DW1 stated that when he went back to the hotel two days later he found the panel where he was installing the meter completely burnt. He concluded that the fire could have been caused by a short circuit but he was unable to identify the cause of the short circuit. His attempt to produce a copy of the installation report prepared by the Defendant for the benefit of the hotel was successfully objected to by the plaintiffs' counsel.

19. In cross-examination, DW1 stated that he verbally alerted the hotel's electrician by the name Anthony of his visit and that they would shut down the meter for one hour. Having been assigned to the hotel since 1998, he had come to know the said Anthony for a while but he did not know PW1.

20. DW1 further stated that his work programme for that day was not presented to the court but the Defendant knew of his assignment. He also stated that the Defendant's team that visited the premises on 21st April, 2007 did not have a work programme. He testified that he knew of the installation inspection report as he had seen it. The witness further testified that the defects had not been rectified and that Anthony confirmed to him that the original notice of the defects had been served. It was DW1's evidence that he proceeded with the installation as the

defects were minimal and he did not make a formal report to his supervisor. DW1 further stated that the Defendant required an electrical contractor's report before the power would be reconnected after the incident. It was DW1's evidence that the fire may have been caused by a short circuit but he could not say whether the hotel or the Defendant was 100% to blame for the short circuit.

21. The advocates filed and exchanged written submissions which they entirely relied on in support of their clients' cases.

22. In order for the plaintiff to succeed in their claim, they must establish to the standard required in civil cases that the fire incident was caused as a result of negligence on the part of the Defendant's employees. They also need to provide evidence of the losses they suffered, this being a claim for special damages which must be specifically pleaded and proved.

23. For liability to be established in a claim of negligence, the plaintiff has a duty to prove that the defendant owed the plaintiff a duty of care and as a result of breach of that duty of care the plaintiff incurred loss.

24. It is undisputed that the electricity supply to the affected hotels originated from the Defendant's power lines. It is also agreed by the parties that the electrical distribution board or panel belonged to the hotels. The Defendant's assertion that the maintenance of the electrical distribution board was the onus of the plaintiffs was unrebutted. On the other hand, the Defendant's denial of the occurrence of the incident and that its employees worked on the panel on the material day was also upset when DW1 admitted that he carried out some works on the board on the material day and that there was a fire incident.

25. DW1 testified that the plaintiffs were alerted through a notice from the Defendant of some defects on their electrical distribution board. DW1 stated that on the material day he found that only one of the defects had been addressed but he nevertheless carried on with the installation of the meter as the defects were minor. PW1 and PW3 claimed that before the material day the hotels had no power issues.

26. In my considered opinion, DW1 having noted that the defects which had been brought to the attention of the plaintiffs had not been rectified ought to have abandoned the installation of the meter. It must be noted that as a technician he was expected to be skilled in the field. His level of judgement in that field ought to have surpassed a layman's opinion on the same issue. It is therefore immaterial whether the Defendant's employee by the name Anthony was present or not. DW1 carried a higher duty of responsibility at that time. DW1 was executing duties on behalf of his employer, the Defendant. The installation of the meter could only be done by the Defendant's employees. It was up to DW1 to ensure that his area of operation was safe. He assessed and concluded that the defects on the board were minor. He then went ahead with the installation.

27. On the other hand the plaintiffs had a duty to ensure that the board was in good order. The plaintiffs' witnesses were not present when DW1 carried out his work. They cannot testify as to the condition of the board. The evidence of DW1 as to the disrepair of the board was therefore unchallenged.

28. It is noted that the Defendant carried the heavier responsibility of ensuring that the work environment was secure before doing anything. Had DW1 been more careful, he may have recommended the replacement of the meter board before the meter could be installed. He did not do so. In the circumstances the Defendant will carry the higher blame and I find that it should carry 70% responsibility and the plaintiffs will shoulder 30% blame for the damage.

29. Did the plaintiffs suffer loss? It is not in question that the electrical distribution board belonging to the hotels was consumed by an

electrical fire and had to be replaced. The plaintiffs exhibited a quotation from Baumann Engineering Limited for Kshs. 1,218,000 for a control panel. On top of this Kshs. 40,000 was required for labour, transport and consumables. There is a letter dated 17th September, 2007 written to Baumann Engineering Limited by the advocates of the plaintiffs complaining of delayed delivery of the control panel despite payment of Kshs. 629,000 out of the agreed price of Kshs. 1,258,000. This confirms that the plaintiffs did in fact purchase and install the control panel. For this item the plaintiffs had claimed Kshs. 1,242,000. The plaintiffs will therefore be awarded Kshs. 1,242,000 being the amount specifically pleaded and proved as the cost for the replacement of the control panel.

30. The need for a plaintiff to prove his claim cannot be gainsaid. In **Douglas Odhiambo Apel & another v Telkom Kenya Limited, Civil Appeal No. 115 of 2006 (Nairobi)**, the Court of Appeal held that:

“Our duty as a first appellate court is to re-assess, re-evaluate and analyze the record and the evidence so as to arrive at our independent conclusions.... Having done so, we find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

The need for proof is not lessened by the fact that the claim is for special damage. Unless consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in the submissions. The law on special damages is that they must be specifically pleaded and strictly proved.”

31. It is the Defendant’s case that the evidence adduced was not sufficient to support the plaintiffs’ claim for Kshs. 13,466,898 as operational loss suffered by the two hotels. The Defendant contends that PW4 did not avail the accounts he relied on in doing his analysis. It is the Defendant’s assertion that PW4 was not even able to state the number of guests moved from the affected hotels to the plaintiffs’ other establishments.

32. As for the evidence of PW3, the Defendant submits that even though he testified that 57 guests were transferred to Tropical Village and 12 guests were transferred to Dream of Africa, the witness did not produce a list of the guests allegedly moved.

33. It was incumbent upon the plaintiffs to lay a basis for their claim. PW3 in his written statement stated that the hotel operated on a generator from 20th to 29th August, 2007 before they moved their guests to their sister hotels. 57 guests were moved from Coconut Village to Tropical Village while 12 guests were moved from Malindi Beach to Dream of Africa. His evidence was that the movement was caused by complains by neighbours over the noisy generator. He also stated that guests had also complained. When cross-examined PW3 stated that the generators operated from 20th August, 2007 to about 20th September, 2007.

34. PW1 was recalled to produce some documents. When he was cross-examined he stated that he could not recall the date the hotels were closed. Referred to a receipt for fuel dated 14th September, 2007 he stated that they bought fuel up to the time the hotel was closed. He also stated that the guests were moved the date after the incident. This contradicts the evidence of PW3 who stated that the guests were moved after a week. PW1 also stated that he could not recall the number of tourists in the hotel stating that the figures were with the reservations manager. Asked why the invoices produced bore the name of the Tropical Village, he stated that the hotels shared the same stores.

35. PW4 in his evidence in chief stated that the diversion of guests to the other hotels was for a period of over two months. He also testified that he was provided with documentation for the months of August, September and October, 2007.

36. When cross-examined PW4 stated that he had not exhibited the documents he used to prepare his report. He stated that the information he was given is that the problem was not fixed until late September or early October.

37. Looking at the evidence given by the plaintiffs’ witnesses, there is confusion as to when the hotels were closed and reopened. The report tabled in court by PW4 shows that he based his findings on income for the months of August, September and October, 2007. PW3’s

evidence was that the guests were moved from the affected hotels on 29th August, 2007. The evidence of PW4 was that the problem was solved in late September or early October. The months of August and October are therefore ruled out. The documents of PW4 therefore become unreliable. In any case, he did not attach the documents he worked on. He needed to have exhibited the list of the guests. The income of the hotels for similar periods in previous years could have provided a good guide. This information was concealed from the court.

38. It must be remembered that special damages is meant to compensate a plaintiff for a quantifiable monetary loss. It is therefore upon the plaintiff to establish the monetary loss by producing evidence.

39. The plaintiffs did indeed tender receipts and invoices showing that they purchased diesel for the generator. This claim was not specifically pleaded. It is assumed it fell under the report prepared by PW4. However, the report of PW4 is so generalised to the extent that it cannot support the plaintiffs' claim for special damages.

40. In **Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited [2016] eKLR; Civil Appeal No. 189 of 2014 (Nairobi)** the Court of Appeal dealing with facts almost similar to those prevailing in this case stated that:

“This, as we already stated elsewhere, was an abstract figure which was thrown to the court with a mere statement that “this is the loss the appellant has suffered. Please award it to the appellant.” In the case of Ryce Motors Ltd & Another vs Muchoki (1995-98) 2 E.A. 363 (CAK) commenting on statements of accounts presented without more as in this case stated, this Court observed;

“... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages.”

For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages.”

41. In my view, the evidence of PW4 was unhelpful to the plaintiffs. The amount paid to PW4 for the work he did was not pleaded.

42. In the circumstances and in view of the evidence adduced, the plaintiffs' claim fails save for the claim for Kshs. 1,242,00 for the replacement of the control panel/meter board. They will get this amount less 30% being their contributory negligence. This gives them Kshs. 869,400 together with interest from the date of this judgement until payment in full. The plaintiffs will also have the costs of the suit.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT