



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 30 OF 2013

SEASONS RESTAURANTS

& HOTELS LIMITED.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD..... DEFENDANT

JUDGMENT

1. Background and Pleadings

The plaintiff's claim against the defendant is for damages arising from destruction of its business premises being a Hotel and Restaurant trading in the name and style of Elementaita Country Lodge situated on land parcel No. **GILGIL/GILGIL BLOCK 1/2985** Gilgil District within Nakuru County.

On the fateful day the 26th February 2013, about 5.40p.m. a Kenya Power and Lighting Company transformer at the main gate to the business premises caught fire that spread to the hotel and lodges. By the time the fire was extinguished by joint effort of the hotel staff and fire extinguishers, damage to the building, the land lawns and trees together with other assets were burnt down.

2. By its plaint dated the 16th April 2013 and filed on the same day, the plaintiff faults and blames the defendant for negligence and consequential damages occasioned to its establishment.

Particulars of negligence are stated among them that the defendant failed to effectively ensure that the transformer and other related appliances were constantly maintained and repaired among others.

It is put forth a claim for Kshs.18,159,840/= arising from the fire and a further claim for special damages in the sum of Kshs.50,000/= together with a further claim for loss of business profits of Kshs.1,175,000/= per month.

The defendant denied the claim by its defence dated 24th October 2013 and attributed negligence to the plaintiff. In the alternative, it pleaded he doctrine of *volenti non fit injuria*

3. Plaintiff's Case

The plaintiff called three witnesses to urge its case.

PW1 was Julius Lietaya Deroni, who was its watchman, and at the material time and date stationed at the main gate to the hotel, in a security box.

His testimony was straight forward that he heard a loud blast from the transformer that was about 15-20 metres away on the road, that he saw fire from the transformer and on the dry grass. He called for help from the lodge manager and together with the staff tried to put out the fire before fire extinguishers came for help. His testimony, which was not shaken on cross examination was that the fire emanated from the transformer burnt some of the hotel houses, trees and the grass, and that later, the hotel houses were rebuilt to the same standard as they were prior to the fire.

4. **PW2 Daudi Kibet** was the accountant for the plaintiff's Seasons Restaurant & Hotels including the Elementaita Country Lodge and that he that he was responsible for its accounts. He testified that he visited the Lodge soon after the fire, and confirmed that (8) eight rooms and the conference hall had been destroyed by the fire.

He gave a tabulation of incomes for the period. It was his testimony that from the date of the fire, no revenue was received from the rooms and conference hall and that they were rebuilt and started operations in 2014 after a loss and adjustment report was prepared.

5. **PW3 Pius Isaiah Khahoya is a registered valuer**, and licensed to practice valuation in the name and style of Chrisca Real Estates(Annual practicing certificate for the period January – December 2013 was duly produced).

He was instructed by the plaintiff to inspect and value the burnt down buildings and trees and adjust the loss. His terms of reference were to:

(a) *give the current open market value of the buildings that were damaged by the fire.*

(b) *Loose assets that were damaged by the fire and*

(c) *Loss of income.*

His testimony was that he visited the suit premises and armed with the necessary documents, he prepared the report dated the 25th March 2013, produced as PExt 1.

On cross examination on the mode used to arrive at the loss and income, he stated that he used the records on bookings. He did not however produce the documents he alleged to have used neither bank statements nor audited accounts.

6. **Defendant's Case**

DW1 Was Timothy Muoki Maingi a technical Officer then incharge of KPLC Depot at Gilgil.

He relied on this written statement dated 10th March 2015. He confirmed the occurrence of the fire at the material date and time. He is the one who switched off the transformer and thereafter did investigations. He stated that the transformer was one year old and was not overloaded and was used well. It was his evidence that an explosion from a transformer may be caused by a fault or oil spill but that was not the case. He stated that he prepared a report on his investigations on the cause of the fire but did not produce the same to the court. He also did not tell the court results of the said investigation.

Upon the above evidence both parties by their advocates filed their written submissions.

I have considered the pleadings, evidence and the submissions including cited authorities.

7. **Analysis of evidence submissions and findings**

There is no dispute that there was fire that gutted down the plaintiff's business premises causing loss and damage. The question that comes to mind, and an issue for the courts determination is what was

the cause of the fire, and where did it originate from?

A further issue will then be whether the said fire caused damage to the plaintiffs premises and assets to the tune stated in the plaint. The issue as to whether the defendant was negligent and therefore liable in damages is of paramount importance.

8. The defendant's only witness DW1, an electrician/technician confirmed having visited the scene of the fire and switching off the burning transformer. He did not produce any document to authenticate his qualifications. He stated that he investigated the cause of the fire but failed to present the investigation report to the court.

His evidence other than confirmation of the occurrence of the fire at the defendants transformer was of no assistance to the court to unravel the cause of the fire, and to the more important issue as to which of the parties to this suit was negligent, each party having blamed the other for negligence. It was however important to state that this witness, who was not an Electrical Engineer testified that the transformer was well used, was not overloaded and its wiring was not faulty. That in itself, absorbed the plaintiff from blame for the causation of the explosion from the transformer.

No other probable source and cause of the fire was established by the defendant and none of the particulars of negligence attributed to the plaintiff by the defendant were proved. (See **Toiyoi Investment Ltd -v- Uchumi Supermarkets Ltd (2012) e KLR**.)

9. The plaintiffs PW1 evidence was not shaken. He heard a blast from the transformer and saw fire from the transformer and the surrounding grass- burning. The fire spread to the hotel rooms and burnt some of the rooms and other assets. That evidence was not shaken. The defendant did not deny that it supplied electric power to the plaintiff, nor that it installed the transformer. (See **Chapter 315 (Electric Power Act)**). I echo the holding in **Jeremiah Maina Kagama -vs- KPLC, (2001) e KLR** when **Alnasir Visram, J** (as he then was) stated at page 2 that:

“It is unfortunate that a qualified electrical nor electrical engineer was not called by the plaintiff.”

In the context of this suit, the defendant failed to produce the investigation report or engage its electrical engineers to unearth the cause of fire. No attempt was made to investigate the cause of the fire. The burden of proof on the causation of the fire lay with the Defendant.

10. **PW1** testified that when the fire broke out, he called for help which was provided by other staff members and fire extinguishers who put off the fire. I therefore do not agree with the defendant's submission that the plaintiff failed to comply with provisions of **Cap 34 Laws of Kenya**. It was not stated what else the plaintiff was expected to do put off the fire.

The defendant pleaded contributory negligence in its defence, but did not call any evidence to support its allegations. To that, the said defence remains unsubstantiated, and mere statements. It ought to have called evidence to support its allegations that the plaintiff did not comply with provisions of the **Physical Planning Act (Cap 387)**, the **Electric Lines Supply Act (Cap 315)** or any other legal provisions and by laws. See **Paragraph 14 and 15** as stated its defence.

11. In **Jeremiah Maina Kagama -vs- KPLC (2001) @ KLR, Justice Visram**, considering **Section 12 of the Electric Supply Lines Act (Cap 315)** on the suppliers statutory liability for damage held that the supplier (KPLC) was statutorily liable for damage caused by a supply line. No evidence was led to the contrary that the defendant did not supply the electric power to the transformer nor of interference by the plaintiff with the said power supply.

12. The plaintiff pleaded the doctrine of *Res Ipsa loquitor* and relied on the case **Toiyoi Investment Ltd -vs- Uchumi Supermarkets Ltd (2012) e KLR**.

In the decision, the court (M.K. Ibrahim, as he then was) upheld with approval the holding in **Bennet -vs- Chemical Construction (G.B) Ltd(1971) 3All ER 822** that:

“--- the pleadings covered the plaintiff's claim in negligence, it being unnecessary to plead res ipsa loquitor because if the accident was proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the Defendants, it was for the Defendants to, show that it could have happened without negligence.”

See also **Lloyd -vs- West Midland Gas Board (1971) 2 1240** when Megal LJ the learned Judge stated:

“Res Ipsa Loquitor is in essence no more than a common sense approach, not limited to technical rules --- It means that a plaintiff prima facie establishes negligence where:

(i) It is not possible for him to prove precisely what was the relevant act or omission which set in the train the events leading to the accident, but

(ii) on the evidence as it stands i.e in the absence of evidence from the defendant, it is more likely than not that the effective cause of the accident, whatever it may have been, was some act or omission of the defendant or of someone for whom the Defendant was responsible, which Act or omission constitutes a failure to take proper care for the plaintiff safety.”

13. In my analysis of evidence, I came to the same conclusion as stated in the cases above. The plaintiff had pleaded the said doctrine in its particulars of negligence. I do not agree with the defendant submissions therefore that the doctrine is inapplicable in the circumstances of this case. In the absence of evidence from the defendant to attempt to show the probable cause of the fire, and not blaming the plaintiff for the same or any negligence, there is no other reasonable conclusion, other than that the defendant by itself or its authorised agents was responsible by omission or commission and failure to take proper care for the transformer and therefore the plaintiffs safety of its business premises.

In my respectful opinion, the plaintiff has proved its case to the required standard, on a balance of probability. I find the defendant liable in negligence and the consequential damages arising therefrom.

14. Quantum of damages

There is no dispute that the plaintiff suffered loss and damage due to the fire that destroyed its hotel rooms, loose assets and loss of income.

It pleaded a sum of Kshs.18,159,840/=, and special damages of Kshs.50,000/=.

A loss and adjustment report of the damage was prepared and presented to the court by P.O. Khaoya, a registered and practicing valuer. Practicing as Chrisca Real Estates (PExt I).

It was his evidence that he used information and documents supplied to him to prepare the valuation report (Appendix 2). This shows a **tabulation** of the lost assets affected by the fire and their cost prices. Copies of receipts from the plaintiff for the items were not attached to the appendix.

15. He further annexed a schedule of organizations that used the Elementaita Country Lodge Soysambu Conference Hall No. 1(that was destroyed) from December 2012 to February 2013 to give an average gross income from the

Hall at Kshs.575,000/= per month. No supporting documents were attached.

Income from accommodation in the Lodges for period December 2012 to 25th February 2013 is

also annexed. It shows an average income of Kshs.600,000/= per month for the 18 Guest rooms.

I have carefully perused the report as prepared and the schedules thereto.

In his general remarks (Page 8 of report) the valuer (PW3) states:

“the value of loose assets/items lost from the building is based on inventory and their respective receipts from the owners.”

16. On Page 9 of the report stated:

“Having regard to the foregoing particulars that have a bearing on the cost of reconstructing the affected buildings and the resultant loss of business, we value the affected buildings and loose assets --- free from all encumbrances as follows:

1. Buildings - Kshs.14,178,840/=

2. Landscaping, lawns

& trees - Kshs. 300,000/=

3. Loose assets - Kshs.3,681,000/=

Total - Kshs.18,160,000/=

4. Loss of income until

construction is complete

Guest rooms - Kshs.600,000/=

Conference Hall 1 - Kshs.575,000/= per month.

17. In Appendix 1, a Breakdown of values in the reconstruction of the Lake Elementaita Lodge is stated at Kshs.18,160,060/=.

Appendix 2 itemises the lost assets in the quest rooms to the tune of Kshs.3,681,220/=.

However, and of concern is that other than listing the values for the improvements and site works to the reconstruction of the destroyed guest rooms, Conference hall and other assets, no supporting documents were annexed to the report or produced as exhibits. See Paragraph 14 and 15 above.

18. It is noted that no explanation was offered during cross examination as to why such vital documents were not availed, or even annexed to the report.

No bills of quantities were produced for the repair and reconstruction of the destroyed buildings. Indeed the plaintiff produced no evidence of the destroyed buildings, their values and or proof of construction costs or payments of the sums claimed in the plaint to the service providers.

As to the income lost from the guest rooms, again nothing was tendered to the court to prove the average income prior to the damage. Lists and schedules provided, unless supporting documents are also provided remain as such. Lists and schedules and therefore of no evidential value.

18(a).The plaintiff too failed to avail books of accounts or audited accounts for at least the year 2012. This would have given the court a glimpse as to the hotels incomes before the fire damage.

I have considered the plaintiffs submissions on this aspect. The only proof of special damage was Kshs.50,000/= being the valuers fees PExt 2 a & b. that I shall allow as duly pleaded and proved.

19. The plaintiffs claim is in the nature of special damages.

It is trite that such claim must not only be pleaded but also specifically proved (**H.C.A No. 161 of 2010 Francis Muchee Nthiga -vs- David N. Waweru (2014) e KLR, and Jeremiah Maina Kagema -vs- KPLC (2001) e KLR. (Supra) Visram (as he then was)** referring to the said case (Jeremiah Maina) in very similar circumstances stated at Page 4 of his judgment that:

“On the issue of special damages of Kshs.180,000/= for repairs to the building no receipts were produced. The loss of income of Kshs.150,000/= for 10 months in which the homes were not occupied was not pleaded nor supported by evidence.”

20. The above circumstances of the case apply in all fours to this case.

It is not enough to throw figures to the court and ask it to award the same. Proof of actual reconstruction costs and refurbishment of the newly constructed guest rooms and Conference Hall were neither provided nor proved. No evidence of actual and direct expenditure towards the reconstruction costs was tendered. The same goes for the expenditure on land scaping lawns, tress and loose assets, unlike in the case **Toiyoi Investments** (Supra) where the plaintiff's Auditor and accountants produced a summary of rental income of the damaged rental building and leases, and the quantity surveyor produced a cost consultancy and contract management to show the estimated cost of reconstruction and reinstatement costs.

These vital documents were missing in the present case. Even after the reconstruction and refurbishment of the guest rooms no proof of payments to the contractors or other bodies were produced.

The plaintiff by its witnesses failed in this regard, and has itself to blame.

21. I agree with the defence submissions that the plaintiffs claim for damages was not proved save for the special damage of Kshs.50,000/=. The rest of the claim must therefore fail.

22. Consequently the plaintiff's claim for damages against the defendant in terms of prayers (a) and (b) in the plaint dated 16th April 2013 is dismissed with costs.

A sum of Kshs.50,000/= (Prayer c) is allowed with costs and interest at court rates from the date of filing of the suit.

Dated, Signed and Delivered this 27th Day of July 2017.

J.N. MULWA

JUDGE