REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 369 OF 1998

CAPITAL FISH K LTD ……..……......................……………………. PLAINTIFF
VERSUS
KENYA POWER & LIGHTING CO. LTD …….................…………DEFENDANT

JUDGEMENT

Coram: Mwera J
Court Clerk Njoroge
Odera for plaintiff
Gitonga for defendant

In doing its best in this matter where principal pleadings were amended several times over, what appears to be the basis of the proceedings herein is:-

a) The Amended plaint dated 16.03.07
b) The Re-Amended Defence dated 26.02.02
c) The Reply to Defence of 23.4.07
Then the twenty – six (26) Agreed Issues of 3.1.09.

In the amended plaint, the plaintiff company stated that it was a fish processing entity, located in a place called Homa Bay, selling its products locally and overseas. It had installed sophisticated modern equipment to ensure quality production in compliance with the law. The equipment requires continuous high voltage supply of power. On 16.07.92 the plaintiff signed a power supply agreement with the defendant company for 315 KVA supply to its said factory. Thus the defendant's 11 KV line to Homa Bay had to be upgraded with the installation of a 315 KVA transformer to provide the required 415 KVA operational voltage to cater for the demand of 315 KVA. That the defendant was obliged in this case to provide a higher rated transformer as a safety measure so that the transformer could not be overloaded. It did not do so. In 1993 the defendant sanctioned an additional 35 KVA connection to the plaintiff's factory increasing the authorized "after Diversity Maximum Demand" to 350 KVA But it did not upgrade the 315 KVA transformer to cater for the added load. The plaintiff contended that that technical omission constituted negligence because the under voltage that was delivered, caused an overload to the transformer as a result of which the plaintiff's equipment was damaged. The damaged electric machinery, equipment and parts were worth sh. 4,814,452/=. There was also cost for a parallel generator that was installed and processing capacity was reduced.

Then on 20.4.04 the plaintiff applied for additional power 600 KVA supply. On 25.5.94 the defendant wrote to the plaintiff detailing the terms for such provision. It was required and it complied with payment of sh. 1,805,575/=. So in total the plaintiff was supposed to have 950 KVA of power supply from the defendant. The defendant, however, installed a 603 KVA transformer which was inadequate to

serve the plaintiff's needs and there followed damage of a burnt motor, water pump motor, cooling fan and compressor motors. That the agreed 950 KVA was not supplied but in 1998 without consulting with the plaintiff the defendant provided 1000 KVA, thereby reflecting incorrect records between the 2 litigants. The plaintiff continued that its concerns were not dealt with by the defendant yet it well-knew that the supply of under - voltage power could and did cause damage to the plaintiff's machinery, equipment and loss in production.

By an agreement of 1994, the defendant was to install and supply the plaintiff with 630 KVA of power. The latter agreed to pay costs of the installation and pay for the power. But the defendant failed to abide by the terms of agreements between them. The agreed level of power was not supplied and that caused the plaintiff damage and loss. Between 1996 and 1997 the plaintiff claimed that it incurred losses as follows:

i) Breakdown of machinery & Repairs – sh. 4,814,452/=
ii) Fuel cost to run a generator – sh. 3,614,326/=
iii) Reduced Production & Loss of Fish sh. 12,150,972/=
iv) Loss for fish supplied overseas sh. 6.3 m
v) Importation & Installation of 2 power stabilizers – sh. 7.5m, then
vi) Loss due to reduced fish production from 3268 tones in 1996 to 2855 tones in 1997 – sh. 12,850,000/=
(Note: It is not clear as at this point if losses at (iii) and (VI) overlap). So the plaintiff prayed for
a) Specific performance
b) Special Damages
c) General Damages
d) Costs and Interest

In the re-amended defence it was admitted that there was a contract/agreement to supply 560 KVA with a transformer rated at 630 KVA. It was denied that the plaintiff informed the defendant that it required continuous supply of power and their agreement was not based on such. Power was to be supplied as per the Act, the contract and conditions (EAPL) plus By-Laws 1953. The defendant further denied that it was even in breach of the supply agreement ending in lower voltage which allegedly resulted in the damage to the plaintiff's machinery and equipment. An action in damages did not lie. That the plaintiff had not put forth a proper statement of when or what machinery broke down. That the plaintiff got the power it needed but failed to pay for it. The claim by the plaintiff that it installed its own generator was termed contradictory. It did not import and install power stabilizers either.

The defendant maintained that power supply to the plaintiff factory did not deteriorate between 1996 and 1997 and so no loss was suffered as claimed. The defendant installed the Rongo – Homa Bay 33 KV line. It was commissioned on 29.11.97 and that improved power supply. Further, a 33 KV line between Ikonge – Tombe – Kisii was installed and commissioned on 6.3.98, further improving power supply to the plaintiff. At this juncture the court is not sure whether the plaintiff's claim falls in late 1997 or early 1998. However, the defendant further pleaded that on 29.11.97 it installed a 1 MVA transformer specifically for the plaintiff's factory because the plaintiff had been overloading the 630 KVA transformers as a result of which it regularly broke down. The plaintiff had all along refused to sign a contract to increase power supply from the original 560 KVA. And after 29.11.97 no further complaints had been received from the plaintiff. The plaintiff contributed to drops in voltage by exceeding consumption over the contracted 560 KVA. Thus no loss/damage was suffered by the plaintiff to be made good by the defendant.

On record there is the defendant's reply to the amended plaint, joining issues and restating what was contained in the re-amended defence. All in the amended plaint was all denied.

And in its reply to the defence, the plaintiff similarly joined issue with the contents of the defence, reiterated the claims in its amended plaint and maintained that the defendant was liable to it in damages.

On 25.5.10 Alex Trachtenberg (PW1), manager of the plaintiff company, told the court that their fish

processing plant at Homa Bay had equipment/machinery like ice machines, plate freezers, plasd (?) freezers, cold rooms, chillers etc. These items of equipment use heavy compressors. To operate them, electricity of 1000 KVA is required (415 volts). The first contract with the defendant to supply power was signed in 1992 for 315 KVA. At this point parties produced EX P1 and Exh D1 respectively.

For the supply of 315 KVA, the agreement was dated 16.7.92 (Exh P1 – 127), when the plaintiff was known as M/s Fish Products K Ltd.

On 1.9.93 an application to increase power by 35 KVA was placed with the defendant i.e. requiring a total of 350 KVA. On 25/5/94 (Exh P1-1) the defendant confirmed that it would supply 630 KVA on payment which was done (Exh P1 -3). The defendant then supplied a transformer of 1000 KVA replacing the old one of 350 KVA. This was necessary following what the court was told as 0.9. power factor. The plaintiff expected to get 415 volts but only 300 – 400 volts were supplied (Exh P1 – 157) – a letter of 19.1.98 referred to. As at 12.1.98 three phases termed only as RED, YELLOW & BLUE were getting less than 415 volts of power (Exh. P1 – 158). Then the court was referred to many letters of complaint by the plaintiff (Exh. P1 – 21 to 58), about under-voltage supplied to the factory. The defendant did acknowledge that problem and came to check on 24.1.97 (Exh P1 – 131). The power factor correction, the defendant promised, could be remedied so that no more under-voltage could occur. The situation had necessitated the plaintiff to run its equipment on generators. Equipment burnt and there was the cost of fuel to contend with. Using generators reduced production at the factory. The party which installed panels for the plaintiff wrote on 16.12.96 (Exh P1 -6) to the defendant to explain that equipment was being damaged due to low power supply.

On 13.11.97 (Exh P1 -13) the plaintiff complained to the defendant about losses it was incurring due to erratic power supply a correction was called for. The same complaint was repeated on 11.12.97 (EXh. P1 – 15 and also on 13.11.98 (Exh P1 – 61). The problem persisted and the defendant reacted on 22.10.98 (Exh P1 -62) by addressing the letter on POWER PROBLEMS CAUSING DAMAGES and promised to investigate and correct. The defendant did address the same issue (Exh P1 – 63) again on October 22, 1998 and on 1.12.98 (Exh P1 – 64). Thus the defendant was carrying out investigations but taking no remedial action.

On or about 24.12.97 (Exh P1 -16, 17), it was certified from Israel where the defendant had exported fish that 100 tons of fish was bad and had been destroyed. PW1 claimed that the fish went bad because of low power supply to their factory, not able to provide adequate freezing. All the time the defendant promised to rectify the problem of low voltage but did nothing.

The court was shown statements (Exh P1 69 to 82) between 1st January and 31st December 1994 to tabulate losses. And a ledger regarding fuel use in the 2 generators the plaintiff used when power failed (Exh P1 – 83 to 91). Each day 658 litres of fuel was consumed. Between 1.1.97 and 31.12.97 some sh. 3,614,326/= was used for fuel.

Lowered production due to the power fluctuations was also placed before court (Exh P1 – 95 to 96) showing that production dropped from 3.2m kg in 1996 to 2.8m kg in 1997.

PW1 divided loss in 2 categories and calculated that bad fish was valued at sh. 12,150,978/= (Exh P1 – 98(i) – special loss) and loss of profit was put at sh. 12,850,000/=. (Exh P1 -68 (ii))

With the fluctuations of power (Exh P1 – 10 letter of 19.9.97) over 2 years PW1 claimed that the plaintiff had to buy 2 stabilizers at sh. 7.5m. It was not clear if these items were supplied and paid for.

The court heard that the 100 tons of fish destroyed (Exh P1 – 16, 17), had been exported to Israel in 4 containers each weighing 25 tons @ sh. 6.4m. The damage to the fish was due to low temperatures because of fluctuation of power supplied by the defendant. Then the plaintiff had to build a sh. 60m power plant because stabilizers could not do much yet fluctuations of power persisted. All was due to the defendant’s negligence. So it should pay general damages and an interest rate of 27% per annum that was operating in 1996/97 market.

In cross-examination PW1 told the court that their claim was based on a contract with the defendant company which was breached. He went through the supply contracts beginning with the 1992 one for 315 KVA, then the one of 1994 increasing power to 630 KVA. That the defendant was to supply uninterrupted power while the plaintiff paid. When there was no power available the plaintiff did not complain. Theirs was a claim that there were power fluctuations. Such forced the plaintiff to buy two generators which cost more than paying the defendant's bills. The generators were back-up facility to be used when power fluctuated. With so many letters to the defendant, it responded that it would rectify the problem but did nothing. The plaintiff's factory was wired by qualified electrical contractors. The defendant could approve the works before connecting power. To PW1, who had been in business for 17 years no protection was required for his equipment except installing the stabilizers. One was put in place in 2008 and the problem was solved. The problem started in 1996; the plaintiff did not expect major fluctuations to interrupt work at their factory. The fluctuations caused damage to equipment resulting in loss of production. Fish was to be kept at minimum stocks or have it moved to Homa Bay. When power fluctuated for 3 days fish went bad and was unfit for human consumption (Exh P1 – 17), as happened on 24.12.97 in Israel. The generator could not run the motor so the loss occurred. There were attempts to move the fish to Nairobi but it had already gone bad. When it was exported, it was destroyed. The fish went bad when it was kept in a defrozen state – in a store without power. Generators ran when power fluctuations took place mostly at peak – hours at night. The generators consumed fuel (Exh P1 – 83 to 91) PW1 spoke of repairs to the damaged machines (Exh P1 – 69 to 82); the defendant has to compensate them. And that could be calculated at sh. 4m. Other losses included fish that went bad.

The court heard that for the loss of fish supplied abroad, the plaintiff could probably retrieve bills, invoices from its archives as for the stabilizers bought PW1 said that he had evidence. To help itself the plaintiff uplifted the phases by installing more machines but that could not resolve the under voltage problem. The power supply required rose from 350 KVA to 630 KVA to 1000 KVA. When the plaintiff applied for 950 KVA they were given 630 KVA. There was damage and later a 1000 KVA transformer was installed.

In re examination PW1 told the court that when there was no power the machines were switched off or operated using generators. But power fluctuations were abrupt and as a consequence machines were damaged.

Gabriel Wasonga Jabong'o (PW2), a registered electrical engineer stepped in the witness box with a Report of Power Supply made by Francis Gachuri, but it was objected to. So PW2 proceeded to testify on the supply contracts between the two litigants.

Beginning with the initial agreement signed by both parties (Exh P1 – 127) the defendant was to supply power rated at 315 KVA. Before doing so the defendant had to survey and confirm the rating of the transformer in the given area which should be of higher rating than the power to be supplied. That would be the case with supply of 350 KVA upwards to 950 KVA. For 950 KVA a transformer of 1000 KVA is required. If the transformer is of a lower capacity than the supply, it will blow up due to over loading. The machinery without protection gets damaged.

PW2 said that he had not done anything for the plaintiff company regarding its machines and plant. His was evidence of an expert. Overdrawing power with a transformer of a lesser rating results in motors not functioning, while a protection mechanism may see to tripping. Designers of equipment are the ones who may incorporate equipment to protect machinery from power fluctuations. Transformers must be such as can bear the supply required. That closed the plaintiff's case.

Daudi Guya Unande (DW1) is a senior technician with the defendant currently stationed in Nairobi. He once worked in Kisumu/Kisii area in 1995 and he knew the plaintiff company whose power meters he used to read monthly. It is a large fish processing company. He produced the reading (Exh D1 – 3). The factory had 360 KVA supply so the transformer ought to have been within that capacity. Sometimes consumption exceeded the limit e.g. when the consumer increased machines, therefore drawing more power. Where such happened the transformer would cease to function and there would be black-outs. To DW1 the plaintiff's demand between 1997 and 2001 exceeded the supply of 360 KVA. It installed

generators which could take over during a black – out. One time there was what DW1 called power – shedding i.e. cutting off supply due to a general power shortage. A motor was then installed to monitor the power out-put of the generator. This would mean giving a rebate to the consumer.

"… due to inability to give the contracted power supply."
The defendant did that in 1998, the year DW1 visited the plaintiff to report on burnt motors but they had been taken to Nairobi. Such damage could be
"…**due to power fluctuation – too high or too low resulting in burning a motor."**

DW1 told the court that the meter readings (Exh D1 – 3) he had in court were compiled by one Waiganjo – not himself. He himself recorded the plaintiff's readings in 1994 but he made no written reports. There was no report about the meter installed in 1998 either. DW1 was aware of the plaintiff's complaints of damage caused by power fluctuations (Exh P1 – 61) and the defendant's response promising to attend to the complaints (Exh P1 – 63). A colleague was sent to attend to the problem. The plaintiff was entitled to 360 KVA at the time of signing the supply contract.

On 25/5/94 (Exh P1 -1) the defendant wrote a letter regarding increasing the power supply to 630 KVA. But in their computer, they only had 560 KVA supply. He did not think the defendant was obliged to supply 950 KVA.

On 27.3.00 the defendant wrote to say that the maximum supply was 560 KVA (Exh P1 – 14a). The court could hear other witnesses on the variation of power supply beginning with 315 KVA rising to 630 KVA or more.

Francis Maina Waiganjo (DW2) was heard next. The witness was employed as an electrical installation technician from 1998. Until he moved to work in Lamu for the defendant company in 2002, he was stationed at Kisumu. While there the witness worked in the large power section dealing with billing and meter reading. He knew the plaintiff company and dealt with it, reading its meter and billing it. At some point the power factor equipment was faulty in the premises of the plaintiff so DW2 went to check. This meant that more power was being drawn but not used. DW2 could not tell what the fault was because the equipment was installed by the plaintiff. It was supposed to draw 560 KVA but most of the time it drew more. The plaintiff had connected for a high load than the defendant had sanctioned. DW2 saw the plaintiff's letters of complaint.

Because of drawing more power that resulted in overloading the system so there would be power under-voltage. Some of the machines could not work and others could burn. The power factor equipment on the premises of the plaintiff did not have protection for under-voltage relay. Such protection would stem damage to equipment in the event of under-voltage supply. It was for the plaintiff, not the defendant to install such gadget.

The court was told that before the defendant connects power, it must be satisfied that a certificate of commencement and completion is produced from a certified technician. Installing protection equipment is not mandatory but good practice. DW2 prepared the schedule of readings (Exh D1 – 3) DW1 referred to. By it the plaintiff drew more power than the contracted 560 KVA. That was not allowed. Such acts meant overloading the system followed by under-voltage. The plaintiff, who had 3-phase rating to run its machines, should only take up to 560 KVA.

In cross-examination DW2 told the court that he visited the plaintiff's factory between 1988 and 2002 although he had no evidence of this. Letters from the company, to the plaintiff were not signed by the witness. When he noted that the plaintiff was exceeding contracted supply, the defendant informed it to apply for more power. DW2 knew that if a customer exceeded the contracted supply, the same could be disconnected.

Eng. Joseph Wafula Masibo (DW3), currently a chief engineer in Nairobi was stationed at Kisumu in 1997 dealing with the defendant's operation, power line installation and maintenance duties. His area covered Homa Bay and the plaintiff was their customer.

The power line supplying the plaintiff was initially 11 KV running from Kericho, via Kisii to Homa Bay. Later the line was upgraded to 33 KV. The plaintiff had a 630 KVA transformer – i.e. of a slightly higher rating than the power supplied. The witness who did not visit the plaintiff's factory only visited a near – by substation. DW3 knew of the plaintiffs' complaints. On 22.10.97 a fire broke out at the factory due to short – circuiting (Exh D1 – 8), in the metering panel where rats had eaten wires. DW3 did not inspect the plaintiff's factory to see if any damage was caused there.

On 23.10.97 DW3 informed his head office of the need to improve voltage levels going to Homa Bay (Exh D1 – 9), because low voltage could be experienced particularly during peak hours in the evenings. So capacitors were installed to raise the voltage. The plaintiff complained of low voltage usually in the evenings. The power line, on which it was, came from far and so fluctuations occurred. Such could also happen when a customer took more power. By the time DW3 left Kisumu he learnt that a 1000 KVA transformer had been installed to replace the 630 KVA one. This was a precaution so that the transformer could not burn.

Installing capacitors in 1997 was to address low voltage and the witness was not aware if that improvement was communicated to the plaintiff. DW3 was not aware that the 1000 KVA transformer ought to have been supplied in 1994. He was not aware of such a request. DW3, nonetheless, was aware that the plaintiff was over-loading the transformer. In such circumstances the defendant gives the customer notice to rectify. That is done because the defendant is in business and they want their customer to continue in business.

John Onyancha Ochenge (DW4) then testified. Once an employee of the defendant, but now retired and a farmer, he trained as a technician with the defendant on overhead lines. In 1997 he was at the Kisumu office covering Homa Bay etc. He knew the plaintiff company which complained of power problem at the end of 1997. DW4 was given the job in 1998. The complaint was about low power supply. When the witness checked the 630 KVA transformer, it was very hot, about to fail. It was changed with a similar one according to the customer's request. That did not work. A report made on 2.9.98 disclosed that the transformer was being overloaded. It belonged to the plaintiff. It was drawing more power than the authorized 560 KVA while the transformer was for 630 KVA. Assessment and measurement revealed that the plaintiff was taking 800 KVA. The transformer could fail unless a bigger one was installed. So DW4 installed a 1000 KVA transformer on 4.9.98 – to save the client's transformer. Then the problem eased.

When DW4 began to deal with the plaintiff, it had a 630 KVA transformer. Such is the property of the defendant although a customer buys it for his own needs. The witness did not know that the plaintiff once requested for 580 KVA supply or it had applied for 415 KVA transformer. DW4 was similarly not aware of the 1994 agreement for 630 KVA. He found such a transformer on site. The plaintiff was not entitled to 1000 KVA supply in 1997. DW4 installed such a transformer on 4.9.98. He did not know if the plaintiff applied for this. The trial closed and each side submitted.

The plaintiff's side began by going over the pleadings. It then focused on grounds of breach of contract between the litigants. That the plaintiff applied for and got a 315 KVA supply of power initially. This was increased by an additional 35 KVA supply bringing it to a total of 350 KVA in 1993. That the defendant did not provide a transformer for that power. The supply was erratic leaving machinery and equipment damaged. The plaintiff did complain in writing and the defendant replied that it was investigating the problem with a view to take remedial action. Then on 20.4.94 the plaintiff applied for and the defendant accepted to supply an increased power supply by 600 KVA making a total of 950 KVA slightly above the contracted supply. Such was not installed until 1998. That according to Section 30 of the now repealed Electric Power Act, ***the Act***, the plaintiff was entitled to the supply agreed in the agreement. Such would ensure that the plaintiff's motors ran without a problem. That the by-laws of the defendant required that at any point of industrial supply it must not be less than 0.9 lagging. When the defendant took the recordings on 7.11.96 that stood at 0.88 factors with voltage fluctuating between 420 and 300, instead of a steady 415 volts.

The defendant never supplied suitable transformers according to contracted supply until 1998 when 1000

KVA one was installed. The rest of the time the plaintiff's factory was subject to power fluctuations that damaged its plant and caused it loss in equipment and reduced production.

If the plaintiff exceeded power drawing the defendant was mandated by the Act to discontinue supply (S. 29). It did not do so so such a claim should be disregarded; it instead breached the statutory duty imposed by the Act. Such duty is always absolute. No need to prove lack of care or diligence. Thus the defendant was liable.

Following that the court was urged to find that the plaintiff had proved its special loss/damage – burnt motors, cost of running generators, loss of production etc. That the defendant did not specifically transverse these claims. Indeed the plaintiff endeavoured to mitigate its losses by installing generators. May it be noted that special damages were not quantified in the submission. In the amended plaint the court was left to compute special damages as enumerated in paragraph 6 and 49.

The defendant's submission was that the plaintiff's demand of power was higher than the contracted 560 KVA. The plaintiff did overload the transformer provided.

The electricity supply on the Kisii/Rongo/Homa Bay was insufficient and demand exceeded it. And those other power fluctuations were caused by natural causes like draught. The defendant could not give a guarantee for this. The plaintiff was authorized to draw up to 560 KVA:

"The plaintiff was overloading the transformer to a limit of 650 KVA which was illegal."

There was no guarantee on supply to the plaintiff who suffered power fluctuations. There was no evidence that the plaintiff was allowed to draw up to 630 KVA – only 560 KVA. The defendant was not responsible or duty-bound to take care of the plaintiffs' equipment inside its premises. That the defendant's obligation ended at the meter box. The plaintiff should have hired a qualified electrician to install power guards and safety gadgets. The plaintiff was responsible for all that befell it. The defendant responded to all the complaints of the plaintiff even by installing a 1000 KVA transformer – all on its own.

Coming to damages, the court was told that the plaintiff did not specifically plead or prove special damages. And there can be no award of general damages for breach of contract – the basis of the claim herein.

There was no evidence placed before court to prove that sh. 4,814,452/= represented damaged electric equipment; no evidence that 2 generators were bought and fuel used was paid for. The same reason was advanced to impeach a claim of sh. 12,150,972/= representing loss due to low production because of power fluctuations, so was the case of loss of fish – sh. 25,200,000/= or also for purchase of stabilizers put at sh. 7.5m and loss of business sh. - 12,850,000/=.

Five cases were cited to emphasise the law and principle that no general damages are awarded for breach of contract and special damages must be specifically pleaded and then proved. When challenging special damages (above) the defendant referred to paragraphs 4(g) and 6(a) of the amended plaint.

On its part the plaintiff had submitted that:

"The proof of the special damage claim by PW1 runs from pages 6-97…,"
and

… Paragraphs 4(g), 6, 7 and 8 of the amended plaint…"

Beginning with liability due to breach of contract, for that is what the plaintiff's case here is all about, the court was urged to find that the defendant breached its statutory duty under the Act and so responsibility it bears is absolute. The plaintiff pleaded and its witness gave evidence that always it applied for higher power supply. When it was provided by the defendant, it did not provide a transformer to match the power supply. Power fluctuations recurred and its plant and equipment was damaged. Production of fish

plummeted and that was loss of business/profits. Some fish went bad and was destroyed I Israel where it had been exported to. That, too, constituted a loss.

The court could not readily come by the Act which has since been repealed. But it was agreed on both sides that a consumer was entitled to be supplied with such amount of power as agreed in the supply agreement (S.30). The level of supply was noted in the supply agreements placed before court. And the plaintiff maintained that the power supplied fluctuated because the defendant did not supply suitable transformers or did not investigate to rectify the problems as borne out by several letters from the plaintiff with responses from the defendant. In fact the defendant claimed that the plaintiff's drawing of power from that system caused problems. At transformer at its factory was overheating as a result. Such state of things is provided for in the Act, Section 29. That provision was quoted by the plaintiff:

"29. (1) if, after making all proper examination of an installation by testing or otherwise, a licensee is reasonably satisfied that –
(a) the wiring or fillings are not suitable for the voltage being employed; or
(b)a leakage exists at some part of the circuit of such extent as to be a source of danger, and that such leakage does not exist as any part of the circuit belonging to the licensee; or
(c) **any other requirements of these Rules are not being complied with, then, and any such case, the licensee shall not commence a supply or shall discontinue the supply of energy to the consumer's terminals, as the case may be, and shall give immediate notice in writing to the consumer of the reason for not commencing or for discontinuing the supply; and in either case supply shall not be given until the licensee is reasonably satisfied that the installation is in conformity with these Rules**:"

The court was told that in the event of a consumer exceeding the consumption over and above the contracted supply the above provisions apply and the defendant ought to discontinue the supply. DW2 conceded that he was aware of this but the defendant did not invoke this power even as it had reports/claims that the plaintiff was overloading the transformer up to 800 KVA. That it made sense to the defendant's business objective and the plaintiff was to continue operating. What all this boils down to is that the defendant breached its statutory duty to run its business of supplying power according to its agreement with the plaintiff and/or the Act. It did not disconnect power when it ascertained that the plaintiff was exceeding contracted supply. It is thus liable for any damage the customer could/did suffer.

Then the question of quantifying the damage came up. It is clear that the plaintiff did plead that its equipment was damaged; it bought and operated generators; it suffered reduced processing capacity; it lost four containers of fish; it bought 2 stabilizers and generally made a business loss. There were sums of money representing each loss/damage in the plaint. But there was no proof by receipts, invoices, audited accounts, way bills/bills of lading etc to support the claim. None at all. It being trite in law that not only should a claim for special damages be **specially pleaded,** butit is also incumbent upon the claimant to prove it, failure to prove disentitles a claimant to the award sought. And that is the case here. Although the plaintiff pleaded special damages, it did nothing to prove the same and so that claim is dismissed.

The plaintiff, it can be said, was alive to the principle in law that general damages are not awardable in a claim of breach of contract. It did not urge the court in its submission to go that way.

In sum the plaintiff succeeds on the basis of breach of statutory duty on the part of the defendant. But that breach does not attract damages. That could have been done by proof of special damages. The plaintiff did not prove that. Its claim thus fails.

Judgment accordingly. But with costs to the plaintiff.

Delivered on 23.1.2012.

J. W. MWERA
JUDGE