



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 1 OF 2004

ASIS HOTEL APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LTD RESPONDENT

*(Being an Appeal from the Judgment and Decree of Honourable Solomon Wamayi Chief Magistrate,
in Eldoret CMCC No. 488 of 2001 dated 5.11. 2003)*

JUDGMENT

1. The appellant *Asis Hotel Ltd* (the hotel) was the plaintiff in the suit filed in the lower court being Eldoret SPMCC No. 488 of 2001. In a plaint dated 10th April 2001, the hotel sued the respondent seeking the following reliefs;

- a. An order of account giving a breakdown of the hotel's electricity consumption from January, 2001 to the date of filing suit and the amount payable for the units consumed.
- b. A permanent injunction restraining the respondent from disconnecting the appellant's electricity supply provided payment was made for power justly consumed.
- c. Costs of the suit and interest.

2. It was the appellant's case that from January 2001, the respondent started increasing its electricity bills by abnormal figures; that the respondent refused to give the hotel an account of its actual electricity consumption and proceeded to unlawfully disconnect its power supply.

3. In rejoinder, the respondent filed a statement of defence dated 19th April, 2011 in which it denied the appellant's claim. It was the respondent's case that the appellant had knowingly and fraudulently tampered with the electricity metres installed in its premises thus preventing them from registering the value of the electrical power supplied to the appellant; that the appellant had failed to pay an outstanding bill of Kshs. 777,307.80 as of 14th March, 2001 and that the respondent was therefore entitled to disconnect its power supply. The respondent further claimed that the trial court lacked jurisdiction to hear and determine the suit in view of the provisions of the Electric Power Act.

4. After a full trial, the learned trial magistrate delivered his judgment on 23rd December, 2003 and made a finding that the appellant had failed to prove its claim against the respondent to the required standard. He therefore dismissed the appellant's suit with costs.

5. The appellant was aggrieved by the trial court's decision. It filed the instant appeal through the

memorandum of appeal dated 2nd January, 2004. The appeal is premised on the following grounds;-

i. That the learned magistrate erred both in law and fact in finding that the Appellant had failed to tender adequate material and/or evidence to warrant relief of account as prayed.

ii. That the learned magistrate erred both in law and fact in finding that the alleged execution of the liability forms amounted to an admission by the appellant of the Respondent's demand.

iii. That the learned magistrate erred in law and in fact in finding that on the basis of the evidence by the Respondent, the Appellant had tampered with the electricity meter installed at its premises.

iv. That the learned magistrate erred both in law and fact in finding that the respondent had duly rendered sufficient account to the appellant.

v. That the learned magistrate erred in law in denying the appellant the prayer for account.

vi. That the learned magistrate erred in law and fact in failing to find that the method used to establish the tempering fell outside the laid down standards of installing check meters.

vii. That the learned magistrate erred in law and fact in finding that the costs be borne by the appellant.

6. The parties agreed that the appeal be prosecuted by way of written submissions. The appellant filed its submissions through its advocates

Ms. *Mwinamo Lugonzo & Company Advocates* on 4th December, 2015 while those of the respondent were filed on 11th April, 2016 by Ms. *Nyaundi Tuiyott & Company Advocates*.

7. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. As the first appellate court, I am enjoined to re-evaluate and reconsider the evidence presented before the lower court to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of hearing and seeing the witnesses and give due allowance to that disadvantage – See ***Williamson Diamonds Ltd V Brown (1970) EA I; Selle & Another V Associated Motor Boat Company Ltd & others (1968) EA 123.***

8. I wish to start by stating that it is settled law that an appellate court should be slow to interfere with findings of fact made by a trial court. There are many judicial pronouncements that elucidate the circumstances in which an appellate court can interfere or reverse the findings made by the lower court. An appellate court should not interfere with findings of fact by the trial court unless they are based on no evidence or on a misapprehension of the evidence or they are based on wrong legal principles – See ***Sumaria & Another Vs Allied Industrial Limited (2007) s KLR 1; Makube V Nyamoru (1983) KLR 403; Mwanasokoni V Kenya Bus Services Ltd (1985) KLR 931.***

9. In ***Kiruga V Kiruga & Another (1988) KLR 348***, the Court of Appeal held inter alia as follows;

“... An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed.....”

These are the principles that will guide me in the determination of this appeal.

10. I have considered the grounds of appeal, the evidence on record and the judgment of the learned trial magistrate. I have also considered the written submissions filed by the parties and the authorities cited by the respondent.

11. Before turning to the evidence adduced by the parties during the trial, I wish to point out that though the respondent in its defence challenged the trial court's jurisdiction to entertain the suit and followed up the issue by filing a notice of preliminary objection dated 13th June, 2001, it appears to have abandoned the said objection since it did not prosecute the preliminary objection or raise any issue related to jurisdiction throughout the trial. The issue of jurisdiction was similarly not raised by any of the parties in the appeal. It is therefore an issue that I will not concern myself with in this appeal.

12. Having said that, I now turn to the evidence that was presented to the trial court. The record shows that the appellant called only one witness in support of its case. This was *Hassan Koskei*, one of its directors. He testified that the hotel had five electricity accounts and five metres for registering its electricity consumption. He produced electricity bills charged on the five accounts in the month of March, 2001 as exhibit 1, 2, 3, 4, and 5. According to PW1, the hotel had complained to the respondent that it was being overcharged for its electricity consumption as the electricity bills contained different amounts referred to as "debit after re-billing"; that every time there was a complaint, the respondent reduced the amount billed to less amounts which the appellant promptly paid. But the dispute regarding the amount shown as debit after re-billing remained unresolved until the hotel's electricity supply was disconnected. PW1 denied that the hotel had tampered with electricity metres as alleged by the respondent.

13. On its part the respondent called two witnesses. DW1 *Peter Mwasia Mulee* testified that he was employed by the respondent as the officer in charge of security in the Eldoret region; that when the dispute regarding the billing of the appellant's hotel arose, in the course of his investigations, he recorded a statement from *Hassan Koskei* (PW1) in which he admitted to having allowed one *Gatheru* a technician employed by the respondent to tamper with the hotel's electricity metres to reduce the electricity consumption registered by the metres. He produced the statement as Exhibit 1. He also checked the metres and confirmed that they had been tampered with; that he explained to PW1 the consequences of tampering with electricity consumption and he signed a liability form accepting to be rebilled.

14. DW2 *Samson K. Akuto*, the respondent's assistant service engineer testified that he inspected the appellant's premises three times and on each occasion he found that the initial metres and check metres subsequently installed to monitor proper electricity consumption had been tampered with. On each occasion, PW1 and his employees completed and signed liability forms which were produced as Exhibit D17 (a-b). DW2 recalled that check metres were installed against the tampered metres to monitor consumption and establish whether the respondents had lost any revenue.

15. After the monitoring exercise was completed, the appellant was rebilled for the consumption that was not registered and valued during the period the metres had been tampered with. The method used for rebilling was explained to the appellant in letter dated 7th February, 2011 – Exhibit D20. According to DW2, PW1 responded to the letter vide his letter dated 2nd April, 2001 in which he acknowledged the amount billed in the five electricity accounts without contest and proposed to liquidate the debt by monthly instalments of Kshs. 150,000 on the 29th day of each month – See Exhibit 28. He paid Kshs. 169,999 on the same date. He however defaulted in the payment of the other instalments and that is why the hotel's electricity supply was disconnected.

16. After analysing all the evidence adduced by both parties, the learned trial magistrate held that the appellant had failed to adduce evidence to rebut the allegations of metre tampering and fraud leveled against it by the respondent and that after check metres were installed and lost revenue established, the respondent had through Exhibit 20 given the appellant a full and detailed account of how the amount in dispute had been arrived at.

17. In dismissing the appellant's claim, the learned trial magistrate stated as follows:-

“I do therefore hold that the defendant was justified to install check metres and rebill the plaintiff as it did. I also find that even without the plaintiff having written to the defendant to seen for rendering of an account, the defendant had vide exhibit D20 rendered a full and comprehensive account to the plaintiff as to how the rebilling was arrived at. The plaintiff has sought for equitable remedies. He who comes to equity must do so with clean hands. I do hold that the fact of the plaintiff having tempered with the electric supply meters herein disentitles the plaintiff of such equitable remedies and I find that the plaintiff has not proved his case on a balance of probabilities and the plaintiff case is dismissed with costs...”

18. Given the evidence on record, i am unable to fault the learned trial magistrate for the above finding. PW1 who was the only witness called by the appellant admitted to having authored letter dated 2nd April, 2001 in which he admitted that the appellant was indebted to the respondent for the electrical power supplied and consumed by the hotel but which was not recorded and paid for owing to metre tempering. This was electricity supplied through account numbers 714162, 714163, 714164, 714165 and 714166 through metre numbers 9449107, 9445919, 9463231, 9463228 and 9449677.

19. A reading of Dexbt 20 shows that the respondent comprehensively explained how the amount rebilled in respect of each of the five electricity accounts was calculated. The appellant through its director (PW1) in response to the tabulations in Dexhbt 20 agreed to liquidate the amount rebilled in equal instalments of Kshs. 150,000 and immediately paid Kshs. 169,995 as a show of commitment to honour his promise of liquidating the entire debt. He did not refute the respondent’s claim that the appellant had manipulated the recording of its power consumption by tempering with electricity metres. His claim in his evidence that he wrote and signed the letter under duress since he wrote it when in Civil jail was not substantiated by any evidence.

20. Though Dexhbt 20 only showed the units of electricity consumed in the appellant’s premises delineating those that had been registered and paid for and those that had not been paid for without indicating their monetary value, I find that failure to indicate the monetary equivalent of the units consumed but unaccounted for did not entitle the appellant to the remedy of account. I say so because the units’ monetary value was clearly stated in the electricity bills addressed to the appellant produced as DEXbt 21-25. The bills clearly indicated the amount charged for the consumed units which had not been accounted for. They were the amounts charged as “debit after rebilling” and they are the same amounts that the appellant through one of its directors (PW1) had pledged to pay in monthly instalments.

21. For all the foregoing reasons, I have come to the same conclusion as did the learned trial magistrate that the appellant totally failed to establish on a balance of probabilities that it was deserving of any of the reliefs sought in its plaint dated 10th April, 2001. In the result, I find that this appeal is not merited. It is accordingly dismissed with costs.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of July, 2016

In the presence of:

Mr. Odhiambo for the Respondent

Miss Biwott holding brief for Mr. Mwinamo for the appellant

Naomi Chonde – Court clerk