



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE 119 OF 2007

MUNICIPAL COUNCIL OF KISUMU.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

J U D G M E N T

By its plaint dated 11.9.2007 the plaintiff prays for the following reliefs:

(a) Kshs.48,781,000.

(b) Interest at court rates on (a) from the date the various sums making up the said figure fell due for payment with settlement in full.

(c) In the alternative and without prejudice to (b) interest on (a) at court rate from 25th October, 2006 with settlement in full.

(d) Costs and interest on (d) from the date of judgment until settlement in full.

The defendant on its part did file a statement of defence which categorically denied the said indebtedness and even went further thereafter to issue preliminary objection on point of law before the hearing of the main suit. The plaintiff testified and closed its case.

When this matter came up for hearing the defendants were absent despite the date having been taken by consent. The defence case was then closed for that reason. The plaintiff called one witness one STEPHEN SULE who testified that he was a Planning Assistant and has been under the employment of the plaintiff for a long time. He said that in the cause of time the plaintiff by then a Municipal Council but has since been elevated to a city status petitioned the Central Government to approve new rates. This was done after its various committees had approved the same. The Ministry of Local Government then approved and the new rates were then gazetted which included wayleaves charges payable by various bodies including the defendant. These wayleaves were for underground cables and electric poles within its jurisdiction. The witness did produce gazette notices No.3332 and 3333 to buttress the claim. The approvals were Kshs.200 on electric pole and Kshs.100 per metre on electric cable.

The plaintiff did communicate these new charges to the defendant who went ahead to request for an invoice over the same. The witness did produce an invoice dated 26.10.2006 for the sum of Kshs.48,781,000 as exhibit P5(a) and (b).

When cross-examined the witness said that the notice was for the notice for reviewing of the charges and fees from Kshs.100 for poles and Kshs.20 for cables. He said that the invoices were for both

electric poles and underground cables. He said that he did not know the number of the meters. He said that any claim for overhead cable is illegal. He said that the plaintiff collects levies approved by the Minister of Local Government.

On re-examination he said that the invoices was not disputed by the defendant. He said that the period they were asking was for 5 years only and that the levies were paid annually.

As earlier indicated there was no evidence offered by the defence despite filing its defence. The plaintiff has equally filed lengthy submissions in support of its claim which I have had the chance of perusing.

ANALYSIS AND DETERMINATION

First of all the gazette notice by the plaintiff was well within the law as provided by the Local government Act. There was need to obtain consent from the Minister before levying any fees. Significantly the same was for purposes of attracting any objection by the public and for that matter the defendant. The letter dated 8.5.2007 from the Permanent Secretary Ministry of Local Government is instructive. The same proposed to approve the way leave as follows:

- i. Electricity per year per pole from Kshs.200 to 300;**
- ii. Underground cables per metre from Kshs.20 to Kshs.20;**

What was approved however was from Kshs.100 to 200 and Kshs.20 to Kshs.40 per electric pole per year and underground cable per metre respectively.

The gazette notice No.3333 clearly spells out and asks all and sundry to peruse the same during working hours from Monday to Friday.

On 26.10.2006 the plaintiff wrote to the defendant demanding the same but there was no response. Equally on 12.3.2007 the plaintiff's counsels wrote to the defendant asking for the sum of Kshs.48,781,000 to no avail. This refusal I believe is what led to the filing of the suit.

Despite not calling any witness its worth perusing the defendant's defence as it forms a strong pleading on record. It appears that the main argument by the defendant was that what the plaintiff was demanding was contrary to Section 63 of the Electric Power Act 1997 now Section 41 of the Energy Act 2006 which terminated the Electricity Regulatory Board which dealt with the question of charges on wayleaves and poles. The said defence further argued that the plaintiff failed to particularize the exact number and location of poles, period and length and location of the cables etc. All these were mere statements in its defence but no witness was called to rebutt.

Nor did the defendant rebutt the fact that it was not satisfied with the approvals by the Minister of Local Government nor the details contained in the gazette notice. Equally the defendant does not deny the fact that they did not receive the invoice for the decretal sum.

Consequently in light of the facts as adduced by the plaintiff I am satisfied that the plaintiff acted within its legal mandate of levying fees. The proposal to the Minister was a requirement under the law. The gazette notice was for the consumption of the public including the defendant. I note also that apart from the way leaves there were other levies which were to be charged by the plaintiff mentioned in the said gazette notice for example exercising mobile and street advertisement etc.

By failing to object to the same the defendant in my opinion cannot cry foul several years later. The levying of fees was a statutory obligation by the plaintiff just as the defendant does in its ordinary cause of business.

Perhaps and in conclusion the defendant would have shed light if it had rebutted the plaintiff's evidence. For now the same is uncontroverted. Consequently judgment is hereby entered for and against

the defendant as follows:

(a) The defendants shall pay to the plaintiff the sum of Kshs.48,781,000 together with interest from the date of filing of this suit;

(b) The plaintiff shall have the cost of this suit.

Orders accordingly.

Dated, signed and delivered this 26th day of May 2016.

H. K. CHEMITEI

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