



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 43 OF 2007

KENYA POWER & LIGHTING COMPANY LTD.....APPELLANT

VERSUS

JULIUS MUUMBWA.....RESPONDENT

(Being an appeal from the Judgment & Decree in RMCC No. 231 of 2005, delivered on 21-2-2007 by the Hon. Mrs. Mwangi –RM at Yatta)

J U D G M E N T

- 1). In the suit before the lower court, the respondent Julius Muumbwa had sued the appellant, Kenya Power and Lighting Co. Limited (KPLC) for compensation for 3152 sisal plants damaged at his farm while the appellant was installing an electric power supply line. The claim is for Kshs. 157,600/=.
- 2). The claim was denied. The appellant filed a written statement of defence which denied the respondent's claim and stated that the respondent was fully compensated for the impairment of the use of the land and the damaged crops.
- 3). At the conclusion of the trial, the lower court entered judgment for the plaintiff for Kshs. 157,555/=.
- The appellant were dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:
 - a. That the plaint ought to have been struck out as the verifying affidavit was defective.
 - b. That the judgment was against the weight of the evidence.
 - c. That the respondent was adequately compensated for the loss suffered.
 - d. That the appellant was denied a fair hearing as the judgment was read in the absence of the appellant.
- 4). The appeal was canvassed by way of written submissions which I have duly considered.
- 5). This being the first appellate court, the court's duty bound to re-evaluate the evidence on record and come to its own finding. See **Selle –VS- Associated Boat Co. Ltd. [1968] EA 123.**
- 6). The respondent testified (PW1). His evidence was that the appellant agreed to compensate him for any damage caused to his land while the appellant was erecting the electric supply line over his land. He

produced a property damage report No. 87515 which reflects the details of the property as 3152 mature sisal plants and prayed for compensation as Kshs. 50 per plant.

7). DW1 Francis Njoroge testified on behalf of the appellant. His evidence was that the document produced by the respondent reflecting the damage to 3152 sisal plants was prepared before the actual work was done. He referred the court to the handwritten remarks at the head of the said document which reads **“SISAL WITHIN TRACE”** and stated that the document was filled in before the commencement of the construction works and that it was not signed by the main contractor and was therefore invalid. That the main contractor only signed for the damaged property. That upon completion of the project the damage was assessed and payments made as per property damage reports No. 87522 and No. 85057 which are signed by all the parties concerned. That is the way leave officer, the contractor and the land owner. Reports No. 87522 and 85057 were produced as exhibits.

8). The bone of contention is whether the 3152 whether sisal plants reflected in the property damage report No. 87515 were damaged. The said document gives the details of the property and reflects that the respondent agreed that the damage detailed in the report is the full extent of damage to his crops caused by KPLC during the survey/construction/maintenance works. The documents signed by the respondent and the KPLC way leaves officer on 9-4-2005.

9) During cross examination, DW1 conceded that the report in question emanated from KPLC. His evidence that KPLC has no memo or circular to show the procedure followed is not very helpful. DW1 could not explain why the report in question was revoked or why it was invalid as stated in his evidence in chief.

10). Reports No. 87522 and No. 85057 which DW1 produced as the valid ones against which the respondent was paid are the same as the one in question, save for the lack of a corresponding form reflecting the payment made on the report in question. On whether it was the contractor to sign the report or a KPLC official, those are internal details known to KPLC and not the Respondent. The report in question is signed by the KPLC way leaves officer and the respondent. The column reflected **“KPLC (ENG/SUPT/TECH) ConstrActorS Rep** was left blank without a signature. Surprisingly, a copy of the document bearing the same No. 87515 with the additional entry of Kshs. 50/= per plant and totaling Kshs. 157,600/= signed on the said date (9-4-2003) with the slot for KPLC/contractor duly signed was annexed to the appellant’s submissions albeit irregularly.

11). I have also noted all the compensation reports produced as exhibits in the lower court were omitted in the record of appeal together with a report which is reflected in evidence as having been prepared by an agricultural official and produced by the respondent. The orders dated 12-7-2007 adopted the orders in SRMCC 227 of 2005. These proceedings have not been made part of the record herein. I have considered whether to strike out the appeal on the basis of the incomplete record of appeal. However, the lower court record which forms part of the records before this court contains the evidence which was presented before the lower court.

12). The evidence by DW1 that the property in question contained the number of sisal plants on the **“trace line”** and was signed before the work commenced is not correct. The report No. 85057 for payment Kshs. 4,700/= was signed on 15-1-2002. The report No. 87522 for payment Kshs. 7,532 was signed on 11-4-2003. The form in question was signed on 9-4-2003 and therefore it could not have come before No. 87522 which was signed more than one year before the report No. 85057. The evidence of DW1 is self contradictory and fails to satisfactorily explain why there was no compensation for the plants listed in form No. 87515.

13). The plaint dated 2-9-2005 in paragraph No. 9 makes a specific claim for Kshs. 157,600/= assessed at the rate of Kshs. 50/= per sisal plant. The lower court record in the judgment refers to the proceedings in RMCC Yatta 234 of 2005 which forms part of the series of cases herein and refers to undisputed compensation of Kshs. 50/= per sisal plant. I therefore find the claim was specifically pleaded and specifically proved. If I were to arrive at any different view, I would strike out the record of appeal for being incomplete and muddled up. The second page of the plaint in the record of appeal is dated 6-9-2015

and is not the same one as the one in the lower court file dated 2-9-2005.

14). On whether the replying affidavit annexed to the plaint is defective, the appellant submitted that the plaint and the verifying affidavit bear different dates. Nothing could be further from the truth. The original plaint in the lower court record is dated 2-9-2005 and the verifying affidavit bears the same date. As stated above, the appellant has annexed as page No. 2 of the plaint a copy of unknown plaint dated 6-9-2005 in the record of appeal.

15). Having re-evaluated the evidence afresh, I am satisfied that the respondent's case was proved on a balance of probability. I find no merit in the appeal and dismiss the same with costs.

Dated, signed and delivered at Machakos this 15th day of December, 2015.

B. THURANIRA JADEN

JUDGE