



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL APPEAL NO. 118 OF 2010**

**KENYA POWER AND LIGHTNING.....APPELLANT**

**VERSUS**

**FRIDAH KAGENI JULIUS.....RESPONDENT**

*(Arising from the judgment and decree of Hon. Mr. A.K. Ndungu, Senior Resident Magistrate at Nairobi Milimani Chief Magistrate's Court dated 8<sup>th</sup> March, 2010 in civil suit No. 3546 of 2004)*

**JUDGMENT OF THE COURT**

**1. Background**

This appeal arises from the judgment and decree of the Senior Resident Magistrate at Nairobi Milimani Chief Magistrate's Court dated 8<sup>th</sup> March, 2010 in civil suit No. 3546 of 2004. The Appellant Kenya Power and Lightning Company Ltd, by a Memorandum of Appeal dated 1<sup>st</sup> April, 2010 and filed in court on 6<sup>th</sup> April, 2010 by the firm of L. M. Kambuni & Associates Advocates, lays down 8 grounds of appeal challenging the decision of Hon. Mr. A.K. Ndungu, Senior Resident Magistrate (as he then was).

**2. Evaluation of evidence**

This being the first appeal, from the onset, the appellate court's responsibility under Section 78 of the Civil Procedure Act is to evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction. As the first Appellate Court I am also guided by the decision in **SELLE –Vs- ASSOCIATED MOTOR BOAT COMP [1968] E.A. 123**, to evaluate the trial Court's evidence, analyze it and come to my own conclusion, but in so doing, I must give allowance of the fact that I neither saw nor heard the witnesses.

However, 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.

Thus, as the appellate court, I will only interfere with a lower court's judgment if the same is founded on wrong principles of fact and or law as guided by the Court of Appeal in **MKUBE VS NYAMURO [1883] KLR, 403-415 P** 403 that:-

***“A Court on 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 the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion, Law JA, Kneller & Hannon Ag JJA.***

However, I emphasize that this court is not bound to follow the trial court’s finding 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.

## **2(a) Respondent’s pleadings in the subordinate court**

By a plaint dated 17<sup>th</sup> March, 2004 and filed in court on 5<sup>th</sup> April, 2004, the Respondent pleaded that she applied and paid for installation of power to her premises situate on plot No. F6 Kahawa North. The Appellant assessed connection fee to the tune of Kshs. 227,679, which she fully paid but that the Appellant had totally failed to supply the power as per the contract (see para3). Paragraph 4 of the said plaint states that by letter dated 11/9/2003, the Appellant purported to terminate the supply contract and made a demand for Kshs. 256,889.11, being alleged outstanding bill. According to the Respondent, the amount due was only 30, 411 which she duly paid to the Appellant. She claimed for loss of rental income to the tune of Kshs. 1,366,000 as at March, 2004 and future loss of rent from the Appellant up to the time of installing the supply to her premises. In the prayers, she sought among others, a mandatory injunction compelling the Appellant to reconnect and or restore the electric power supply for the suit premises pending hearing and determination of the suit and a permanent injunction restraining the Appellant from disconnecting the electric power supply to the Respondent’s suit premises for reasons other than non-payment of the consumed electric power and the statutory levies thereon or other lawful cause. She also prayed for general damages for breach of contract, costs and interest.

## **2(b) Respondent’s Testimony**

The Respondent’s testified that she lived in Ongata Rongai, doing business having retired from the Ministry of Health. Julius Muriungi was her father while Fredrick Nyabuti Mogaka was her husband. She owned premises in Githurai Kimbo Phase 1 plot F6 where she put up 46 single rental rooms on 5 floors between 1999 and 2002 and installed electricity. She was being supplied by KPLC the Appellant. She applied for supply/ installation of power to the mentioned premises and received an approval from the Appellant Company. She paid what she was required to pay. She produced what she called contract documents as exhibit 1a and 1b. 5 meters were installed. For two years, power was not installed. It was installed between December 2004 and January, 2005. She later received a demand for 259,339 as outstanding bill which she denied owing as she had fully paid all the bills. She followed up the issue. She produced some 2003 bills for 5 accounts on plot F6 Githurai Kimbo in the name of Fredrick Nyabuti Mogaka & 12 others said to have been send to her by the Appellant when there was no power as Exhibit 2. She was to pay Kshs. 87 every month as standing charges but that there was no power. She made inquiries at Stima plaza and the Appellant discovered that they had made an error and by then, they had disconnected her home power after transferring the bill to her house account, as per the February, 2008 bill which she produced as exhibit PEX4. She stated that initially, her father Julius Muriungi assisted in following up the matter for her, and wrote a letter on 13/8/2003 to the Appellant complaining that he was not being connected-PEX5. She also wrote a demand letter on 10/9/2003 through her advocates Nelson Kaburu which she produced as PEX6. She further produced PEX7 showing a reply by the Appellant. In her further testimony, the power was restored in December 2004. She had rented out the premises in Githurai Kimbo at Kshs. 2000 per room per month and were all occupied. Initially, 45 were occupied but when power was disconnected, tenants started moving out progressively and by January 2003, there was none up to January 2005. The rooms were fully occupied in March, 2005. She claimed to have suffered loss as a result of the disconnection as she never owed any money at the time of disconnection and no notice was given prior to disconnection or even reconnection.

In cross examination by the Appellant’s counsel, the Respondent stated that the electricity was supplied 2 years after paying the initial amount in 2002 and that the power was connected at the end of 2004. She could not recall the exact date when the power was disconnected. She denied receiving a letter transferring the monies (bills) to her Rongai account, stating that she was only shown on computer that a

transfer had been effected. She stated that the bundle of bills she had produced as PEX 2 was in the name of her husband albeit it was her who had paid the money. Questioned further, she stated that the bills showed that the premises had 46 rooms; each meter was for a floor. She stated that there was an amount of 30,411 owing to KPLC which was paid on 4/4/2003. She indicated that the caretaker was there to confirm the tenants. She further stated that the caretaker had evidence of the payments. She stated that one water meter served the whole building and that in December 2002 she had 21 tenants. In December 2004 is when the power was reconnected. She further stated that according to the supply contract, the Appellant was to supply electricity within 90 days from the date of quotation. Her application was received on 16/3/2001. She finished constructing the rental rooms in 2000 or 2001 or thereabout and that the contract document is dated 2002.

In re-examination, she stated that she submitted her husband's name for the account where the connection was to be made. She further stated that she knew the rental amount being collected by her caretaker. She recalled that although 30,411 was owing to the Appellant at one time, the amount which the Appellant demanded was 256,899.

### **3. Respondent's witness Evidence**

Julius Muriungi Muriangi testified as PW2 for the Respondent. He stated that he was a businessman and father to the Respondent. He further stated that he gifted his plot at Githurai to the Respondent who was his daughter. He was involved in the construction of the 45 residential units comprising 5 floors on the plot which was still registered in his name.

He further testified that electricity was installed. He paid deposit for connection and he was given a receipt which he identified as produced by PW1 as PWE 1a. He also identified what he called a supply contract dated 5/2/2003 produced as PWEx 1b. According to him, power was originally supplied and after sometime it was disconnected. He recalled that the disconnection was done on 26/8/2003. He stated that he wrote a letter of complaint to the Appellant on 19/8/2003. Further, that KPLC terminated the contract and that he had received a demand for Kshs. 266,889.11 by a letter dated 25/8/2003. He stated that Kshs. 30,411 were bills he personally paid following an earlier claim. According to PW2, premises were occupied when there was electricity. According to him, tenants disappeared after the power was cut. He stated that there were 45 flats on 5 floors and that he could not recall when reconnection was done.

In cross examination, he stated that the plot was registered in his name and he had the documents. He maintained that disconnection was done in August 2003 and that when he paid Kshs. 30,411, he was issued with a receipt.

### **4. No evidence from defence offered**

At the close of the Respondent's case, the Appellant's advocate informed the court that they did not wish to offer any evidence and the matter was slated for mention on 16/12/2009 for submissions. Parties filed written submissions. Judgment was eventually delivered on 8/3/2010.

### **5. Written submissions**

#### **5(a) the Appellant's submissions**

The Appellant filed detailed written submissions on 16/12/2009 whereas the Respondent filed hers on 7<sup>th</sup> January, 2010 in reply to the Appellant's submissions.

In their submissions, the Appellant's advocates summarized the claim as pleaded into five main issues. The first two issues concerned the Respondent's prayers for mandatory and permanent injunctions which the Appellant contended, were not available to her as she had not pleaded the same and that she had failed to prove that she was entitled to the orders. The Appellant submitted that the Respondent's pleadings and evidence in court did not tally and that it was not clear which suit premises the Appellant was to connect and supply electricity. They observed that whereas the PWEX 1a addressed the premises

as plot F6 Kahawa North as pleaded in the plaint, the Respondent produced PWEX 2, a bundle of bills in reference to plot F6 Githurai Kimbo. In their submission, as there was no express proof that the two reference numbers belonged to one and the same premises, the Respondent had not discharged the burden of proving her case on a balance of probability. Further, that there was no pleading before court related to F6 Githurai Kimbo and allowing such evidence would be tantamount to abusing the principle of natural justice and a fair trial, in particular.

**The Appellant further submitted that there was no total failure to supply electricity to the Respondent premises** as pleaded, contrary to the assertion by the Respondent and her witness in their sworn testimony that power had been installed. They added that according to PWEX1a, power was to be supplied within 90 days upon fulfillment of conditions set out including payment of balance. In their view, these conditions were not met by the Respondent and that therefore there was no proof that the Appellant had totally failed to supply power.

**As to whether there was termination of a contract, the Appellants submitted** that PW1 and PW2 claimed that there was a letter of 11 September, 2003 received from the Appellant purporting to terminate the supply contract on grounds of outstanding bill, which letter was never produced in evidence, an indication that there was never such an intention by the Appellant to terminate the contract of supply. They submitted that this allegation though pleaded was not proved as contested in the defence

**The Appellant also submitted that the Appellant reserved the right to disconnect** electric power where a bill was outstanding. In their view, the Respondent having admitted owing Kshs.30, 411, she failed to prove payment. They asked the court to conclude that if there was any power disconnection then it was due to the outstanding bill, which right the Appellant had to exercise.

The submission also challenged the bundle of bills produced by the Respondent PWEX2 showing accounts for F6 Githurai Kimbo and not F6 Kahawa North as pleaded. They urged the court to disregard that evidence for being irrelevant. They pointed out that the bundle of bills PWEX 2 belonged to one Fredrick Nyabuti Mogaka&12 others who were unspecified, being consumers of electricity on plot F6 Githurai Kimbo, not F6 Kahawa North as pleaded.

**They challenged the allegation by the Respondent in** her evidence that the Appellant attempted to transfer the bill to her Rongai home account as there was no evidence of transfer as per her PWEX4 and as this fact was not pleaded.

They raised issues that ownership of the premises by the Respondent as at the material date of 11/9/2004 was not proved as opposed to PWEX1a the premises upon which supply was to be installed. Further, that even PW2, her father was unable to prove that the premises belonged to him.

**On the claim for loss of rental income it was submitted that it was first essential** to prove that the premises belonged to her or linkage.

**On whether she proved there** being rental units at the suit premises- it was submitted that in the absence of documentation such as approved building plans, fitness for occupation, that the suit premises were occupied or that there was any rental income accruing- being specific damage which is quantifiable, it not having been specifically pleaded or proved, the Respondent was not entitled to the prayers.

**On whether special damages** should be awarded, counsel cited the case of Herbert **HAHN VS AMRIK SINGH (1982-88) 1 KAR 738** where it was held that special damages must be specifically pleaded and proved. In their view, as there was no indication in the plaint on how many rental units was fully or partially occupied by a specific number of tenants or agreements for tenancy, the claimed lump sum of Kshs.1,366,000 was not proved and did not refer to any specific number of months or tenants. They submitted that no tenancy agreements were produced in evidence to prove the existence of tenants.

**On mitigation of loss**, it was submitted that no evidence was adduced to show that she mitigated loss. In their view, she should have paid erroneous outstanding bill to retain the alleged tenants as she pursued

compensation, referring to the *Hahn case* above.

**On the prayer for future loss of income and or damages for breach of contract**, they submitted that this was a special damage which was not specifically pleaded and proved.

They further contended that there can be no general damages for breach of contract.

**On who should bear costs prayed for**, they prayed for dismissal of the suit with costs to the Appellant.

## **6. The Respondent's submissions**

On behalf of the Respondent, it was submitted that prayers for injunctions were abandoned in evidence as the remedies sought had been overtaken by events as the Appellant had reconnected the power.

On the location of the premises, it was submitted that the Appellant knew where it had installed the power and who their customer was as electricity is installed to premises.

It was further submitted that power was supplied after signing the contract but it was disconnected and that the Appellant totally failed to supply power after disconnecting, for two years.

Counsel for the Respondent further submitted that the Appellant could exercise the right to disconnect power for non-payment but that in this case, there was no prove of non-payment; that the Respondent had stated that there was a bill of Kshs. 30,411 which was paid before disconnection; and that the Appellant did not disprove or prove non-payment or payment.

It was further submitted that although the Appellant's system was computerized, they did not prove the existence of any lawful bills outstanding, maintaining that the Appellant could have disconnected the supply for illegal connection or uncertified wiring which was not the case in the instant case.

On the issue of who the real account holder was, it was submitted that it was the Appellant who had asked the Respondent to indicate in whose names the account should be and she gave her husband's name. It was therefore estopped from raising the issue.

According to the Respondent, the ownership issue could not be raised, the Appellant having admitted the existence of a power supply contract with the Respondent, and as electric power is not supplied to owners only and that in any event, she was the owner of the premises, having received it as a gift from her father who confirmed in evidence and having developed the rental units with her finances.

According to counsel, evidence is not just evidence when it is documentary- oral evidence is evidence as the demeanor of the Respondent had been observed even on cross-examination. They also submitted that proof of existence of premises was as per the bills the Appellant sent to the Respondent in the name of Fredrick Nyabuti & 12 others on each bill.

On whether she had pleaded special damages, it was submitted that the Appellant had claimed what she lost at the time of suing and pleaded for what she might lose before trial.

It was further submitted that as the Appellant had adduced no evidence, they could not produce evidence by way of submissions which were mere allegations hence the evidence by the Respondent remained unchallenged, praying that her claim should be allowed.

## **7. The decision of the learned trial magistrate**

The trial magistrate, upon hearing the parties and considering their pleadings, submissions and authorities cited, found in favour of the Respondent. He found that there was general consensus that there was a contract of supply of electricity to the Respondent by the Appellant. He also found that there was no dispute that there was disconnection of electricity supply to the Respondent's premises. In his view, the

issues for determination were; whether the disconnection was wrongful and if in the affirmative, whether the Respondent was entitled to damages and if so, how much. He found that the pertinent issue of ownership of the property in question was not controverted as the Respondent had proved that her father had gifted her and that she had constructed residential rooms. Further, that the Appellant had proceeded to enter into a contract with the Respondent using the name of her husband. In his view, the belated controversy into ownership was to side step the main issues in the suit, the Appellant having failed to adduce any evidence to the contrary. He held that the Appellant was estopped from raising ownership issues having entered into a contract with the Respondent to supply power on the premises in question.

On whether the disconnection was wrongful, the learned magistrate found in the affirmative and that that it was the demand for Kshs. 256, 889 which led to the disconnection. He found that the amount was found to be erroneous upon inquiry by the Appellant and that the only amount outstanding was Kshs. 30,411 which was duly paid. In his final analysis, the Appellant disconnected power supply based on a bill which they acknowledged to have been erroneous and therefore as no evidence was offered to justify the disconnection or that the Respondent had breached any terms of the contract, the disconnection was wrongful.

He also found that following the disconnection, the Respondent's tenants vacated the premises in question giving rise to loss of rental income. In his estimation, the Respondent had lost Kshs. 2,160,000 as income for the period of 2 years- 2003 and 2004, and as full occupancy was attained in January, 2005 after reconnection was effected in December, 2004, this figure being inclusive of damages for breach of contract. The learned magistrate relied on the decision in **CIVIL APPEAL NO. 215 OF 2002 FELIX MATHENGE VS KENYA POWER & LIGHTNING COMPANY LIMITED, TUNOI, GITHINJI, ONYANGO OTIENO JJA**

Where the Court of Appeal awarded damages in a situation where KPLC, the Respondent in that appeal, had unjustifiably disconnected power to the appellant's premises thus subjecting them to loss of income. The Court found KPLC liable at the rate of the rent payable per month multiplied by the period under reference.

The trial Magistrate also found that the prayer for injunctions having been overtaken by events of a reconnection, the Respondent was not bound to canvass it anymore. The learned magistrates' pecuniary jurisdiction being limited to two million at the time, he reduced the award from Kshs. 2,160,000 as awarded, to cover 12 months at the rate of 2,000 per room for 45 rooms to Kshs. 2,000,000 because the Respondent had submitted herself to the jurisdiction of the court. He awarded her costs of the suit and interest.

## 8. Appeal

Being dissatisfied with the judgment and decree of the learned trial magistrate, the Appellant herein filed this appeal asserting that:-

- a. *The learned magistrate erred in law and fact in finding that the Appellant rather than the Respondent had breached the power supply contract.*
- b. *The learned magistrate erred in law and fact in finding that the power supply disconnection by the Appellant was wrongful whilst there was an outstanding bill by the Respondent.*
- c. *The learned magistrate erred in law and fact in finding that the disconnection of the power supply had a direct result of making the Respondents lose tenants.*
- d. *The learned magistrate erred in law and fact in finding that the Respondent owned or was beneficially entitled to the rental premises at the material time and that she had indeed leased them out to tenants when no documentary evidence was produced to prove the same.*
- e. *The learned magistrate erred in law and fact in finding that the respondent had specifically proved her claim for special damages whilst she had not specifically particularized the number and type of rental units, the respective rent for each of the alleged units, the number of tenants occupying the same, and provide documentary evidence of rent if any paid.*
- f. *The learned magistrate erred in law and fact in failing to hold that the Respondent failed to*

*mitigate her loss if any and rebating any sum found payable to the respondent as reasonable and appropriate.*

- g. *The learned magistrate erred in law and fact in entertaining a claim for loss of future income when the same had not been particularized, itemized and reasonable for the Respondent's loss of income.*

The Appellant prayed that the judgment of the subordinate court delivered on 8<sup>th</sup> March, 2010 be set aside and substituted with an order dismissing the plaintiff's suit with costs. They also prayed, in the alternative, that the appellate court reassesses the damages claimed taking into account the failure by the Respondent to mitigate her loss.

The parties' advocates in this appeal appeared before me for mention on 28<sup>th</sup> July, 2014, and agreed by consent to file written submissions to dispose of the appeal. The Appellants' counsel filed their submissions on 11<sup>th</sup> August, 2014 whereas the Respondent's counsel filed theirs on 31<sup>st</sup> July, 2014. Opposing the appeal, the Respondent clustered the grounds of appeal into 4 and cited several authorities.

On grounds 1&2, they submitted that the Appellant was in breach of the admitted contract to supply power to the Respondent's premises and therefore they could not be heard to allege otherwise since they did not prove the existence of any outstanding bills or breach by the Respondent warranting disconnection. They relied on the case of **EDWARD MARIGA & ANOTHER VS NATHANIEL SCHULTER & ANOPHTER, CA NO. 23 OF 1997** where the court held that pleadings are not evidence and cannot be used as a defence without evidence to support them.

On ground three, they submitted that the learned magistrate could not be faulted for believing the witnesses and relying on the cited authority in civil appeal **NO. 215 OF 2002**. In his view, courts must take judicial notice that tenants prefer to lease premises with electricity.

On ground 4, they submitted that the Appellant was estopped from raising the issue of ownership of the premises as there was no plea in their defence, and having admitted the existence of a supply contract with the Respondent to the suit premises. They further contended that power is not just supplied to legal owners of premises and therefore the contention by the Appellant was not legitimate.

On damages, the Respondents' counsel submitted on several authorities in support of the award. They supported the trial magistrate's findings in toto and prayed for dismissal of the appeal with costs.

## **9. The Appellant's submissions on appeal**

The Appellant's advocates filed their written submissions on 11<sup>th</sup> August, 2014, citing several authorities in support of the appeal to guide the court. They reiterated their detailed written submissions filed in the subordinate court and restated their grounds of appeal as filed.

## **10. Issues for determination**

I have carefully perused the record of appeal and re-evaluated and re-examined the pleadings, evidence and submissions of both parties in the subordinate court and the findings and reasons for the decision by the learned trial magistrate as well as the written submissions by both parties to this appeal. In my view, the issues for determination in this appeal are:

- a. ***Whether there was a contract for supply of electricity between the Appellant and Respondent on premises quoted as Kahawa North Plot F6 and as per the application approval and assessment letter dated 24/9/2002.***
- b. ***Whether there was any breach of such contract of supply to plot F6 Kahawa North if at all it existed as admitted by the Appellant in their defence through power disconnection***
- c. ***Whether the Respondent had any tenants who vacated the suit premises due to power disconnection***

- d. ***Whether the Respondent suffered any loss of rental income and or future income***
- e. ***Whether the Respondent was entitled to general damages for breach of contract***
- f. ***Should the Respondent have mitigated her loss if any?***

The following are my findings on the above issues:

That by her plaint dated 17<sup>th</sup> March, 2004, the Respondent Frida Kageni Julius pleaded that she applied for installation of power to her premises at Kahawa North plot F6 and she received an assessment for Kshs. **227,679** vide letter dated 24/9/2002 which she paid in full but that the Appellant (see para 3) had totally failed to supply the power as per the contract. She produced a receipt for payment **of Kshs. 227,066 and no more. She also did not produce any contract of supply.**

At paragraph 4 of the said plaint, she pleaded that by letter dated 11/9/2003 the Appellant purported to terminate the supply contract and made a demand for Kshs. 256, 889.11 being alleged outstanding bill whereas to her knowledge, the amount due and owing was only Kshs. 30,411 which she duly paid to the Appellant. **The quoted letter and bill were never produced in evidence.**

***The issue before me for determination, as per ground 1 and 2 of the memorandum of appeal, is, whether there was, in the first place any contract of supply and if so, was it breached and by whom?***

A careful examination of evidence adduced in the court below by the Respondent and her witness together with the exhibits produced, PWEX 1a dated 24/9/2002 shows an acceptance/quotation letter to supply a three phase, 5KVA service line to be installed on Plot No. F6 Kahawa North. The quotation amount was Kshs 227,679 inclusive of Value Added Tax. In the said letter, the Appellant acknowledged that the Respondent had already paid 227,066 as per the receipt PWEX 1b dated 10/9/2002, produced in evidence. By the same exhibit, the Appellant was required to ensure that full payment was received within 90 days from the date of quotation failure to which the terms could be revised. She was further required to **sign the attached supply contract and complete it in the name the account will operate. In addition, the Respondent was required to pay an account deposit of 2,500 for the contract to be entered.**

Regrettably, the **signed completed supply contract** mentioned in the quotation letter was never produced in evidence. There is also no evidence of payment of balance of the assessed sum totaling to Kshs. 613, and neither was evidence of payment for Kshs. 2500 on accounts deposit exhibited. The Respondent stated that 5 meters were supplied one for each floor. Again, it was expected that evidence of payment for accounts for the 5 meters would be adduced. In addition, the 5 meters would be expected to have different accounts numbers. None was shown to the court. What was adduced in evidence were bills for 5 accounts on plot No. F6 Githurai Kimbo and not F6 Kahawa North as per the quotation letter.

Although the existence of a supply contract between the Appellant and the Respondent is admitted in the Appellant's statement of defence, the same was not produced in evidence. In addition, the admission must have been in respect of the Plot quoted in the plaint as Kahawa North Plot F6 and no other as this is this were the particulars the Appellant was responding to. I find it odd that the Respondent did not find it necessary to produce the said completed and signed contract. In my considered view, its production could have helped the court appreciate the terms and conditions of the power supply contract that were allegedly breached by the Appellant, and assisted the court reach a truthful and fair decision. The failure to produce the said contract of supply, in my view, left room for obscurity apparent on the record.

The production of the signed and completed contract, in my view, would indicate exactly who the real parties were or the name in which the supply contract was to be made. It would also guide the court in assessing damages once proven, to run from which material date as the claim touches on breach of contract. The question therefore is, which is this contract which was breached? Is admission of existence of a contract of supply of electricity conclusive evidence of its content and terms that the parties had agreed upon? And did the admission preclude the parties from demonstrating that such a contract existed particularly when the adverse party denies breach of the alleged contract? What were the specific terms of the contract that are alleged to have been breached?

This court is disturbed by questions such as, which contract did the Appellant admit its existence, noting that her pleadings refer to premises on plot no. F6 Kahawa North and not F6 Githurai Kimbo as testified and as contained in the bills she produced in evidence containing the name of Fredrick Nyabuti & 12 others.

This court also notes that the Respondent produced bills for her premises at Ongata Rongai in her name.

This court reiterates that this being a first appeal, it is not bound to follow the trial court's finding 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.

Before I proceed to consider whether the Appellants or Respondents were liable for breach of contract which was not produced in evidence, I think the issue of the burden of proof must be addressed. Counsel for the Appellant correctly submitted that the Respondent bore the burden of proof. This is the law as espoused under sections **107** and **108** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*, that he who alleges must prove. They submitted that the Respondent had the duty to prove her case on the balance of probabilities.

I associate myself with the submission above on the burden of proof as held by the Court of Appeal in the case of ***KIRUGI AND ANOTHER V KABIYA AND 3 OTHERS [1987] KLR 347*** where the Court of Appeal held that *the burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.*

From the pleadings, all that the Respondent was required to prove in her testimony was that upon the approval of her application for supply of electricity to plot F6 Kahawa North as pleaded, she complied with all the conditions contained in the approval letter. The conditions in the approval letter were:-

- a. *payment of the balance of Kshs. 613;*
- b. *deposit on account of Kshs. 2,500;*
- c. *necessary consents for way leaves obtained;*
- d. *commencement of work notice; completion of work and test certificates in respect of the internal wiring issued by the Respondent's electricity contractor who must be registered under the Electricity Licensing Board(Power and Duties) Rules 1962. Construction works for the service line will not be undertaken unless the wiring certificates have been received;*
- e. *providing the name in which the account would be registered by the Appellant; and*
- f. *completion of and signing of the attached supply contract before final connection is carried out.*

She was to prove that upon complying with the above set conditions, the Appellant failed to install the electricity supply within 90 days.

The letter of acceptance to install power on the quoted premises clearly spelt out that electricity would be supplied within 90 days upon the Respondent complying with the above conditions. by her own pleadings as outlined in her plaint, the Respondent was therefore required to prove that the Appellant breached the *signed and completed supply of electricity contract* in the name the account would operate by failing to install the electricity as agreed, within 90 days from the date of execution of the contract upon her complying with conditions of the contract.

Regrettably, the Respondent did not produce any contract of supply of electricity to the pleaded premises. Her testimony on record concerns different premises and evades mentioning the premises that were specifically pleaded. This evidence was inconsistent with her pleadings. She thus failed to produce the completed and signed contract to demonstrate that the account she supplied to the Appellant for electricity connection on plot F6 Kahawa North was the one in her husband's name on plot F6 Githurai Kimbo. Secondly, she failed to provide the nexus between plot F6 Kahawa North and F6 Githurai Kimbo, these being two different descriptions. The record does not show any explanation from her or her father PW2 as to when the Kahawa North plot F6 changed into the Githurai Kimbo F6. Further, she maintained that the account belonged to her husband Fredrick Nyabuti Mogaka when the bills produced clearly show that the

account belonged to Fredrick Nyabuti Mogaka and 12 others. She did not attempt to explain who the 12 others were.

While her complaint complained of failure to connect power after she had paid the deposit as required, she gave several versions in her testimony and in cross examination. First, that there was no connection of power for two years after signing the supply/ installation contract. She later changed her story and stated that power was connected and later disconnected. She however did not state when the power was installed for the first time after the alleged contract was signed and when it was disconnected, leading to the loss of tenants and rental income that she claims she suffered. She then concludes that power was connected at the end of 2004 and January 2005. In cross examination, she stated that *electricity was supplied 2 years after paying the initial amount in 2002 and power was connected in 2004.*

Another piece of evidence incapable of belief is where the Respondent alleged that the Appellant had attempted to transfer the unjustified bill to her Rongai home and only deducted it when she went to complain. She stated that the transfer was as contained in the February bill for her Rongai home. However, there was no evidence of transfer as the bill produced as Ex3 clearly showed that an amount of Kshs. 256,889.11 was a debit after rebilling on A/C **2349602-01 on 24/01/2008** for **Plot 26038 Ongata Rongai**, almost 4 years after the dispute herein had been filed in court on 17/3/2004. There are no details on this bill of where it had come from. For the Respondent's testimony to be believable, the bill should have shown a billing prior to the institution of the suit. In her testimony, she also stated that after she lodged a complaint with the complainant, the said unjustified bill was removed from her Rongai home account. She produced Exhibit 4 to prove the same. My examination of Exhibit 4 for A/C 2349602-01 for supply as at 03/03/2008 shows a balance brought forward from the previous bill as Kshs. 259,590.30. There is no evidence of removal of that erroneous bill and no doubt, it was still outstanding from the previous bill as per Exhibit 3. The two bills she relied on showed a debit of Kshs.3, 001 from the bill issued on 16/2/2008 and a debit of Kshs. 2,700 from the bill issued on 07/03/2008 and not 256,889 as alleged. The Court below referred to a bill for March removing the transferred bill to her Ongata Rongai premises. The only bill produced by the Respondent is the one issued on 07/03/2008 debiting Kshs. 2700.

The inconsistencies in the Respondent's testimony are neither few nor minor. They go to the root of the subject matter. She pleaded that by a letter dated 11/9/2003, the Appellant purported to terminate the supply contract and demanded for Kshs. 256, 889.11 as outstanding bill for F6 Kahawa North. The letter in question was never produced in evidence. She also pleaded that as far as she was concerned, the only outstanding bill was Kshs. 30,411 which she paid and testified that the demand for this amount was by a letter dated 4/4/2003. She never produced in evidence any receipt for payment of Kshs. 30,411 or the demand letter. Be as it may, if we were to believe this aspect of her testimony, then it must tie up with the 5 meters allegedly supplied/installed one for each of the 5 floors. In my view, there could have been no block bill for Kshs. 30,411 for 5 meters installed and if there was any, nothing prevented the Respondent from producing it in court, having pleaded that it existed and that she had cleared the said bill.

Regrettably, the Respondent's testimony is incapable of belief especially when she adds that during the period when power had been disconnected, she only received standing charges bills of Kshs.87 as per the various bills produced in the name of Fredrick Nyabuti Mogaka &12 others, for Plot F6 Githurai Kimbo covering the period January to November, 2003. Assuming F6 Githurai Kimbo and F6 Kahawa North are one and the same premises, she never testified to that effect or that power was installed in January, 2003 after the approval in September, 2002. She pleaded and testified with inconsistencies that two years after the approval and payment, no power had been installed to the relevant premises. In this case, the only relevant premises are the ones pleaded as F6 Kahawa North.

I have calculated the totals of all the said standing charge bills produced. The standing charges alone range between Kshs. 87 and 90.30. The totals come to Kshs. **1,752.30**. However the said bills do not just reflect the Kshs. 87.00 or 90.30. They show different sums for different accounts. Ex 2 from page 36 to 55 of the record of appeal shows totals due for the 5 accounts as follows"-

- a. on a/c 2247261-01.....438.30+ 351.30+ 264.30+ 525.30+ 90.30+ 177.30
- b. on a/c 2247262-01.....175.90 + 88.90+ 262.90

- c. on a/c 2247263-01.....88.90+262.90
- d. on a/c 2247260-01....., 438.30+ 351.30+ 264.30+525.30+90.30+ 177.30
- e. on a/c 2247259-01.....88.90+ 175.90+ 262.90

The totals for the above bills per account come to Kshs. **5, 100.80**. The question therefore is, where does the bill for 30,411 fit, when was it issued or served upon the Respondent and when was it cleared? There is no evidence whatsoever to prove this fact as pleaded by the Respondent.

The evidence of PW2, the Respondent's father did not perk up the Respondent's case. His own letter of complaint to KPLC as produced PWEX 5 dated 19/08/2003 was clear that he was complaining of failure to install power to the premises on F6 Kahawa North even after he had paid all the money for the installation as required. He also complained of losing income for non- occupation of his premises because of electricity. He never complained that the Appellant had disconnected power supply from the premises after installing the same. Neither did he complain that the tenants were vacating the premises because power had been disconnected from the said premises. His testimony in court did not support the letter of complaint. He tended to prove that power was disconnected on 26<sup>th</sup>/8/2003 after he wrote a letter of complaint on 19/8/2003 that the appellant had failed to install power. He stated that he received a demand letter dated 25/8/2003 for Kshs.266, 889 and on 26/8/2003, power was disconnected. I find his testimony murky. It could possibly not be true that this witness complained of total failure to install power to the premises and about six days later, the Appellant proceeded to issue an exorbitant bill and a day later disconnect the said power. If it did happen, then there was no material produced in court to prove the claim.

Further, a reading of the letter written to the Appellants by the Respondent's advocates dated 10th September, 2003 PWEX6 demanded connection of power following her application of 16/3/2001 and quotation for Kshs. 227, 679 which she had dully paid but that since March, 2001 the Appellants had totally failed to connect the power and that all her tenants had vacated the premises by reason thereof and she continued to lose income by the same reasons. There was no mention that power had been installed and disconnected. Clearly, as at that date, power had not been supplied as per the supply quotation submitted to her as per the quotation and approval letter dated 24<sup>th</sup> September, 2002 produced in evidence. My reading of the quotation and approval letter of 24.09.2002 was that Power could only be supplied upon her meeting the conditions contained therein and upon her completing and signing the attached supply contract. Therefore, it follows that if there were any tenants then they were in occupation long before the expected supply, not that they vacated the premises upon the disconnection of supply. The allegation that the tenants had occupied the premises on account of the electricity supply was not proved. It would also not be true to say that the said tenants vacated the premises because of disconnection of electricity. I am fortified by the contents of the demand letter and pleadings by the Respondent to the effect that the Appellant had totally failed to connect power after payment of Kshs. 227,679.

I ask myself as to how the Appellant could have disconnected power that it had failed to install or supply in the first instance. In my analysis and re-evaluation of evidence on record, the Respondent did not prove on a balance of probability, that the Appellant failed to supply power after the alleged payments and neither did she prove that power was connected immediately upon payment of the amount as quoted and later disconnected.

The Respondent clearly pleaded that the disconnection was carried out after serving her with an exorbitant bill. It was upon the Respondent to prove her pleadings not only by her testimony, but where appropriate, by documentary evidence. In the circumstances of this case, the Respondent's case was no doubt grounded on an alleged written contract and documentary evidence as her pleadings made reference to letters and bills. These could not be proved by mere word of mouth. The burden lay with her to prove the terms of the contract that had been breached by the Appellant to her detriment. She did not prove. She also claimed the power was disconnected after being served with an erroneous bill which was later transferred to her Rongai home. No such demand letter was produced. No such exorbitant bill which was allegedly later transferred to her Rongai home was exhibited in evidence. In addition, she claimed she had been billed Kshs. 30,411 which she considered the legitimate outstanding bill and which she alleged that

she fully settled. No such bill or receipt for payment which she stated in her testimony that she was issued with was ever produced in evidence. And the testimony of her witness too was that he personally paid the bill for Kshs. 30, 411 but no document was produced to prove payment.

All the many questions I have posed were never answered by the Respondent in her evidence.

Apparently, PW2 her father had a lot of interest in the matter since he was acting on behalf of his daughter and had even paid the bills by himself. He made no reference to the claim he had made in his letter of complaint dated 19/08/2003 to the effect that the Appellant had alleged that there was an illegal power connection. He did not corroborate the Respondent's testimony that the account was to be registered in the name of her husband Mr. Fredrick Nyabuti Mogaka, and neither did he mention anything to do with the 12 others in the 5 accounts standing charge bills.

There is also no explanation why the standing charge bills received were not settled, assuming they related to the alleged contract of supply for plot F6 Kahawa North as pleaded, and not plot F6 Githurai Kimbo as per the oral testimonies in court. Further, there is no explanation why the Respondent never complained of only receiving standing charge bills as opposed to actual bills if power had been installed as per the supply contract and later disconnected. Why did she not produce standing charges bills for 2003, 2004, 2005, 2006 or 2007. If the power was installed and later disconnected, this begs more answers to many questions. Besides, where are the bills for actual consumption for the period prior to the alleged wrongful disconnection? Why did the Respondent not plead that her supply was wrongfully disconnected as opposed to total failure to supply? Why was there no single bill whether standing or actual to show that from the effective date of installation, the Respondent did not owe any monies to the Appellant? The bundle of bills produced was all for the year 2008 after the suit was instituted in court.

Albeit there was no counterclaim by the Respondent, its trite law that a party is bound by their pleadings. They must adduce evidence that prove the allegations contained in their claims, not frame a different case during the hearing as was the case for the Respondent. The Respondent failed to prove her claims as pleaded. The evidence related to disconnection after supply whereas her pleadings stated that the Appellant had totally failed to supply power to her premises after she had paid all the supply and installation charges as advised.

Having said all that, I hold that there was no valid supply/ installation contract between the Respondent and Appellant to supply/ install electricity on premises known as F6 Githurai Kimbo as per her testimony, that of her witness and the documentary evidence produced in court, capable of being breached. I therefore hold that the learned magistrate acted in error in holding that the Appellant had breached a contract by disconnecting electricity supply to the Respondent's premises without ascertaining whether there was any power supply/ installation in the first instance, and which specific premises were affected by the alleged disconnection.

The Appellant's counsel submitted at length concerning ownership of the premises. In my view, the Respondent did not require a title document or construction approvals to prove a contract for power supply as it was not shown that the Appellant only supplies power to registered proprietors. The Respondent had evidence that her father gifted her plot and PW2 her father did confirm the position. The only problem is that she was unable to prove that the subject matter of her suit was F6 Kahawa North as her evidence was at variance with the pleadings.

In my analysis, I am persuaded by the finding by Retired **Justice A. Ringera in the case of COPELAND V DIANI CAR HIRE & SAFARIS HCC 5562 OF 1991** cited by the Respondent's counsel that *if the amount is not pleaded, evidence in support thereof is inadmissible.*

The court went further to state that *If such evidence is admitted on record by reason of want of vigilance on the part of opposing counsel, an appellate tribunal will set aside any award based thereon; and that by parity of reasoning, the trial court should reject the evidence even if it is not objected to for reason that exclusionary rules of evidence do not depend on the quality of advocacy in the courts for their existence and enforceability. Whether a matter is defended with competence or it is not defended at all*

ought not to affect the applicability and enforceability of the rules of evidence.

It is with equal discernment that I evaluate the Respondent's claim subject matter of this appeal, that her evidence and that of her witness failed to prove the pleaded facts and it matters not that the case was vigorously defended or not defended at all in the subordinate court.

In this appeal, just as in the **ODD JOBS V MUBIA {1970} EA 476** case, I do not find anything followed in the course of the trial that the unpleaded issues had been left to the court for decision. It is simply that the Respondent did not adduce evidence to prove the pleaded facts. In addition, the apparent inconsistencies evident in the oral evidence and documents produced by the Respondent were not addressed by the trial magistrate. I hold that this was an error on his part.

The Respondent's failure to call Mr. Fredrick Nyabuti Mogaka to provide his nexus with the contract for power supply between her and the Appellant is to say the least suspect. It can only be concluded that there was something mystifying about the claim which the Respondent did not wish to disclose to the court.

***b. Whether the Respondent had any tenants who vacated the suit premises due to power disconnection and or Whether the Respondent suffered any loss of rental income and or future income***

The Respondent also failed to call her caretaker to corroborate her evidence on the existence of tenants and or whether, when and why they vacated the premises upon power being disconnected, and exactly how much they were paying her. This evidence was necessary to prove her claim for lost rental income and anticipated future rental income. This was necessary as it emerged during cross examination that the Respondent could not prove existence of tenants and the loss. She stated that her caretaker knew the tenants and how much they were paying as he was said to have been responsible for receiving payments from them. There is no reason why she did not call him to confirm those facts. This court's conclusion is that the caretaker had in his knowledge facts which could have adversely affected the Respondent's case. This brings into operation the decision in the Court of Appeal for Eastern Africa in *the case of **BUKENYA & OTHERS VS UGANDA [1972] EA 548** where the Court of Appeal stated:-*

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

Thus, 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 herein to avail all witnesses who would assist the court arrive at the truth and a fair decision. It can therefore be inferred that had she called the mentioned caretaker and Mr. Fredrick Nyabuti Mogaka, they would have given evidence adverse to her case.

I therefore find that the learned magistrate erred in law and fact in holding that the Respondent had proved loss of rental income and future income in the absence of evidence that the 45 tenants occupied the premises, vacated as a result of the disconnection and as to how much they were paying the Respondent. The distinguishing feature between this case and that of **FELIX MATHENGE VS KPLC CA 215 OF 2002**, as cited by the Respondent's counsel is that in that case, there were specific pleadings on the loss of income as shown on page 3 of the said judgment, quoting from paragraphs 18 and 19 of the plaint. In this case, the Respondent never made a specific plea as to how much she was receiving from the tenants per month. She adduced evidence which evidence did not add up to the amount of Kshs. 1,366,000 pleaded.

I hasten to reiterate that PW2 in his letter of complaint dated 19/08/2003 claimed that: –

***“Your office has been giving me all manner of excuses as to why you have not connected me after paying all the money you requested me to pay and I have been losing income from non-occupation of my premises because of electricity.....if there were any loss arising from the alleged illegal connection(which I am not aware of ) you should use your investigations to recover what you have lost***

but **SHOULD not be used as an excuse for not connecting me..... these are two different issues which should be treated separately** ”

In addition, her advocates M/s Nelson Kaburu did on 10<sup>th</sup> September, 2003 write to the Appellant and stated thus concerning supply of electric power to plot F6 Kahawa North:-

***“we act for Fridah who applied for supply of electric power to her above premises on 16/3/2001 which application you approved and gave her a quotation for Shs 227, 679/= which was duly paid to you. Since March 2001, you have totally failed to connect the power and all her tenants have vacated the premises by reason thereof and she continues to lose income by same reason.....”***

In these correspondences, it was clear that the claim related to non-connection and not disconnection of power supply to the Respondent’s premises. If the claim as pleaded was that tenants had vacated as a result of failure to supply electricity, then it could not turn out in evidence before court that there was subsequent disconnection of electricity to the premises leading to the tenants vacating premises.

In this regard, having considered all evidence in totality and re-evaluated the Respondent’s testimony and that of her witness and documents produced, the evidence of Mr. Fredrick Nyabuti Mogaka and the caretaker was material and failure to call them to testify dealt a fatal blow to the Respondent’s claim. I am conscious that it is not the quantity of evidence that matters in any given case, but that the evidence adduced must be capable of proving the alleged facts on a balance of probability, must be relevant and that it must be reliable and capable of belief. In my view, the worth of the Respondent’s evidence and that of her witness was below the standard required to prove her claim against the Appellant on a balance of probability.

I am therefore satisfied with the Appellant’s contention that the trial magistrate erred in law and fact in holding that she had proved the existence of tenants and accrual or loss of income in the absence of evidence to support her claim. With this kind of evidence, it matters not that the Appellant did not tender any evidence in defence. It even matters not that the matter proceeded as a formal proof. The Respondent did not discharge the burden of proving her case to the required standard. Her case had gaping holes and must fail.

Whereas I agree with the Respondent’s advocates submissions as derived from the attached authorities that evidence can be oral or documentary and that it is not just documents that can prove a fact, however, it should be noted that the authorities relied upon can be distinguished from this appeal. The facts and circumstances were very different and the learned Judges of Appeal in **WAMBUA Vs PATEL& ANOTHER[1980] KLR 336, and JACOB AYIGA MARUJA & ANOTHER Vs SIMEON OBAYO CA 167/2002** were clear in their mind that they were relying on the *dictas* not *ratio decidendi* of their peer judges. I see nothing in their *dictas* that can persuade me to find that where, like in this case, the Respondent’s own pleadings inferred reliance on documentary evidence or other evidence but failed to adduce such evidence which could have been critical in the determination of her case; but was not adduced for reasons not known to the court, then she must have her claim allowed through thick or thin.

In this case, the Respondent based her claim on electricity supply contract which was not produced. It cannot be said that it was unrealistic to expect her to produce the contract subject matter of the claim for breach and from which damages were being sought. She also claimed for special damages for loss of rental income yet made no effort to demonstrate to the court that she earned the claimed amount. She had a caretaker whom she claimed knew the tenants and how much each paid as he used to issue receipts but made no effort to call him. She had worked in Government- Ministry of Health and even knew or ought to have known what accounts meant. There was no expectation that she must produce accounts. But having stated that receipts were being issued to tenants for rent as received by her caretaker, what difficulty did she have calling the caretaker or producing copies of those receipts? Her claim was not difficult to quantify as was the case in the authorities cited by her counsel, but she had to prove, unlike in the cases referred to by the Respondent’s counsel concerning the illiterate livestock farmer and in **WAMBUA Vs PATEL& ANOTHER[1980] KLR 336, and JACOB AYIGA MARUJA & ANOTHER Vs SIMEON OBAYO CA 167/2002.**

In my view, documentary evidence was a necessary prerequisite to prove the loss allegedly suffered by the Respondent.

***c. As to whether the Respondent was entitled to special damages as pleaded and general damages for breach of contract***

I have already found that there was no contract capable of breach as there was no proof of the same by the Respondent. Similarly, there were no tenants who vacated the premises for failure to connect power supply or even for disconnecting power to the suit premises. On the other hand, the nature of damages in the material suit was special and for special damages to be awarded, they must be specifically pleaded and specially proven. I am guided by the decision in the case of (**DAVID BAGINE V MARTIN BUNDI CA No. (Nrb) 283/1996**, the Court of Appeal referring to Lord Goddard CJ **in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177**) held that-

*“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage., it is not enough to note down the particulars and to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”*

In her pleadings, the Respondent claimed for loss of future rental income as at March 2003 but gave no specific period the income and loss covered and at what rate and for how many tenants. She also claimed loss of rental income and quantified as such, as Kshs. 1,366,000 but never mentioned the period it covered or the number of tenants and at what rate. She never amended her pleadings to specify or increase the figures. The court nevertheless awarded her Kshs. 2.0 Million as lost income in the period of 2 years stating that he took into account future loss of income or damages for breach of contract. In the absence of evidence as to when the alleged contract was entered into and or breached, and in the absence of relevant and reliable evidence that the Appellant breached a contract by disconnecting power supplied to the Respondent’s pleaded premises, I find that there was no basis for this award of Kshs.2 million which was not pleaded and or proved. I find that the award was erroneous. The learned magistrate’s jurisdiction as pointed out in his judgment was 2 million. He went further to quantify the loss to exceed 2 million and proceeded to reduce it to the maximum allowable under his jurisdiction. This computation lacked legal basis. Jurisdiction is everything and lack of it meant that he could not, in the first place entertain the claim for anything beyond 2 million. I therefore find that the trial magistrate erred in law and fact in awarding the Respondent the said sum of Kshs. 2.0 million inclusive of general damages for breach of contract and future loss of income as the same was not specifically pleaded or even proved as a special damage. In addition, he lacked jurisdiction to so increase the amount pleaded, which amount exceeded his pecuniary jurisdiction but he nevertheless attempted to cure the problem by reducing the same.

Furthermore, it is trite law that general damages cannot be awarded in a matter of contract. Such a proposition is to be found in the Court of Appeal decision in **JOSEPH UGADI KEDERA V EBBY KANGISHA KAVAI (personal representative of EPHRAIM KAVAI (deceased) CA NO. (KSM) 239/1997** where the court reiterated the law that:-

*“There can be no general damages for breach of contract. ‘Damages arising from a breach of contract are usually quantifiable and are not at large “where damages can be quantified they cease to be general.”*

Thus, there must be proof of actual loss as a result of the breach. In this case, as I have repeatedly stated, there was no such proof of actual loss.

***d. whether the Respondent should have mitigated her loss.***

I will consider the matter of the effect of the Appellant not adducing any evidence to prove their defence allegations. I conclude that they did not support or prove the allegation of breach of contract by the Respondent. They did not assist the court either. But again, I do not fault them for not calling any evidence as it was their choice not to prove anything before the court. Whatever the Appellant gathered in cross examination of witnesses could not on its own be said to have built up their defence. What was

pleaded by the Appellant therefore remained mere allegations and bones without any flesh. Nonetheless, failure to adduce any evidence by the Appellant did not oust the Respondent's duty to prove the allegations against the Appellant.

In my view, the submissions by the Appellant's advocate were only useful in as far as they were to clarify the law not adducing evidence for the defence as the parties themselves had the opportunity to state in court to prove the allegations as pleaded. It is trite law that parties are bound by their pleadings to avoid ambushing the other party. Further, it is not for the other party to disprove the claim but for the party who alleges to prove the allegations on a balance of probability.

Why did the Appellant choose not to tender any evidence in defence having pleaded breach of contract by the Respondent and instead rely on written submissions? In my view, the Appellant's submissions did not amount to evidence even if they were purely on points of law. In addition, law is not evidence. Equally, pleadings are not a piece of evidence. It follows that submissions by counsel when trying to fault the evidence of the Respondent did not challenge the facts as presented, as in doing so, he was trying to give evidence for his client from the bar. As matters stand now, this court only has the evidence from the Respondent and her witness and the documentary evidence adduced, which evidence, as I have indicated, is inconsistent, irrelevant, unreliable and incapable of supporting her claim. It fell short of the standard of balance of probability. It had a plethora of gaping holes.

This is a court of law and must decide the appeal on the basis of whether the applicable law was followed by the trial court in assessing the facts as presented, and whether evidence adduced proved the Respondent's claim on a balance of probability.

According to the Respondent, in the absence of any evidence adduced by the Appellant, the Respondent's allegations as to contract of supply, disconnection and breach thereof are not ousted. I agree that there can be no breach of contract on the part of the Respondent in the absence of evidence to show what wrong she did. The defence did not discharge any proof as claimed in their pleading. My conclusion therefore is that the Appellant's defence was a mere bone without flesh in support. It did not prove any averments in the defence that tended to exonerate it fully from culpability.

The misery is, however, that the Respondent did not; on a balance of probabilities prove that the Appellant was culpable either. Having pleaded breach of contract, and loss of rental income, it was incumbent upon her to prove her allegations against the Appellant on the standard required in civil cases, regardless of whether the suit was defended or not; to ensure that her pleadings are supported by relevant evidence that is capable of belief, not just a testimony; and that burden did not shift to the Appellant who did not have any counterclaim against her.

But which contract was admitted and or breached? And in respect of electricity supply to which of the two premises described differently in the pleadings and in the letter of 24<sup>th</sup> September, 2010? Did the Respondent discharge her part of the contract and which one? Did she pay the balance of the assessed sum and in respect of which premises? Did she pay for the account deposit? If her evidence is that 5 meters were supplied, did the Kshs. 2500 account deposit apply to all the 5 meters? When was the electricity supplied and when was it disconnected giving rise to the suit subject matter of this appeal? If the installation was made in the name of her husband, what was so difficult calling him as a witness since there were some bills in his name and 12 others? Failure to call Fredrick Nyabuti Mogaka as a witness to prove the Respondent's claim that she provided his name to the Appellant to be registered as the account holder, and the failure to explain how the said Fredrick Nyabuti Mogaka became the contracted consumer with 12 others leaves a lot to be desired.

### **Conclusion on each of the grounds of appeal is that**

1. There was no proof of contract of supply of electricity to premises known as F6 Kahawa North or F6 Githurai Kimbo subject matter of the suit in the subordinate court capable of breach by the Appellant.
2. There was no proof of installation of electricity supply to any of the premises known as F6

Kahawa North or F6 Githurai Kimbo before the suit subject matter of this appeal was filed in court.

3. There was no proof of disconnection of power supply to the premises alleged to be the subject matter of the contract of supply between the Appellant and the Respondent.
4. There was no evidence of loss of tenants to the alleged premises F6 Kahawa North or F6 Githurai Kimbo as a result of the alleged disconnection.
5. There was no proven rental income capable of an award by the trial court.

Consequently, the Appeal herein is allowed, the judgment and decree of the subordinate court vide Nairobi Milimani Chief Magistrate's Court Civil Suit No. 3546 of 2004 dated 8<sup>th</sup> March, 2010 is hereby set aside and substituted with an order dismissing the Respondent's suit with costs of the appeal to the Appellant.

As the Appellant did not call any evidence in the lower court, I order that each party bear their own costs of the subordinate court.

I further order that the sums of money in satisfaction of the decree herein as deposited in a joint account of advocates for the parties be released to the Appellant with all the interest accrued within seven days from the date of this judgment.

**Dated, signed and delivered at NAIROBI this 24<sup>th</sup> day of September, 2014.**

**ABURILI ROSELYNE EKIRAPA**

**JUDGE**

**In the presence of**

.....for the Appellant

.....for the Respondent

.....Court Clerk