



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 415 OF 2013**

**THE KENYA POWER & LIGHTING CO. LTD .....APPELLANT**

**- V E R S U S -**

**HEZEKIAH NGUGI.....RESPONDENT**

***(An appeal against the judgment of Hon. S. Atambo (M/s) resident magistrate delivered on 5<sup>th</sup> July 2013 in Milimani SRMCC No. 11890 of 2004)***

**JUDGEMENT**

1) Hezekiah Ngugi, the respondent herein, filed an action against Kenya Power and Lighting Co. Ltd, the appellant herein before the Chief Magistrate's Court. In the aforesaid suit the respondent sought for *interalia*

*i. An order directing the appellant to remove electric cables running atop and across the respondent's plot no. Uhuru Estate Phase 3 House no. U33C*

*ii. Special damages for ksh.744,000/=*

*iii. Costs and interest.*

2) The appellant filed a defence to deny the respondent's claim. When the suit came up for defence hearing, the appellant and its counsel were absent from court forcing the trial court to close the defence case.

3) In its judgment delivered on 5<sup>th</sup> day of July 2013, the trial magistrate stated that prayer (i) of the plaint was overtaken by events since the appellant had removed the offending cables from the respondent's plot. The trial court however entered judgement in favour of the respondent in the sum of ksh.744,000/= as special damages. The trial magistrate stated that the particulars of special damage were pleaded in the plaint and the breakdown provided and that there was no evidence by the appellant to the contrary. The appellant was dissatisfied with the decision and was therefore prompted to file this appeal.

4) On appeal, the appellant put forward the following grounds:

***1. The learned magistrate erred in law and fact and misdirected herself by failing to consider that the plaintiff had failed to discharge his burden of proof in special damages.***

***2. THAT the learned trial magistrate erred in fact and in law in awarding special damages of kshs.744,000/= which amount was not properly proved at trial.***

**3. THAT the learned trial magistrate grossly misdirected herself as to the principles applicable in awarding special damages and thereby arrived at an erroneous finding that special damages of kshs.7444,00/= had been proved.**

**4. THAT the honourable court erred in law and fact by granting interest unprocedurally and irregularly and without due consideration.**

**5. THAT the honourable magistrate failed to appreciate that the plaintiff was not an expert witness to tender his own accounts.**

**6. THAT the honourable court erred in law and fact by finding that the respondent had demonstrated full compliance with the provisions of the Planning Act Cap 296 Laws of Kenya.**

**7. THAT the honourable magistrate erred in law and fact by ignoring the submissions adduced by the appellant.**

5) Though the appellant put forward 7 grounds of appeal, the main issue which commends itself for determination is on the question as to whether or not the trial magistrate was right to award the respondent special damages in the sum of ksh.74400/= special damages. It is the submission of the appellant that the trial magistrate erred by making the award on the basis that there was no evidence to the contrary on law and facts. It was pointed out that special damage was specifically pleaded but no evidence was tendered to establish the same on a balance of probabilities. The respondent is of the contrary view that he tendered evidence to prove special damage. He pointed out that his contractor PW2 testified to the effect that electric cables running over and across the respondent's land, hindered the respondent's construction work. The respondent further referred to the evidence of PW3 who is in the business of letting out rental premises and collecting rents for his client. According to the respondent, PW3 gave reliable estimates about the rents. PW3 tendered in evidence tenancy agreements to buttress his evidence. I have considered the rival submissions over this issue. It is clear from the judgment that the trial magistrate appreciated the fact that special damages must be specifically pleaded and proved.

6) The record shows that the respondent presented the evidence of three witnesses. The appellant's advocate had the advantage of cross-examining the respondent's witnesses. It is not in dispute that the claim for ksh.744,000/= was specifically pleaded. The question which remains to be answered is whether or not there was sufficient evidence which proved the claim. The relevant witness who was summoned to testify over this issue is one John Mwaura Ndungu (PW3). This witness is a person who was in the business of letting out rental premises and collecting rent for many years. The record shows he produced tenancy agreements over the property. The appellant did not summon witnesses to controvert or contradict the evidence of PW3. On a balance of probabilities, I find that the respondent discharged the burden of proof. Consequently the decision to award special damages as prayed cannot be interfered with.

7) In the end, I find no merit in the appeal. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 22<sup>nd</sup> day of September, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent