



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 19 OF 2011

ABEL M. MOMANYI BIRUNDU APPELLANT

V E R S U S

KENYA POWER & LIGHTING CO. LTD. RESPONDENT

J U D G M E N T

In his amended plaint dated 3.11.2010 the appellant sought orders against the respondent as follows:-

1. A refund of KShs.1,400/=

1A The defendant be ordered to reconnect electricity on contract number 22741271

2. General damages for breach of contract
3. Costs and interest on the above a & b.
4. Any other order

The trial court heard the dispute and granted the prayer for the reconnection of the electricity and the prayer for costs. The appellant was not satisfied with the decision of the trial court and filed this appeal. The grounds of appeal are that the trial court ought to have allowed the prayer for the refund of Kshs.1,400/=, the trial court relied on the nonproduction of bylaws governing the contract by not awarding general damages, the trial court misapprehended the law on awarding general damages in contractual case, he trial court erred in law in not awarding KShs.1 million which it found could have compensated the appellant and that the judgment is full of contradictions.

Parties agreed to have the appeal determined by way of written submissions. The appellant submitted that the bills were fully paid and by the time the disconnection was made on the 11.12.2009 no bill was outstanding. The claim for KShs.1,400/= was based on a bill dated 16.12.2009 and therefore it was prepared after the electricity had been disconnected. The sum of **KShs.1,400/=** is described in the bill as "offline debit due to erroneous collection". That item is not known and the appellant paid it. The appellant is therefore seeking a refund of that amount. With regard to damages the totality of the appellant's submissions, though divided in several subheadings as per the memorandum of appeal, is that having found that the appellant did not have power supply for a period of 14 months the court ought to have granted general damages. The trial court even went ahead to indicate that it could have awarded **KShs.1 million** but it didn't. Further the court was of the view that the bylaws governing the supply contract could have exemption clauses but was not produced yet the award of general damages is not based on the production of those bylaws. The burden of proof was on the respondent to produce those bylaws and to show that they contain exemption clauses. The appellant proved his case and the court was wrong by holding that the computation of the damages was quite difficulty as the plaintiff did not provide proof of the amount of money he spent during the period he had no power.

On his part counsel for the respondent submitted that the appeal raises only two issues namely whether the court was right in declining to award the appellant general damages and whether the court was right by not compensating the appellant damages for loss of business. Counsel submits that general damages have to be proved and they are awarded on the presumption of the direct, natural or probable consequence of the act complained of. The burden of proof was upon the appellant and the appellant's own pleadings did not provide for that. The sum of **KShs. 1 million** was only mentioned by the trial magistrate as an orbiter. There was no prove that the appellant had incurred business losses due to loss of electricity. Further the court properly declined to award the sum of **KShs.1,400/=** as there was no proper evidence adduced.

The record of the trial court shows that one witness testified for the appellant and another witness for the respondent. The appellant's case was that he had a power supply contract with the respondent this being contract number **22741271**. His monthly bills were between KShs.1,500/= to 2,000/=. By 17.11.2009 the bill outstanding was KShs.1010.30 and he paid it. He had no bill outstanding. On 11.12.2009 his electricity supply was disconnected. He told the person who was disconnecting that he had no outstanding bill but he did not listen to him. He went to complain to the manager at Kakamega but he was told to pay reconnection fee. The appellant refused to pay. On 13.12.2009 he wrote a letter to the area manager Kisumu complaining about the disconnection. On 16.12.2009 he received a bill for KShs.3,655.20. On the bill there was a charge for KShs.1,400/= for offline debit due to erroneous collection. On 23.12.2009 he paid KShs.3,700/=. He told the respondent's manager that he had paid the bill and he was told a member of staff was going to reconnect him. That was not done. The appellant decided to file the suit. He testified that he suffered as his electrical gadgets lied idle. He denied that even after the disconnection he was enjoying electricity supply. According to him even when the power supply was disconnected he kept on receiving electricity bills.

DW1, ALBERT MUYANGA, testified that he was employed by the respondent as a customer care staff based at Kakamega. He was aware of the appellant's contract and he did not receive any complaints from the appellant before the suit was filed. The appellant kept on paying his bills and as of 15.7.2009 there were no arrears. On 30.6.2009 he issued cheque number 159 to settle a bill for KShs.1,400/=. Another bill dated 6.11.2009 indicated a payment of KShs.1,400/= vide cheque number 159 and a reversal was done. According to DW1 the sum of KShs.1,400/= was not a reconnection fee but erroneous collection. On 11.12.2009 the appellant's power supply was disconnected. It was observed that the appellant had reconnected the supply on his own and in March 2010 the power was disconnected from the pole. The appellant failed to differentiate between reconnection fee which is KShs.500/= and erroneous collection. Had the appellant paid the fees the power was going to be connected. On 11.12.2009 when the disconnection was made a sum of KShs.1,400/= was outstanding. On 24.11.2009 the appellant paid a bill of KShs.1010/=. The reversal of the cheque was done on 10.12.2009 and the appellant was informed of the cheque reversal through the bill that was issued on 23.12.2009. It is the evidence of DW1 during cross-examination that by the time the disconnection was done the appellant had not been notified of the cheque reversal. DW1 confirmed that the bill for December for KShs.3,655/= was honoured and the said bill covered the sum of KShs.1,400/=. According to DW1 the reversal of the sum of KShs.1,400/= is the source of dispute. The appellant had no receipt to show that he paid the sum of KShs.1,400/.

The main issues for determination in this appeal is whether the court was correct in declining to award the appellant the sum of KShs.1,400/= and whether the appellant ought to have been awarded general damages. With regard to the first issue it is clear from the evidence that the appellant on 30.6.2009 issued a cheque number 159 for KShs.1,400/= to settle a bill of that amount. The respondent received the cheque and it catered for that bill. It appears that the same cheque was taken to have been paid for a subsequent bill for November 2009. The respondent noted the anomaly in its records and reversed that entry. The essence was that the appellant's account for November 2009 had been shown to have paid another KShs.1,400/= while that was not the case. The appellant was not aware of that reversal as it was relayed to him through the bill dated 16.12.2009. It is important to note that this bill bears the date of 16.12.2009 as well as 23.12.2009 which later date was the due date. Further this bill had two different figures namely 3655.17 and 3655.20. The later bill of 16.12.2009 contained the erroneous amount of KShs.1,400/= that had been credited to the appellant. By paying that amount the appellant simply did offset what had been credited to his account by the respondent's mistake and that was not a double

payment. The appellant contends that there was no second bill for that amount but I do find that the respondent was correct by offsetting that amount in the December bill. In essence therefore there was no double charging and that amount is not refundable.

The next issue revolves around the award of general damages. From the evidence on record from both parties it is clear that the disconnection was done on the 11.12.2009. A second disconnection from the pole was done in March 2010. The appellant filed his suit before the lower court on the 15.1.2010. The evidence further establishes that when the respondent indicated the erroneous debit of the sum of KShs.1,400/= the appellant was not aware. In effect therefore while the respondent was claiming a sum of KShs.1,400/= from the appellant the appellant was not aware that his account had been erroneously credited/added a sum of Kshs.1,400/= and that the respondent had noted that anomaly and had reversed the entry. So when did the appellant come to know of the respondent's demand of that amount of KShs.1,400/=. It is the evidence of both parties that on 24.11.2009 a bill for KShs.1010 was paid by the appellant. The statement of account produced by the witness for the respondent shows that KShs.1,000/= was paid to settle that bill leaving a balance of KShs.10.27. The statement shows that on 10.12.2009 the erroneous sum of KShs.1,400/= was debited to the appellant's account. That amount had been credited on the 6.11.2009. As held herein above the respondent was within its right to offset that amount. The bill for December 2009 was KShs.2,244/=. Together with the sum of KShs.1,400/= and the balance of KShs.10.27 made up a total bill of KShs.3,655.17. The record shows that that amount was paid on the 23.12.2009.

It is clear that the disconnection was done on the 11.12.2009. By that time the appellant was not aware that a sum of KShs.1,400/= was due to the respondent. There is no evidence that the appellant was notified about that outstanding amount before the bill of 16.12.2009 was issued to him. Before he could receive the bill and settle it his power was disconnected. The double entry for the sum of KShs.1,400/= was an error by the respondent and it was duty bound to explain to the appellant that there was that mistake. I do believe that the only time the appellant came to know that there was double entry was during the hearing of the case when DW1 produced the statement of account as defence exhibit 4. Since the respondent did not care to inform the appellant that there was a sum of KShs.1,400/= due which amount was only discovered on 10.12.2009, I do find that it was a mistake on the part of the respondent to rush to the appellant's premises the following day 10.11.2009 after having noted the double entry and disconnect the electricity. The appellant was right to go and complain that the only bill that was due to him was the amount of KShs.1010 which he had already paid. Indeed by 10.11.2009 the bill for KShs.3,655.17 had not been prepared which bill contained the demand for KShs.1,400/=. I do find that the respondent's act of disconnecting the appellant's electricity was done in haste and was unlawful. It was stated that the appellant had issued a bouncing cheque but no cheque was produced to prove that. Further the double entry of cheque number 159 was a mistake of the respondent as a cheque that had been paid in June 2009 ought to have been banked and could not have resurfaced on the 6.11.2009 for it to be credited again.

It is the position of the respondent that the appellant paid the reconnection fee of KShs.500/= as per the evidence of DW1. The power could have been reconnected. Since the power was disconnected on 10.11.2009 even before the appellant was aware of the outstanding balance of KShs.1,400/= it was not advisable for the respondent to demand reconnection fee before restoring the power supply. In any event there is no demand note for that amount. In any case the respondent could have included that claim in its subsequent bill. It was the respondent that had caused the problems and it ought to have approached the appellant with humility and explain to him what the problem was. The respondent simply exercised its muscles and went to the pole and disconnected the power. The meter for the appellant was not produced to show that power was being used even after the disconnection. The defence filed by the respondent does not include averments that there was unlawful reconnection even after power had been disconnected.

In the end, I am satisfied that damages ought to have been awarded to the appellant. It appears that from the time the suit was filed until when the court made its judgment on the 1.3.2011 the appellant did not have power. The trial court noted that that a period of 14 months. It is not clear why the appellant did not file an application for a mandatory injunction to have the respondent reconnect the electricity supply before the case was heard. The fact that the case took about 14 months to be settled cannot be blamed on

the respondent. Although counsel for the respondent appears to suggest that the appellant ought to have specifically proved general damages, it is clear that where there is a wrong which is established to have occurred then damages ought to follow. I do find that a sum of **KShs.200,000/=** would be reasonable compensation for the appellant. In his submissions before the trial court the appellant sought a sum of **KShs.500,000/=**. In its judgment the trial court indicated it could have awarded any sum up to KShs.1 million as the appellant did not have power for 14 months. However, that should not be taken to mean that the court awarded that amount or that it is the amount of damages due to the appellant. The appellant's ground to be awarded KShs.1 million is misplaced.

In the end, the appeal on a refund of KShs.1,400/= fails. The appeal on general damages is hereby allowed and the appellant is awarded a sums of **KShs.200,000/=**. Each part shall meet his/its own costs.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E