



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 502 OF 2011**

*(Arising from the Judgment and decree of Hon. W. Mokaya Ms. in NAIROBI CMCC 414 of 2007 delivered on 12<sup>th</sup> November, 2011.)*

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

**VERSUS**

**MUHIA MUTEGA.....RESPONDENT**

**JUDGMENT**

1. The appeal herein arises from the Judgment and decree of Hon. W. Mokaya Ms. in NAIROBI CMCC 414 of 2007 delivered on 12<sup>th</sup> November, 2011. The Respondent herein was the plaintiff. He sued the defendant for recovery of Kshs.700, 000 with interest from 16<sup>th</sup> January 2006 at court rates till payment in full and costs of the suit.

2. The Plaintiff's/Respondent's main complaint was that he entered into a contract for supply of electricity with the appellant/defendant under Account No. 157273081 Single phase to premises on Plot No. 238 at Kariobangi Light Industries.

3. In 1999, the Respondent had applied for a 3 phase electricity supply to his premises aforesaid and the appellant installed vide meter No. 990301. However, without the Respondent's authorization or knowledge, the appellant opened an electricity consumption account No. 208834 for an entity known as Genmer Agencies Limited at the plaintiff's said premises under the said plaintiff's meter, who consumed electricity thereon leaving an outstanding electricity bill of Kshs.145,594.22/155,517.67 which sum the said entity failed to pay. The Respondent contended that the said Genmer Agencies Limited was not a tenant of the Respondent and neither had the respondent authorized any supply of electricity power to the said entity in the Respondent's premises.

4. The appellant is then alleged to have demanded that the Respondent settles that electricity bill and upon refusal, the appellant disconnected power supply to the Respondent's premises on 18<sup>th</sup> May 2004 until 16<sup>th</sup> January 2006 when it was ordered by the court to reconnect it. The Respondent therefore claimed for loss of rental income in his premises at Shs.35, 000 p.m. for 20 months all totaling Kshs.700, 000/- since he could not get a tenant for the period the premises had the power disconnected. The appellant never called any witness or evidence.

Vide a Judgment delivered on 12<sup>th</sup> September, 2011 Hon. W. Mokaya (Ms) allowed the Respondent's claim with costs and interest. It is that judgment that provoked this appeal.

5. The memorandum of appeal dated 5<sup>th</sup> October 2011 sets out 5 grounds of appeal namely:

1. *The trial magistrate erred in law and fact in holding the appellant liable for failure to supply electricity to the Respondent whereas there was no legal obligation to and there in fact was no existing contract for supply of electricity to the Respondent.*
2. *That the learned magistrate misapprehended the evidence presented and in failing to appreciate that the Respondent as the landlord had leased out the entire premises (Plot No. 238- Kariobangi) and with the Respondent's consent the tenant thereon held an independent contract for supply of electricity and there could therefore be no concurrent contract with the Respondent for the supply of electricity to the same premises.*
3. *The trial magistrate erred in law in entering judgment on a claim entirely based on contract without any evidence of proof of the terms or existence or terms of the material contract.*
4. *The trial magistrate erred in law in the assessment and award of Kshs.700, 000/- to the Respondents.*
5. *The learned magistrate erred in law in the award of interest and costs to the respondent.*

The appellant prayed that this court do allow this appeal and set aside the judgment of 12<sup>th</sup> September 2011; order for re-trial before another magistrate or consider the evidence on record and submission by counsel and proceed and determine the suit finally.

6. The appeal herein was admitted to hearing on 20<sup>th</sup> May 2014 and directions given on 21<sup>st</sup> July 2014.

7. The parties' advocates canvassed the appeal by filing written submissions as agreed between them. In their submissions filed in court on 5<sup>th</sup> August 2014, the appellants submitted that the Respondent had no cause of action against it as it had no contractual obligation or relationship with the respondent for the supply of electricity during the period 18<sup>th</sup> May 2004 – 16<sup>th</sup> January 2006. In the view of the appellant, during that period, the Respondents' premises were under a contract for supply of electricity to account No. 2088334-01 entered into between the Respondent's tenant one Gerald Munene Mugo who opened the account in the names of Genmer Agencies Limited hence the Respondent was not privy to that contract for supply of electricity and therefore had no *locus standi* to institute suit.

8. The appellant maintained that therefore when that account fell in arrears, the appellant lawfully exercised its right to disconnect supply of electricity vide the account which was in arrears. Reliance was placed on the Court of Appeal decision in **Kenya National Capital Corporation Ltd. V. Albert Maina Codeiro & another [2014] e KLR** citing **Agriculture Finance Corporation V. Lengetia Limited [1985] KLR** that:

***“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. There existed no direct contract between the first respondent and the appellant, and so the first respondent had no cause of action against the appellant.”***

9. On ground 2, the appellant submitted that the moment the respondent rented out premises to Gerald Munene Mugo who opened his own contract for supply of electricity to the same premises, no two contracts could exist over the same premises vide the same meter therefore the first or original account lapsed automatically and there existed no obligation on the part of the appellant to supply power to the original account. Further, that when the Respondent applied for a separate account, then electricity was connected and the tenant's account lapsed although it was in arrears. They also submitted that they could not supply/connect electricity to an account that was in arrears.

10. On ground 3, it was submitted that since the claim was based on a contract, the court should have satisfied itself, among others, that there indeed existed a contract between the parties at the material time and the terms thereof before determining whether there was breach of any term thereof. In other words, that there was no offer or acceptance as per the extract cited from **Cheshire, Fifoot and Formstonss, the law of contract (14<sup>th</sup> edition) Pages 34, 35** by the Court of Appeal in **Kenya National Corporation Limited (supra)**. In their view, for the period of electricity supply to the premises there was no privity of

contract between the parties.

11. Grounds 4 and 5 were argued together to the effect that there was no justification in awarding Kshs.700, 000/- and costs and interest to the Respondent since no contractual relationship existed between the parties. The Respondent opposed the appeal herein and filed his submissions on 27<sup>th</sup> August 2014 urging this court to uphold the judgment and decree of the subordinate court and dismiss this appeal with costs.

12. On ground No. 2 the Respondent submitted that he had a contract of supply under A/C 157273081 with the Respondent for single phase power supply to his premises and later applied for enhancement to three phase supply which fact was according to the Respondent, admitted in the defence, and therefore it did not require adduction of any evidence on it as espoused in Section 61 of the Evidence Act. In addition, the Respondent maintained that the account for which there was arrears thus a/c No. 208834 was not between him and his tenant Gerald Munene Mugo but with Genmer Agencies Limited which was a stranger to him.

13. It was further submitted on ground No. 2, that the Respondent was a stranger to Genmer Agencies Limited as he never signed a tenancy agreement with it. That he only signed a tenancy agreement with Gerald Munene Mugo hence he never consented to an independent contract for supply of electricity to the said defaulter Genmer Agencies Limited leading to the power disconnection. On ground 3, the Respondent submitted that there was no evidence of the account opened by him with the appellant lapsing and what was submitted was from the bar, not evidence.

14. On grounds 4 and 5, the Respondent submitted that as there was no relationship of a contractual nature between the parties hereto, the default was not by the Respondent in settling electricity arrears bill hence the trial court did not err in making the award.

15. The Respondent prayed for dismissal of the appeal with costs.

16. This being the first appeal, this court is by the provisions of Section 78 of the Civil procedure Act bound to reanalyze, reassess and reevaluate afresh the extracts of evidence on record in the trial court and come to my own independent findings and conclusions, taking into account the fact that I neither saw nor heard the witnesses as they testified, thereby giving due allowance in that respect, as was espoused in the cases of **Sielle vs Associated Motor Boat Company (1968) EA 123**, **Williamson Diamonds Ltd Vs Brown (1977) EA 1** and **Arrow Car Ltd vs Bimowo & 2 Others (2204) KLR 101**.

17. This court is also obliged to rely on the evidence on record and not introduce extraneous matters not dealt with by the parties in the evidence as was espoused in the case of **KPA V. Kuston (Kenya) Limited (2009) 2 EA 212** and **PETERS V. The Sunday Post Ltd (1958) EA 424** that;

*“.....whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the Appellate court will not hesitate so to decide.....”* See also **Mkube V. Nyamuro (1983) KLR 403-415 P. 403** where the court of appeal stated that:

*“a court of appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence, or a Judge is shown to have demonstrably acted on wrong principles in reaching his conclusion.”*

18. It must therefore be borne in mind that this court is not bound to follow the trial court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

19. Applying the above principles/law to this case, the evidence in the court below shows that the

Respondent testified as PW1 on oath and stated that he was the legal/registered owner of Plot 238 Kariobangi. He produced a Title Deed to that effect. That he had developed his plot for light industrial work and had a tenant Gerald Munene Mugo who rented it from April 1999. He produced a tenancy agreement and receipts of payment for advertisement for a new tenant.

20. The said tenant left in May 2004 and send him (Respondent) a letter after he had left. When the Respondent took the keys and went to inspect the house, he found electricity disconnected at the Meter box and on inquiry from the appellant, he was advised that there was an outstanding bill of Kshs.145, 594/02. This was in December, 2004. He checked and realized that the person who had consumed the electricity was a stranger to the respondent as it was a company. He therefore demanded that the appellant reconnects power in December 2004 but the appellant refused and so the respondent sued the appellant vide CMCC 5824/05 which suit was compromised. Power was reconnected to the said premises on 16<sup>th</sup> January 2006, from 18<sup>th</sup> May 2004. During all that time, the respondent never got a tenant due to power disconnection even after he advertised in the newspapers. He therefore sued for loss of rental income of Kshs.35, 000/- per month which Gerald Munene Mugo used to pay.

21. In cross-examination PW1 answered that KPLC disconnected power because of the outstanding bill and that he tried to apply for a new account immediately but the appellant refused and reconnection was only done following a court order.

22. The respondent denied signing any transfer of account. He also stated that if one was opening a different account, a letter from the landlord was not required and that he did not know how Genmer opened the account and how the power was disconnected. That wrote a demand Notice to the appellant herein in December 2004 and the premises were vacant for 20 months.

23. The appellant did not tender any evidence in defence.

24. The trial magistrate relying on **HCC 261/2001 Alsafran Health Care Limited Vs. Kam Pharmacy Limited** held that the respondent was not privy to the contract of supply of electricity between the appellant and Genmer Agencies Limited hence he was not responsible for settling the bill. She also found the defence on record as being a mere denial of the plaintiff's claim and allowed the respondent's claim with costs and interest.

25. I have carefully considered the pleadings in the lower court, the evidence adduced by the respondent both orally and documentary, the submissions in the lower court and before this Court, together with the law relied on and the decision by the trial court. The parties advocates filed written submissions and authorities which I have carefully considered as above.

26. In my humble view, the main issue for determination is whether on a balance of probabilities, the respondent was entitled to the prayers sought in the plaint.

27. The plaintiff claimed for Kshs.700, 000/- being loss of rental income suffered by him when the defendant/appellant refused to connect power to his premises for a period of 20 months. He claimed that he did not incur that bill and neither did he enter into any contract with the 'person' who incurred the bill and neither did he authorize the appellant to supply power to Genmer Agencies. The defendant/appellant denied the claim. It denied demanding that the Respondent settles the outstanding bill. It contended that it was the Respondent's tenant who incurred the bill through the company name of Genmer Agencies Limited using Meter No. 990301 situated on the premises under supply contract No. 2088334-01 and that the Respondent knew of the relationship between the tenant and Genmer Agencies Limited and also knew that electricity supply to the premises was continued under a new supply contract 2088334-01 for the exclusive benefit of the tenant.

28. Further, it was contended that as there was no supply of electricity contract between the Respondent and appellant, the appellant did not demand for settlement of any bill by the Respondent and that reconnection in his favour could only be done on a new supply contract and not on the tenant's contract. The appellant, besides the defence, cross-examination of Respondent and the submissions filed on record,

did not call any witness and neither did it adduce any evidence to support the contentions and averments in its defence.

29. From the onset, it must be borne in mind that the burden of proof lies on he who alleges through the trial. In this case, the burden of proving that the appellant was under a duty to supply electricity to the premises after the disconnection therefore lay on the Respondent to prove on a balance of probabilities, See **Kirugi & Another V. Kabiya & 3 others [1987] KLR 347**. Such burden was not lessened even if the case proceeded by way of formal proof.

30. The Respondent in the court below and in his submissions before this court claimed that the appellant, without the respondent's knowledge and or authorization opened an electricity consumption A/C No. 208834 for an entity known as Genmer Agencies Limited at the Respondent's premises and meter, who consumed electricity thereon leaving an outstanding bill of Kshs.145,594.22 or 155,517.67 which sum the said entity failed to pay. The question is, did the Respondent prove the above allegation by way of evidence in court?

31. The Respondent stated on oath that he was the proprietor of the premises developed plot for light industrial work. That he had one Gerald Munene Mugo who rented it from April 1999 to May 2004 when he vacated and handed over the keys to the respondent's advocate and on the Respondent inspecting the premises he found electricity disconnected. On inquiry he was informed by the appellant that there was an outstanding bill. He discovered that the bill was incurred by a stranger; Genmer Agencies Limited not Gerald Munene Mugo. By his exhibit P.Exh.1, the tenancy agreement, it was clear from clause 5 (b) that the tenant was not to assign or sublet the demised premises without consent (c)The account for all main services was to be in the name of the tenant and (f)the electricity was to be paid by the tenant when due and payable. The Respondent's own letter of 15<sup>th</sup> December, 2004 Pexh.4 was also clear that the purpose of the upgrade of the account sought by the Respondent from single phase to three phase was to enable the new tenant Gerald Munene Mugo to operate his bakery business at the premises. It is not in dispute that the original letter and account which was for single phase was in the names of the Respondent. It is also not in dispute that it is the Respondent who sought to upgrade the account to three phase to enable the new tenant Gerald Munene Mugo operate a bakery business which was a light industry.

32. There is nothing in that agreement for tenancy to show that the new tenant was barred from operating that bakery business in any other name other than his own name (person). Clause (c) of the tenancy agreement bound the tenant to ensure account for all main services was to be in the name of the tenant.

33. It was therefore the duty of the respondent to ensure that the tenant was not in breach of the terms of that tenancy agreement. Yet from the available evidence, no doubt, the tenant operated electricity account in the name of the Company Genmer Agencies and when he vacated the premeises at the expiry of the tenancy, he left an outstanding electricity bill.

34. This court does not find any evidence that the respondent cautioned the appellant not to supply electricity to the premises using any other account and in any other name other than the respondent or the tenant Gerald Munene Mugo. There is also no evidence that the tenant required any other express authorization from the Landlord/Respondent to register the new account, and this fact is confirmed by the respondent in his evidence that there was no such requirement. The Respondent admitted in cross-examination that if one was opening a different account, a letter from the Landlord was not required.

35. Albeit the Respondent denied knowing Genmer Agencies Limited and how they opened the account and operated it thereby incurring the electricity bill, there is no evidence that for the five year tenancy period that Gerald Munene Mugo had contracted with the Respondent as tenant, he defaulted in rent payment or that he vacated the demised premises and left it in the hands of a stranger. The Respondent himself confirmed that at the end of the 5 year tenancy term, the tenant send him a letter, informing him to collect the keys from the advocates' offices and indeed, the Respondent did find the keys. What baffles this court is why did the Respondent not inquire from Gerald Munene Mugo about who Genmer Agencies Limited were, upon discovery of the outstanding electricity bill in the name of a stranger who had incurred the electricity bill. In my view, that piece of evidence was necessary since the tenancy

agreement at clause 59c) was clear that the main accounts had to be operated in the name of the tenant and here was a case where the tenant appeared to have breached that term of the tenancy agreement.

36. The Respondent upon finding that there was an outstanding electricity bill, which in any event, he expected the account to be in the tenant's name, it was only prudent that he first asks the tenant to explain to him who the account holder was and their nexus and or how the said electricity bill was incurred. There is no indication that the Respondent even made such inquiries. He simply demanded that the appellant reconnects the electricity to the premises without conditions since he did not know Genmer Agencies Limited. This court does not buy into that kind of loom and thinking by the Respondent. I say so because there was no evidence that the appellant in this case required the consent or authority of the Respondent, or notification before connecting power to a different account name from that of the tenant.

37. There was also no evidence that the appellant was or acted in breach of any contractual term of any agreement between it and the appellant as there was no such agreement produced in court between it and the Respondent, in failing to reconnect the electricity due to the unpaid bill and or for connecting electricity to an account name that was not authorized by the Respondent.

38. In this court's view, if Genmer Agencies Limited was a stranger to the Respondent then it was incumbent upon the respondent to call Gerald Munene Mugo to confirm that he (the tenant) did not incur any electricity bill to that amount being claimed by the appellant and that the appellant supplied power to a stranger. The failure by the respondent to call Gerald Munene Mugo as a witness, in my view was an indication that the Respondent knew or had reason to know and believe that it was his tenant who operated the account and bakery business in that name of Genmer Agencies. Albeit the Respondent wanted the court to believe that Genmer Agencies Limited was a Limited Liability Company very different from the tenant, he did not lay out any search from the Registrar of Companies to establish if indeed it was a Limited Liability Company. In addition he did not avail a search certificate from the Registrar of Companies to show who the directors of that company were, to rule out the possibility of the tenant being the Director thereof. Limited Liability Companies are by law artificial persons yes, but behind that veil of incorporation are natural persons and it would not have been difficult to bring to the fore that fact.

39. Then there was this allegation that the Respondent repeatedly requested the appellant for reconnection of power since he was not responsible for the bill to no avail, necessitating a suit which was later compromised and a new account opened in his name before reconnection was made. There is no single letter produced in evidence to show that from May 2004 when the tenant vacated the premises, the respondent demanded for reconnection of electricity. There was also no evidence that the appellant demanded that the respondent do clear the bill by himself before reconnection could be done. The demand notice was only written on 15<sup>th</sup> December, 2004 about seven months after the tenant had vacated the premises.

40. On the lawfulness of the disconnection of the electricity supply to premises where there are outstanding bills/arrears, I find that Section 64 of the former electrical power Act, 1997 (repealed) useful. The Section provides:

***“The Licencee may refuse to supply electrical Energy to any local authority, company, person or body to persons whose payments for the supply of electrical energy are for the time being in arrears (not reasonably being the subject of dispute)”***

41. In this case, there was no dispute that the Respondent's premises were occupied by a lawful tenant – Gerald Munene Mugo who faithfully paid rent to the Respondent for the period of the tenancy without any default. There is also no dispute that the tenant was responsible for settling all the accounts bills and therefore whether he used his business name or company for running the bakery business is neither here nor there, since the respondent did not complain that the tenant had breached any of the terms of the tenancy agreement and neither did he call the tenant as his witness as aforesaid. The Electric Power was undoubtedly consumed by the business that was being carried out in the premises with authorization from the Landlord and there was evidence that the consumer thereof was in arrears. There was also no pending

dispute between the consumer and the supplier of electricity in the premises which was in arrears and therefore the action taken by the appellant was lawful.

42. The Respondent was not the consumer/account holder and further there was no evidence of an agreement that the owner/Landlord of the premises had to be notified in case of default of payment of electricity bills before disconnection could be carried out.

43. In addition, although the Respondent averred that the appellant had breached a contract, the record shows that there was no contract between the respondent and appellant for the supply of power to the A/C 2088334-01 which had fallen into arrears. It is trite law that only parties to a contract can seek to enforce it. I am in agreement with the decision in **Kenya National Oil Corporation Limited V. Albert Mairo Cordeiro & another [2014] eKLR** that:

***“ a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if a contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.....”***

44. In this case, I reiterate that there existed no contract of supply of electricity to account No. 2088334-01 which fell into arrears between the Respondent and the appellant. It therefore follows that the Respondent had no cause of action against the appellant.

45. The Respondent's failure to involve his former tenant Gerald Munene Mugo in the proceedings whether as a witness or as a party, since the tenant was in occupation of the premises at the time when the power was consumed and the account fell in arrears before he left the premises is suspect. Pexh.3 statement of accounts issued in December, 2004 was clear as to who had incurred the outstanding bill. Why did the respondent wait until December before asking to be given a statement of account to show who had incurred the bill?

46. It is also not in dispute that the electricity supply was only reconnected after the Respondent agreed to open a new account in his own name on 16<sup>th</sup> January 2006, over one year and 8 months, which lends credence to the submission by the appellant that it had no contract of supply with respondent upon which it could be asked to reconnect power. Furthermore, the consent decree that settled Milimani CMCC 5832 of 2005 between the parties herein filed earlier on by the respondent demanding for reconnection PEX5 shows that the power was only connected to the plot(not account) upon the respondent fulfilling the appellants' applicable terms and conditions including payment of the current electricity bills for the supply. The respondent also paid costs of that suit. That exhibit 5 does not show that the respondent got away with his demands that the supply be reconnected to the account which was held by the Genmer Agencies and which was in arrears.

47. Then there was the claim that the Respondent lost income (rental) for 20 months since he could not get a tenant to occupy premises that had no electricity despite advertising. That may be so, but the question is, who is responsible for that loss? Secondly, did the Respondent mitigate that loss and if so, how. The Respondent produced a tenancy agreement to show that Gerald Munene Mugo was to pay him rental income of Shs.25,000 for the 1<sup>st</sup> year, 30,000/- for the 2<sup>nd</sup> and 3<sup>rd</sup> year and Sh.35,000/- for the 4<sup>th</sup> and 5<sup>th</sup> year, Payable quarterly in advance. The tenant was also to deposit a sum of Shs.50,000/- being 2 months rent which ***“shall be returned to the tenant at the end of the tenancy unless the same will have to be utilized as arrears of rent or for repairs to the said premises”***

48. **The Respondent** did not adduce any evidence as to what happened to the deposit of sh.50,000/- whether it was refunded to the tenant or whether he applied it to any of the purpose as per the tenancy agreement. The Respondent testified that the tenant used to pay him Kshs.35,000 p.m. and that is the amount he claimed for 20 months from the date the electricity supply to the premises was disconnected. Since the tenant faithfully paid rent as per the tenancy agreement, and as per the respondent's own testimony in court, and left without any default or damage to the premises, It is surprising that the Respondent could not apply the deposit amount towards settlement of the electricity bill outstanding, since there was no evidence that the respondent refunded that deposit to his tenant at the end of the

tenancy period.

49. There is no evidence that KPLC asked the Respondent to pay/settle the bill which had been incurred by the tenant. Nonetheless, since it was the Respondent who would suffer loss of rental income if he did not have electricity connected to the premises, it was in my view incumbent upon the Respondent to mitigate the loss and seek for reimbursement either from the stranger who may have trespassed into his premises, the tenant who had breached the term of the tenancy agreement by opening a main account in the name of a different person from himself, or from the appellant. Further, the respondent did not have to wait for 7 months before making a formal demand and 20 months without power then claim for the loss of Kshs.700,000/-

50. In my view, the Respondent withheld very important evidence from the court which would have shown whether or not he knew the person of Genmer Agencies Limited or whether his tenant breached the tenancy agreement. The respondent's incessant demand that the appellant reconnects power and claims the unpaid bill from the Genmer Agencies Limited is also suspect.

51. I reiterate that the Respondent should have called the tenant to provide his nexus with Genmer Agencies Limited or deny it all together, noting that as at the time of the tenants' departure, there was no outstanding rent due and the Respondent admitted that it was the tenant who was settling the bills. In **Bukenya & others V. Uganda (1972) EA 548**, the Court of Appeal stated:-

***“The prosecutor must make available all witnesses necessary to establish the truth, even if that evidence may be inconsistent. Where evidence is called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.*”**

52. The above principle is applicable to civil cases as well. Although Section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact, however, in this case, it was the duty of the Respondent to avail all witnesses who could assist the court arrive at the truth and fair and just decision and it can only be inferred that had the respondent called the tenant as a witness, the tenant would have given evidence adverse to this respondent's case.

53. There having been no contract between the appellant and Respondent over the account that was in arrears, it is incomprehensible how the trial magistrate found in favour of the Respondent for loss of rental income of Kshs.700,000 plus interests, and in the absence of any efforts by the Respondent to mitigate that loss. Mitigation of damages is a mandatory requirement of the law. The Respondent did not have to wait for 20 months to claim loss of rental income. As stated earlier, he could have applied the Shs.50,000/- deposit by the tenant, questioned the tenant as to who Genmer Agencies Limited was and why the bill could not be settled by the tenant whom he had leased the premises to, demand for settlement before claiming for reimbursement. In **Grand Holiday Hotel Limited Vs Kenya Power & Co. Limited [2012] eKLR; and African Highland Produce Ltd. V. John Kisoro NKR HCCA264/99** the court was categorical that a party claiming for damages has a duty to mitigate loses.

54. It should also be noted that from the Respondent's pleadings and evidence on record, it is not clear exactly when the power was disconnected. At paragraph 8 of his plaint, he pleaded that ***“the defendant unjustifiably directed the plaintiff to pay the said outstanding bill which the plaintiff declined so to do and as a consequence the defendant disconnected power supply to the plaintiff's said premises on or before 18<sup>th</sup> May 2004 and despite the plaintiff's demand for the electricity power supply to be reinstated the defendant declined to do so until when the defendant was so ordered by the court so to do and did so on 16<sup>th</sup> January, 2006.*”**

55. In his testimony on oath he stated as follows:

***“...The tenant only informed me that he had left. I took the key and went to inspect the house. Electricity was disconnected at the meter box. When I checked with KPLC they informed me that there was a bill. This is the bill for Kshs.145,594/02. I received it in December 2004.”***

56. In the demand notice dated 15<sup>th</sup> December, 2004, there was no mention of date of disconnection save...***“you have accordingly disconnected supply.....to our client’s premises .....”*** it is therefore not clear whether there was power or not as at the time of advertisements as per the space orders of August, September and October, 2004, and the premises being industrial, it is also not clear how the respondent expected to get a tenant to occupy the premises which had no electricity supply and carry out industrial work.

57. In the end, I find that there was no evidence that the appellant disconnected power supply to the respondent's premises due to the respondent’s failure to settle an outstanding bill since it is clear that the respondent was not the contracted consumer of the said electricity for the 5 year period. I find that albeit the appellant did not adduce any evidence to support their defence on record, and that answers in cross-examination and submissions are not evidence and could therefore not have assisted to built their defence, that failure to adduce evidence by the appellant in the circumstances of this case did not oust the respondent's duty to prove his allegations in the plaint against the appellant on a balance of probabilities.

58. My decision is takes into account all the circumstances of this case as guided by Section 119 of the Evidence Act, Cap 80,Laws of Kenya which provides:-

***“ The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common cause of natural events, human conduct and public and private business their relation to the facts of the particular case.”***

59. It is for the above reason that I find that there was no proof that the appellants unjustifiably disconnected power supply to the respondent's premises. The law permitted them to disconnect power supply where there was unpaid bill as per the contract of supply hence no law was breached by the appellants.

60. I further find that there was no proof that the appellant disconnected power supply after demanding that the respondent settles the arrears thereof, since by his own testimony, the respondent found power supply disconnected after the tenant vacated the premises at the end of the tenancy period, on inspecting the premises. I further find that the respondent was duty bound to explain why it took him from May 2004 to December 2005 to demand reconnection and why he did not contact his tenant to give an explanation for the arrears when the tenant was operating business in the premises and consuming power and demand settlement thereof.

62. I also find that the respondent had a duty to ameliorate/mitigate the loss. He did not have to wait for 20 months nearly 2 years from May 2004 to 16<sup>th</sup> January 2006. He should have settled the bill and sued the consumer since it is clear from his own testimony that it was the tenant who consumed electricity and settled the bills. In addition, it was clear that the original contract of supply of single phase was superseded by the subsequent contract of supply of three phase wherein a new account was opened to serve the tenant and therefore there was no contract between the appellant and respondent for consumption of electricity which the appellant could be accused of breaching to the detriment of its customer. In **Felix Mathenge V. KPLC (2008) eKLR** the Court of Appeal held that:

***“it is true that the appellant suffered loss of income because of unreasonable and capricious behavior of the Respondent. But, he needed not to have taken about 4 years to remedy the situation. He ought to have taken all reasonable steps to mitigate the loss he had sustained consequent upon the wrongful act of the Respondent. He neglected to act to offset his loses which he would have warded off by paying what was due to the Respondent so as to attract back to the suit premises the tenant s who had been forced to vacate. By doing so, thus he would have minimized the damages.”***

***As the appellant was not at all a man of straw, it was unreasonable for him to wait for 4 years before reconnecting the power supply to the suit premises. We think that he could have done so within a period of 12 months which period the appellant should be entitled to damages.....”***

62. And in **Abel Momanyi Birundu V. KPL (2013) e KLR** the court held that the appellant should have mitigated damages/loss by seeking a mandatory injunction for reconnection. I agree with the above decisions wholly.

63. In the instant case, from the evidence on record the Respondent was not a man of straw. By his affidavit of means sworn on 12<sup>th</sup> October 2011, he had assets in terms of money in the bank, shares of listed companies, and land. He also deposed that the decretal sum was quite meager compared to his net worth. He therefore ought to have been allowed to execute decree. There was no other evidence to show that between May 2004 and 16<sup>th</sup> January 2006 he was a man of straw such that he could not settle the bill, and as I have stated earlier, he had the tenant's deposit of Shs.50, 000/- which he could have applied towards settling the outstanding bill.

64. I therefore find that in the instant case, the trial magistrate totally failed to consider that very important principle of law that parties must mitigate their loses.

65. In my view, the Respondent could have reconnected power within 3 months. Had he proved that the power was unjustifiably disconnected which he failed to prove, I would have awarded him loss of Shs. 35, 00x3 =105,000/- for loss of rental income. But since he did not prove that the disconnection was unjustifiable and or unreasonable, I would not award him anything.

66. It is for the above many reasons that I fault the trial magistrate for finding in favour of the Respondent who failed to prove his case against the appellant on all fours.

67. Accordingly, I allow this appeal, upset the judgment and decree of the subordinate court made by W. Mokaya (Ms) on 12<sup>th</sup> November 2011 and substitute that judgment and decree with an order dismissing the Respondent's suit with costs.

68. The appellant shall also have costs of this appeal.

69. Finally, I order that any amount of money deposited as security for the due performance of decree in the lower court should forthwith be released to the appellant's counsel on record for onward transmission to the appellant as appropriate.

**Dated, Signed and Delivered at Nairobi this 22<sup>nd</sup> day of October, 2015.**

**R.E. ABURILI**

**JUDGE**

22/10/2015

Coram R.E. Aburili J

C.A. Adline

No appearance for appellant

No appearance for respondent

**Court** – There are 2 ladies in court one Julian Ochoki court clerk from Nyaundi Tuiyot and Company for appellant and Carolyne Mbithe court clerk from Wachira Ndungu & company for respondent. They indicate that they were send to request advocates present in court (if any) to hold brief for their law firms (employers) but they found none.

The judgment is therefore hereby read and pronounced in open court in their presence since. The

judgment date was given in court on 9<sup>th</sup> July 2015 in the presence of both advocates for the parties.

**R.E. ABURILI**

**JUDGE**

**22/10/2015**