



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 1075 of 2003**

**between**

**GRAND HOLIDAY HOTEL LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA POWER AND LIGHTING CO. LTD.....DEFENDANT**

**JUDGMENT**

The plaintiff Grand Holiday Hotel Limited approached the seat of justice by way of a plaint dated 16<sup>th</sup> day of October, 2003 and subsequently amended on the 20<sup>th</sup> day of November, 2006. The amended plaint was filed on the 23<sup>rd</sup> November, 2006.

The salient features of the same are that at the material time to this suit the defendant was the only body empowered to provide electrical power; the plaintiff was a customer of the defendant company holding an Electricity Account No.0530136-01 and meter number 466241 installed within the plaintiffs premises on Tsavo Road within Nairobi area; the installation of the meter was undertaken by the defendants its agents and or servants.

The plaint goes further to aver that on or about the 12<sup>th</sup> day of July,1997 the defendant through its servants and/or agents interfered with the plaintiffs power system through its inspection note No.185988 purporting that the plaintiffs meter had a slower pace and that the same was computing wrong readings; that the defendant again through its servants and or agents without exercising due care and diligence in an attempt to correct the purported wrong readings and without due care and diligence fixed another meter that was unsuitable for the plaintiffs power consumption and business.

The plaint goes on to aver that by reason of the afore said change of meter, the plaintiffs monthly consumption costs shot up from Kshs.35, 000.00 per month to Kshs.40, 000.00 per month; this change in the rate of monthly consumption rate impacted negatively on the plaintiffs business as these led to disconnections, reconnections and interruption of the power supply to the plaintiffs hotel premises. By reason of this the plaintiffs business could not sustain the undue charges varied as power bills and such interference to proper business operations.

The afore set out matters complained of led to the defendant through its agents and or servants to disconnect the power supply to the plaintiffs premises between October 1999 and February 2002; resulting in the closure of the plaintiffs business over the said period.

A reinvestigation of the plaintiffs meter was carried out by the defendant in the year 2002 and it was found out that one incorrect and unsuitable charging system had been set up leading to the mismatching of the current transformer CT and the meter. This discovery led to the defendant to proceed on its own motion to correct the anomaly and gave the plaintiff credit of more than Kshs.2, 700,000.00.

It is the plaintiffs assertion that by reason of matters complained of the plaintiff suffered damages to the total tune of Kshs.300, 000,000.00 resulting from closure of the plaintiffs hotel catering business, Hotel lodgings and Boarding Business, Hotel Hire of private Board Room; loss of good will for all business, loss of reputation and standing, loss of qualified man power and employee and depreciation of Hotels Assets.

**In consequence thereof the plaintiff sought general damages for loss of business, good will and all loss resulting from the closure of the plaintiffs premises enumerated in paragraph 11 here above.**

**(b) Interest on (a) and (c) at court rates.**

**(c) Costs of the suit.**

In response thereof the defendant filed a defence dated 12th day of November,2003 which was subsequently amended on the 7<sup>th</sup> day of February,2004 and further amended on the 10<sup>th</sup> day of July,2007. The salient features of the same are that paragraphs 2, 12 and 14 are admitted, denied paragraph 1 of the plaint and capacity to file the suit on the part of the plaintiff. The defence goes further to aver that it is conceded that indeed at the material time to this suit the defendant was the only body authorized to provide electric power and that the plaintiff was its customer holding an account number 0530136-001; denied the rest of the content of the averment in paragraph 3 of the amended plaint. It goes further to deny that its agents did interfere with the plaintiffs power system as alleged; contends that it is empowered by the contract of service to do periodic checks of the power supply and meters by its inspectors who are well trained and better placed to confirm efficacy of power supply and readings. It is their contention that it is the plaintiff who committed a criminal offence by interfering with the power of supply with a view to getting the supply without paying for its worth.

To fortify their stand further that in the year 1998 routine check at the plaintiffs' said premises the defendant's agents discovered that the plaintiffs' meter had been tampered with. Where upon the said defendants agents issued an inspection note which the plaintiffs agent signed in the presence of the defendants agent admitting liability for damaging and or tampering with the said meter. Following that admission of liability the defendant had no alternative but to cause the meter which had been tampered with to be replaced. They concede that in the year 2002 while its agents were on another routine check with a view to changing the meters from mechanical ones to digital ones, they discovered that the plaintiffs meter was not computing the proper readings and recommended a replacement.

In addition to the afore set out averments the defendant denied paragraph 6,7,8(b) of the amended plaint and put the plaintiff to strict proof; that the defendant was forced to disconnect the plaintiffs power supply as the plaintiff while paying for electricity had also issued several dishonoured cheques; denied having the plaintiffs account re investigated as alleged, denied particulars of damages attributed to them and put the plaintiff to strict proof; that the plaintiff is the author of his own misfortune and for this reason he stands non suited with regard to the plea of general damages.

In the alternative to the afore going further averred that the plaintiff having received and utilized credit given to him by the defendant he is estopped and precluded by conduct from claiming damages or any further payments other than that which it was given credit for. Lastly that the plaintiff is put to strict proof of its allegation and with that sought the dismissal of the plaintiff's suit with costs to them.

In a reply to defence dated the 11<sup>th</sup> day of July,2007 and filed on the 12<sup>th</sup> day of July,2007 the plaintiff joined issue with the defendants averments in the defendants further amended defence, reiterated the contents of paragraph 4 and 5 of the amended plaint, denied the averments in the further

amended defence and put the defendant to strict proof; denied tampering with the meter as alleged by the defendant; asserted that it is the defendant's agents who tampered with the said meter; reiterated all the contents of the amended plaint. In response to all the averments in the further amended defence; asserted that the suit is competent and it raises triable issues.

In consequence thereof urged the court to dismiss the defendant's further amended defence with costs.

Parties were heard. The plaintiff called three witnesses the first witness to take the stand was Charles Oyoko Amutete. The salient features of his testimony is that:-

(i) He works for a company called Daman Engineering works consultants based at Hurlingham shopping centre dealing with electrical installations and electrical contracting. He is a graduate from Mombasa Polytechnic with a Diploma in Electrical Engineering. In connection with these proceedings PW1 stated that he was approached by the plaintiff for consultation with a complaint of having fluctuating bills resulting in frequent disconnection of power supply to their business premises. Following the above instruction PW1 duly went to the plaintiff's premises and carried out inspection of the electrical wirings on the plaintiff's premises and found the wiring in order. Upon establishing that the wiring was in order PW1, sent for information on consumption, and rating which was served from passed power supply bills and upon scrutinizing the said information he discovered that the defendant had installed a wrong meter to facilitate the plaintiff's power consumption. It is PW1's evidence that he has knowledge that power consumption is categorized into three categories namely AO for domestic consumption, A1 for commercial use and B1 for large power consumers like industrial undertaking. To the witness' recollection, each consumer is supplied with a meter which bears a number and CT- current transformer rating. It is from the current transmission readings that a customer is billed. The current is measured through the meter. With regard to the working, material that the witness had with him, as annexure, it shows clearly the plaintiff had been given a rating of B1. Each meter has maximum meter consumption which if you go over board then you have to graduate to the next rating. With regard to the plaintiff's consumption rating, it should have been 100/5A. Instead of the rating given to him of 200/5A and this is what resulted in wrong meter readings. The information assessed showed that meter number 9691146 had been mismatched with the current transformer (200/5) with CTS (100/5) leading to a double charge for the power consumed from July, 1998-Feb 2002. Concedes that there is revelation that after the defendant realized their mistake they gave the plaintiff credit of Kshs.3, 436,593.31. At the end of the assessment PW1 stated as a result of the defendant's acts complained of the plaintiff's business suffered greatly at the hands of the defendant. That the plaintiff had no hand unit because it is not possible for the plaintiff to install his own C.T. current transformer because those installed by the defendant have seals on them and in order to remove them and install his own he had to break the defendant's seals and there was no evidence of such a breakage complained of by the defendant. He lays the entire blame on to Kenya power and lighting company the defendant herein for the plaintiff's predicament.

When cross-examined the witness admitted that he was not an engineer and he has not been classified as such although he had applied to be recognized as such; he currently operates under the companies Act as a contractor. The mode of operation followed by them is that PW1 would carry out inspection, prepare a report and then sent it to the company's secretariat to have it typed. After typing, the report is returned to him to proof read, have it perfected and then signed by him. PW1 added that he has registered his business as a contractor and not an engineer; he asserted that he had been given instructions to carry out the survey by the owner of the business Willie Kamuren. What PW1 received in the form of instructions was a blanket complaint of inflated bills and PW1 was instructed to find out the cause which he did. It is his testimony that he worked using the documents given to him and that he was qualified to be assigned the duties of inspection by the company and that to him he did a good job. He was firm that the defendant mismatched the plaintiff's meter with a wrong CT of a higher consumption which resulted in the fluctuation of bills which were high. He was also firm that it was an offence for one to break the seals of the component where the meter is housed. He does not however know when the plaintiff closed the hotel business.

PW2 was one Emmanuel Sonkoi Nchoko. The sum total of his evidence is that he had been

employed as a manager with the plaintiff. He was a senior supervisor in 1994-96 when he was promoted to the position of a manager in July, 1996. To his recollection the defendant's agents carried out a change of meter in 1997. The exercise was carried out by the defendants Technicians which resulted in an escalation of bills going as far as Kshs.200, 000.00 up from a previous monthly bill of about 30-40,000.00. The escalation of the billings led to frequent disconnections of power supply which in turn led to loss of business as customers could frequent the place where there were no lights and the business had to eventually close down. They closed down in 1998 and it was not until in February, 2002 when they opened the business again. They suffered losses of loss of business depreciation of assets forcing them to replace nearly each and every item on the premises. It is PW2s evidence that as at the time of his testimony their business had not picked up. For the period he worked with the plaintiff before closing down he had no knowledge of any interference or manipulation of the meter.

When cross-examined PW2 reiterated his evidence in chief and then added that he was not an employee of the plaintiff when the business started. He joined them in 1994 when the business was already on going. The facilities offered at the hotel were catering, hotel rooms 37 of them plus one suite, conference hall facility and 2 restaurants and a butchery all of which had been operational. It is further his assertion that they had 42-45 employees all of whom left because the establishment could not pay them. He was firm that he recollects the defendant's agents frequently disconnecting the power supply to their premises and on one such occasion the disconnection was done at 10.00 p.m. He is a Stranger to allegations of any of the defendants' employees having tampered with the meter. Neither has got any idea as regards the change of meters on the premises. He was firm their hotel business was doing well as they were marketing it well. He disowned a document allegedly emanating from the plaintiff purporting to be admitting liability for tampering with the defendants installed meters because if that had been the position then the defendant would not have given the plaintiff credit of kshs.2.7 million on power supply costs.

PW3 Villy Rotich Kamuren is the main witness for the plaintiff. The salient features of his evidence are as follows:-

The plaintiff is a limited liability company having been incorporated on the 21/7/94 with the plaintiff as a Director as per the content of the memorandum and Articles of Association exhibit 2. They were clients of the defendants for purposes of the supply of power to them by the defendant from inception of the business up to the occurrence of events which culminated in these proceedings. Their consumption rate of the power supply was commensurate to the rate of consumption of the power supply with bills ranging from between Kshs.20, 000.00-40,000.00 as shown by exhibit 3. In 1997 the defendants changed their meter and from then on the plaintiffs started receiving escalated bills as shown by the bill for 10.10.97 when they were billed in the sum of Kshs.167,918.70 to 177,498.80 rising to an alarming figure of Kshs.242,929.30 as at 28/10/98 as per the content of exhibit 5. The escalation of the bills forced the hotels to close down in July, 1998 leaving behind the manager and the security personnel to look after the premise even if the business had closed down and the plaintiff had only skeleton staff on the ground, they still continued to receive exorbitant bills exhibit 6,7 and 8. Inquires were made if the plaintiff was running a factory a matter they responded in the negative.

(i) It is PW3 evidence that in August, 2002 the defendant made a refund to them of Kshs.2.7 million which the defendant declined to pay to the plaintiff and instead they stated that the money was not refundable as cash but the same would be used to defray future costs for fresh billings. To PW3, this was a clear indication that the defendants had realized the mistake they had made. It later transpired that the error had occurred when the meter was changed where by the meter was mismatched with the CT current transformer.

After rectification of the error the bills came down to as low as Kshs.11, 000.00 per month as shown by exhibit 9 and 10. He disputes allegations of either the plaintiff's employees or management having interfered with the meter because had that been the correct position then it should have been for purposes of paying lower bills but not with a view to having the bills escalate. Secondly PW3 does not agree that the plaintiffs' employees tampered with the meter in any way because if this had been the correct position then the defendants would not have given them a credit exhibit 11. PW3 Confirmed the evidence of PW2 that the hotel had closed down in July, 1998 and they incurred losses as follows:-

(a) 38 rooms- Kshs.72, 000.00 daily.

(b) Conference room with capacity holding of 500 people Kshs.20, 000.00 daily.

(c) Outside catering Kshs.150, 000.00. Their clientele comprised booking from pipeline, KFA, University graduation parties whereby parents brought their sons and daughters to hold graduation parties in the hotel. Whenever disconnections occurred the plaintiff was obligated to refund to the customers the unspent money contends. They had a good will. It is the stand of PW3 that when they reopened the hotel and resumed business they were just limping as they had lost charitable both from within and without.

(ii) The plaintiff also suffered loss of property as most assets had rusted.

When cross-examined PW3s responses were that it is correct that where the plaintiffs' hotel is located there were other hotels around; that the 38 rooms comprised those that were single, double or tripple; it was a good hotel as it had been classified as a three (3) star hotel; its conference capacity was 500 people also ideal for wedding parties; other facilities were 4 Restaurants, 2 on the first floor and two on the Mezanine floor. They had an operational butchery and two offices for the manager, assistant manager and the chairman. PW3 went on to state that they started having problems with the meter in 1997 as that is the time the bills started escalating. He was firm the hotel closed in 1998 although the meter was still functional and attracted billings but for a smaller amount. He confirmed that they did not pay for any electricity during the time that the hotel had closed down. According to PW3 electricity bills were paid for in cash. He conceded that the cheques shown to him read Grand Holiday hotel, purportedly having been issued at the time when the hotel was closed and although the signature on them appears to be his he does not recall signing those cheques. He is a stranger to the content of a letter allegedly emanating from the defendant addressed to them whereby the defendant was complaining that the plaintiff had tampered with the defendants meter leading to an under recording of consumption. Lastly that the reason for receiving bills during the period when the hotel was not operational was because they had security personnel on the premises. Denied writing to the defendant to state that they had tampered with the meter.

The 4<sup>th</sup> witness was one Joseph Otieno whose salient features is that he was an accountant by profession and it is his firm which had been contracted to be doing auditing and accounting for the plaintiff. They carried out an audit of the plaintiffs business in 2004 and according to him and for purposes of assessment are that.

(a) In 1995 the company realized a net profit of Kshs.2,321,558.00

(b) In 1996 there was a profit of Kshs.3,254,215.00

(c) In 1997 a profit of Kshs.1,422,944.00

As for electricity consumption the report shows that-

(i) At 1997 the electricity was Kshs.3, 003,243.

(ii) In 1996 electricity and water was Kshs.211,477.00

(iii) In 1995 electricity was Kshs.195,862.00

(iv) In 1998 the income went down to Kshs.8,510,015 from Kshs.18,911,144 in 1997, the reasons being that the profits the company had made had been consumed by electricity and water.

When cross-examined PW4 stated that he did not know the reason for the rise in electricity; that he was professionally qualified to handle the job; he operated from the firm of Otieno and Associates accountancy; that he was familiar with the plaintiffs business which comprised rooms, conference facilities and a restaurant and pub but was sure that it has no casino and the use of the word gaming was not in reference to gambling but to room service; that the figures given for water and electricity cover the

whole period of accounting. Concedes that in 1998 all the figure for each item audited came down may be for the reason of the company sizing down on staff and activity. Lastly that he used the word gaming activities in the accounting sense means that activities which generate income and do not necessarily mean activities carried on.

The defence called 3 witnesses. The first to take the witness stand was Julius Maina Mutai. The salient features of his evidence is that he is an engineer working with the defendant for a period of time. He is conversant with matters relating to these proceedings as these arose when he was still working with the defendant in his capacity as customer service engineer in the south sub region which covers the city centre, Eastleigh, Buru Buru, Umoja, Kayole and Embakassi. He is familiar with the plaintiff as they are among the defendants large scale consumers within the city centre who used to have problems with bills repayments which led to frequent disconnection of the power supply due to non payment or due to bouncing cheques.

The account number 536136-01 was opened in the year 1992 and was still functional as at the time of trial. The initial meter number was 4962 41 but on 12/6/98 when one of the defendants technicians visited the plaintiffs premises, they found the meter had been tampered with where upon the said technicians one Patrick Sakhasia left an inspection note number 185938 advising the customers of the anomaly. The seal had been cut and the meter movements erratic notwithstanding that the said meter was okay when it was installed as it had been inspected on the 15/2/1995.

It is DW1s stand that upon their technician leaving the inspection note at the plaintiff's premises a representative of the plaintiff called on the Technician and signed a liability note without giving his name. The under charge consumption was worked out and it came to Kshs.146, 000.00 which was brought to the attention of the customer vide the defendants' letter dated 24/8/99 which was paid along side other bills. Arrangements were made to replace the meter number 406241 in an exercise which was going on country wide where by the previous mechanical meters were being replaced by digital ones namely number 9691146. It is DW1s evidence that this new meter had a rating of 200/5 and had been tested in their laboratory and it had no problem and passed for installation on 30/6/98. DW1 went on to state that later on the defendants own staff charged with the duty of carrying out routine Audit on meters to confirm their functionality of meter readings they discovered that they had discovered a mismatch between the ratings of the meter and the rating of the current transmitter. The meter was rated 200/5 while the current was rated 100/5. This report was made in the year 2002. Upon receipt of the said Auditors report, DW1 sent a Technician on to the site to verify that information and the technician sent verified the information and confirmed its correctness, DW1 made arrangements for a replacement which replacement was made with meter number 20162072 which was rated 100/5 AM. The replacement was on 11/3/2002. Upon replacement with the correct meter the defendants set up on analyzing the would have been correct ratings from the time meter number 9691146 was installed way back in 1998 in terms of what had been overcharged by checking the billings between July, 1998 and March, 2002 which overcharge came to Kshs.2,760,296.69 leading to the raising of a credit note in favour of the plaintiff which was credited into his account with the defendant and was used to defray the plaintiffs power consumption bills as and when they arose from that date till the credit had been exhausted. DW1 concedes that on 24/7/2003 he received a demand letter from the plaintiffs counsel alleging that the defendants were responsible for losses suffered by the plaintiff. DW1 was surprised as the defendant had discovered the anomaly through its audit on their own, rectified it on their own and then gave credit which he utilized. To DW1, the plaintiff was the Author of his own problems leading to disconnection as they used to pay by cheque which sometimes bounced some of which are listed as 00134 dated 11/10/99 for Kshs.490, 347 returned by the bank on 18/10/97; 000011 for Kshs.60, 000.00 dated 17/12/99 and returned on the 30/12/99; No. 0000121 dated 7/12/99 for KSHS.90, 000 returned on 30/12/99, No.000017 dated 28/12/99 for Kshs.152, 657.00 returned on the 5/1/2000; No. 000144 issued on 31/8/2000. For Kshs.115, 000.00 returned on 6/9/2000; No. 000141 issued on 22/9/2000 paying Kshs.160, 000.00 returned on 27/9/2000.

To DW1 all these bounced cheques exhibit D3 (a) (b) (c) (d) (e) (f) had been issued and signed by the plaintiff PW3. That from the content of the documentation shown the plaintiff's premises were consuming electricity. That the meters had been inspected before installation with No.9691146 being investigated on 26/6/98 upon discovery that the earlier one was faulty ;( exhibit D2). DW1 conceded that by reason of the

mismatching of the meter the meter was recording twice. He has knowledge that whenever the readings read 00 it was because there was no electricity consumption.

When cross-examined DW1 reiterated the evidence in chief and then added that the plaintiff was one of their customers, the defendant had a duty to supply the power to him so long as he paid his bills; there were disconnection of the plaintiffs power supply but these were not connected to a mismatch. He maintains that the meter they replaced had been tampered with; the seals are placed by the defendant's staff and are meant to prevent persons tampering with the seals. DW1 is not the one who discovered that the seal had been tampered with. That once a seal has been affixed in the laboratory these cannot be replaced at the site.

DW1 went on to state further that it is not him DW1 who attended the plaintiff's representative who came to the defendants premises and admitted having tampered with the meter and even DW1 does not know who attended the said representative. Concede tampering with a meter is a criminal offence but DW1 has no knowledge if any of the plaintiff's representatives were prosecuted for that offence. Concedes that it was the duty of the defendant to ensure that there is no mismatching of the meters and the current transmitter. That duty lies with the defendant. Concedes it is them who discovered a normally and rectified it. That disconnection were on account of bounced cheques. Concedes that there is a time they disconnected the power during the period the mismatched meter was in place.

DW2 Patrick Murandafu Sakhasia gave evidence confirming that he was an employee of the defendant holding the position of electrical superintendent as at the time of trial in the security department having been in the defendant's employment for 21 years as at the trial; in 1997-98 he was a senior Technician. DW2 recalled that at one time he went to the plaintiff premises on a routine inspection of meters in the company of a police officer. He discovered the body seals had been tampered with. DW2 left the inspection note at the plaintiff's premises with instructions that the plaintiff's representative calls at the defendants premises to sign a liability note. The plaintiff's representative did so and signed the liability note exhibit D5.

When cross-examined DW2 reiterated his evidence in chief and then reiterated that he went with police to check the meter as a routine exercise for fear of encountering hostile customers. Conceded exhibit D5 does not have the seal and stamp of either the plaintiff or the defendant; that it only has a name with no ID card. Concedes that he never took the broken seal with him.

DW3 on the other hand John Atata gave evidence that he was in the employment of the defendant and had been so employed for 20 years as at the time of the trial based in the technical Audit department. His main role is to ensure the functioning of the customer service division through inspection and verification of the functioning of the meters. He recalled visiting the plaintiff premises in early 2002 on routine check up and found that their meter was not sealed. Further checking revealed that there was mismatching of the meter and its rating leading to the meter recording higher ratings than what was being consumed. DW3 prepared a report to that effect and forwarded to the Authority who arranged for verification which was confirmed the content of exhibit D6.

When cross-examined DW3 stated that he found the meter not sealed but is not in a position to tell whether it had been tampered with or not. Confirmed that the rating was not to the required standard as there was a mismatch. That the customer is not in a position to detect any mismatch.

At the close of the trial parties filed written skeleton arguments. Those of the plaintiffs are dated 10<sup>th</sup> day of September, 2008 and filed on the 12<sup>th</sup> day of September, 2005. The salient features of them are as follows:-

- (i) The action arises from actions done by the defendant in their capacity as the sole distributors of electricity supply in the country which act was done negligently and for want of skill which claims the defendants have also moved to the seat of justice to defend.
- (ii) Each filed own issues for the courts guidance in the determination of this dispute.

- (iii) Since there was no counter claim made by the defendants in their defence the court is urged to the defendants defence and evidence with regard to allegations of tampering with the meter and or breakage of seals for the period prior to the cause of action which was as correctly pleaded was on or about the month of June 1998 after the installation of the meter No.9691146.
- (iv) They contend that on a balance of probability and especially on the basis of evidence adduced by the plaintiff through its witnesses namely PW1, 2 AND 3 and as confirmed by the audience of the defendant as well as documentation exhibits produced by both sides, the plaintiffs has proved its case and answered each and every issued raise by them for determination.
- (v) The defence evidence holds no water as it attempts to impute wrong doings on the part of the plaintiff with regard to the acts complained of.
- (vi) Content the plaintiff as a consumer of electricity supply vide account number 530136-001 held with the defendant and in respect of meter number 406241 as initially installed and subsequently changed with meter number 961146 as admitted by the defendants was owed a duty of care by the defendants and as admitted by them they had a duty to provide electricity power supply to the plaintiff along side others.
- (vii) It is the plaintiff's contention and as supported by evidence from both sides that the agreed plaintiff's electricity consumption rating was 100/5A. Where as when the defendants changed the old meter with meter No.9691146 they changed the rating of the plaintiff electricity consumption from 100/5A to 200/5A. This change led to the escalation in the billings which the defendant's witnesses have agreed that it was a mistake on their part.
- (b) It is also conceded that this mistake was discovered by the defendants themselves and by reason of this they admit to have given the plaintiff a credit of Kshs.2,760,296.69/= which is acknowledged by the plaintiff.
- (viii) It is the contention of the plaintiff that by reason of what has been stated in number (vii) above the plaintiff suffered loss and damage as particularized in the plaint and seeks an award of the same in the plaint.
- (ix) The court is invited to discount and or ignore the defence exhibit D2 purporting to be an acknowledgement of liability note as it has not been demonstrated that the person who signed it was indeed an employee and or agent of the plaintiff.
- (x) They urge the court to rely on the case law cited as guidance.

The defence submissions are dated the 29<sup>th</sup> day of October, 2008 and filed on the 29<sup>th</sup> day of October, 2008. The salient features of the same are as follows:-

- (i) That on the basis of the content of the pleadings of both parties as amended as well as the documentary exhibits filed by either party the plaintiff does not have a cause of action against the defendant because:-
- (a) It is not clear on what basis the plaintiff is seeking damages from the defendant whether on contract or on negligence.
- (b) There is no mention of the provision of law that the defendant has breached to enable the plaintiff claim damages.
- (c) If the claim is on account of a breach of contract between the plaintiff and the defendant, there is no way the plaintiff can claim general damages for breach of contract.
- (d) The court is invited to note that it is now trite that general damages are not payable where there is an alleged breach of contract.

(ii) That if the plaintiffs claim is based on negligence then the plaintiff has not proved any duty of care owed towards him by the defendant.

(b) There has been no particulars of negligence given either in the plaint or in the evidence on how the defendant has been negligent so as to claim damages.

(iii) In the alternative, if the court is of the opinion that the plaintiff has a case then the defendant contend that the same has not proved the same on a balance of probability because:-

(a) The plaintiff has produced a report exhibit 1 purporting to have been made by an engineer who gave evidence as DW1 which report the defendant contents that it cannot be relied upon because although PW1 purported to be an engineer it turned out upon cross-examination that he is not registered as an engineer and secondly the documents allegedly relied upon to prepare the said report were produced in November, 2004 a year after the alleged report had been produced on 17<sup>th</sup> August, 2003. Thus giving rise to questions of credibility. The court is invited to treat as a fabrication and hold that the same is a fabrication solely produced for purposes of purporting to prove that indeed a report was ever made. Further reasons for discrediting the said report was from the fact that there is no mention of fees having been charged for assessment and preparation of the report and 3rdly no explanation was given as to why it took a year to prepare the said report.

(iv) The evidence tendered by the plaintiff's witnesses is contradictory and inconsistent with regard to the alleged offending meter and the time of the alleged wrong doing attributable to the defendant.

(v) The court is invited to ignore the plaintiffs attempt to fill in the gaps in its case through its submission as submission are not evidence. The court is therefore invited to note that the evidence is not clear as to when the fluctuations occurred whether in 1997 or 1998.

(vi) The court is invited to note that it is not clear as to what the plaintiff is claiming from the defendant as the plaintiff has purported to leave the assessment to the court by not giving details of what it earned daily.

(vii) The court is invited not to believe the plaintiffs assertion that the premises were closed because of the plaintiffs admission that they left three employees on the premises and secondly by reason of evidence of electricity consumption during the alleged period of closure was the same as that consumed during the period when the premises were allegedly not operational and use this to support the defendants stand that the said premises were in fact never closed at any one particular time.

(viii) There is nothing to show that the plaintiffs business had been effectively marketed to attract a large clientele.

(ix) With regard to the defendants assertion, it is contended that these hold because:-

(a) It is admitted the plaintiff is the defendant's customer. He applied for electricity supply and was supplied with supply meter No.406241 in 1994.

(b) The defendant's allegation of tampering with the defendants meter has been proved by the documents produced especially exhibit D5.

(c) It is the plaintiffs tampering with the meter which led to the changing of meter number 9691146 on the 12<sup>th</sup> day of June.

(d) The plaintiff continued using the said meter without any problem until February, 2002 when the defendants agents on a routine check found a mismatch where in the plaintiff's rating was reading 200/5A instead of 100/5A.

(e) The said discovery and rectification was on the defendants own motion and it is not true that the

plaintiff's complained of the high bills leading to the inspection and the subsequent discovery of the mismatch.

(f) There is proof that the plaintiff continued consuming and paying for electricity paid in the said period.

(g) The defendant duly compensated the plaintiff for the high bills charged by way of a credit note of 2.7 million which facility the plaintiff enjoyed up to the year 2005.

(x) The court is invited to reject the plaintiff's belated assertions as to damages from the defendant as the same is an after thought.

(b) The fact of closure of the plaintiffs business is negated by the fact that during the period of the alleged closure is negligence by evidence of issuance of cheque purporting to have been for payment of electricity consumed by the plaintiff during that period which cheques could not have been issued had the business been closed.

(xi) The court is invited to be guided by case law cited.

The plaintiff filed a reply to the defendants submission dated the 14<sup>th</sup> day of October, 2008 and filed the same date reiterating that the evidence on the record speaks for itself that the plaintiff's claim is based on negligence and that is why the plaintiff has submitted on and satisfied the these ingredients for establishing negligence; the claim as laid in the plaint by the plaintiff is proper as there is no format for which particulars of negligence ought to be pleaded; contend the plaintiff has given sufficient particulars of negligence in paragraph 4,5,6,7,8 and 8(b) of the plaint. Documentary proof produced by the plaintiff were confirmed by the evidence of DW1 that indeed a mismatch which led to the issuance of inflated bills; that there was no inconsistency in the plaintiffs; the period taken by PW1 to prepare the report is immaterial, what is material is the content of the report which has been supported by the defendants own evidence and documentary.

As for damages payable the court is invited to note that the plaintiffs is entitled to leave the court to assess the damages using evidence showing that the company used to make profits before the advent of the mismatched meter and started making losses after the mismatching of the meter as the fluctuating bills ate into the profits. That there is no way the defendant can ignore liability considering that they accepted that they were in the wrong and that is why they gave credit to the plaintiff of 2.7 million.

Both sides cited case law to court namely the case **of KIMWERI VERSUS REPUBLIC (1968) EA452** wherein a letter tendered in evidence as an exhibit was rejected because there was doubt as regards its source and its truthfulness; **FELIX MATHENGE VERSUS KENYA POWER AND LIGHTING COMPANY LTD NAIORBI CA NO. 215 OF 2002 (UR)** where in the appellant was granted damages where he lost income from rental premises on account of losing tenants due to inflated bills; the case of **KENYA POWER AND LIGHTING COMPANY LIMITED VERSUS JOSEPH KHAEMBA NJORIA KAKAMEGA HCCA NO. 68 OF 2002** which dealt with a claim for damages arising from a case of an electrocution; the case of **AFRICAN HIGH LAND PRODUCE LIMITED VERSUS JOHN KISORO NAKURU CA NO.264 OF 1999** wherein the CA had held that a party has a duty to mitigate his losses; and lastly **KENYA POWER AND LIGHTING COMPANY LIMITED VERSUS OSIEMO NYAMWEYA ALEX KISII HCCA NO. 113 OF 2001** wherein the high court upset a lower courts award of both general and special damages on account of the principle that no general damages are payable for an alleged breach of a contract and secondly that the special damages had not been strictly proved as required by law.

Each party filed own issues for the guidance of the court in the determination of this matter. Those of the plaintiff are dated 12<sup>th</sup> day of January, 2004 and filed on the 29<sup>th</sup> day of January, 2004. While those of the defendant are dated 15<sup>th</sup> day of May, 2007 and filed on the 17<sup>th</sup> day of May, 2007. This court takes into consideration the content of the rival pleadings, evidence, submissions, principles of case law cited to court as well as the documentary proof relied upon by each side and the court proceeds to respond to

these issues separately but in a summary form starting with those of the plaintiff.

- (1) On the issue of capacity to sue by the plaintiff it is noted from the defence that this was raised as an issue to be taken up but it was not taken up PW3 produced exhibit 2 a memorandum and Articles of Association of the plaintiff and this no doubt cures the issue of locus standi. The court therefore finds that there is capacity to sue and that as no preliminary objection was taken by the defence to fault the proceedings on a point of technicality the plaintiffs' claim is a proper candidate for a merit disposal.
- (2) Issue number 2 is answered in the affirmative because the defence assessed herein demonstrates and as confirmed by their own report exhibit 6, the defence indeed mismatched the plaintiffs' meter with a higher current transmitter causing it to be recording twice for every consumption of the current consumed by the plaintiffs' business.
- (3) It is on record that the defendants relied on the evidence of DW2 and exhibit D5 to assert that there was interference. But having admitted in evidence that DW2 did not retrieve the alleged broken seal; did not prove that the person who signed the admission of liability note was an employee of the plaintiff and lastly having admitted that interference with a meter is a criminal offence and the defendants' failure to give reasons as to why they took no action to vindicate the wrong done to their meter through a criminal prosecution casts doubt as to their allegation of there having been interference with their meter. The court therefore finds that there was no interference with the defendants' meter by the plaintiff's agents and or servants on the said plaintiff's premises.
- (4) With regard to issue number 4, the evidence of the defence is that their work is highly skilled. The meters as well as their current transmitters are usually taken to the laboratory for testing before they are installed. It is also admitted by them that an assessment is usually made with regard to the customers' electricity needs before they determine the quantity of supply and then supply the correct meter with a matching current transmitter. It is on record that indeed an assessment was done and the meter installed whereby correct billings were made. A problem arose when there was a change in the meter and that is when mismatching occurred. Since it is the defendants' agents who were the skilled experts, they were obligated to ensure that there was no mismatch and for this reason the court finds no other explanation for the mismatching which occurred save to say that this was not an act of inadvertence but an act of negligence in the performance of duty by the defendants' agents.
- (5) In response to issue number 5 the court adopts the evidence assessed and the findings on issue number 4 above and proceeds to find that the evidence points to the findings that as confirmed by the content of exhibit D6, the mismatched meter was not suitable for the plaintiff's needs and that is why it resulted in escalating bills.
- (6) On issue six the court adopts the evidence assessed and its response to issue number 4 and 5 above and makes a finding that the amount reflected in the billings made by the defendants of the plaintiff's consumption for the contested period was not the correct billings and that is why the defendants gave the plaintiff credit.
- (7) The response to issue seven is that the evidence assessed from both sides and the findings on the other preceding issue have confirmed that the error caused by the escalation of the bills was not caused by an act of tampering of the meter by the plaintiff's agents but as a result of the defendants' action of mismatching the meter with a wrong current transmitter.
- (8) Issue number 8 is answered in the affirmative because any loss that occurred as a result of the escalation of the bills can only arise from the defendant's action. The plaintiff had no hand in it.
- (9) With regard to issue number 9, not all disconnections are to be faulted especially those related to the defendant's inability to pay the properly billed supply of electricity. Those faulted are those which have been assessed to have been occasioned by inability to pay inflated bills which inflation had arisen as a result of the defendant's wrong doing.

(10) Issue number 10 is answered in the affirmative as this was admitted by the defendant through the evidence of DW1 and confirmed by production of exhibit D6.

(11) Issue number 11 is answered in the affirmative as this was admitted in the evidence of both sides and also proved by production of the bills exhibits 4, 5, 6,7,8,9 and 10.

(12) As for damages suffered this will be dealt with after responding to the issues raised by the defendants.

In response to the defendant's issues, the court in addition to adopting the evidence adduced by both sides also adopts its responses to the plaintiff's issues where the issues are similar and makes an order that the findings and assessment so adopted applies to the issues raised by the defendant.

1. Issue number 1 is answered in the affirmative because the defendant admitted to have mismatched the plaintiff's meter with a wrong current transmitter leading to the installed meter recording consumption twice resulting in inflated bills.

2. Issue number 2 is answered in the affirmative as confirmed by the evidence on the record but this right does not include negligent mismatching of the meters and the current Transmitters.

3. On issue number 3 the court adopts its response to a similar issue raised by the plaintiff and also as confirmed by production of exhibit 2 to show that the plaintiff has capacity to sue and that is why the defendant did not take up this issue as a preliminary issue.

4. Issue number 4, 5 and 6 are inter related and these are responded to in the negative. The court adopts its response when responding to the plaintiff's issues that the plaintiff did not interfere with the defendant's meter for the reasons that the defendant admitted not to have retrieved the alleged broken seals as proof of tampering with the seals. The person who signed the liability note has not been identified to be an agent and or servant of the plaintiff. Lastly having admitted that proven tampering of the defendant's meter is a criminal offence and the defendant having declined to prosecute the perpetrators without any reasonable explanation for failing to do so, the court has no option but to draw an inference against the defendant that the only reasonable explanation for their failure to so act was on account of a realization that no such tampering as alleged by them ever took place.

5. Issue number 7,8,9,10,11 and 12 are inter related and will be dealt with together. The court adopts the evidence assessed and the responses made with regard to similar issues raised by the plaintiff and proceeds to state that indeed PW1 was assigned to carry out the inspection of the plaintiff's consumption of the defendant's electricity supply to the plaintiff's business premises. Indeed PW1 carried out the survey and filed a report exhibit 1. PW1 confirmed that the wiring which is supposed to be undertaken by the consumer were in order. There has been no issue raised by the defence that the plaintiff's wiring was faulty in any way. The court therefore finds that the wiring on the plaintiff's premises was in order. It is also on record that PW1 also found a mismatch. Although the defendant urged the court to discount this evidence because PW1 did not appear to have the requisite qualification and requisite expertise to undertake the exercise he was charged with even if this evidence is discounted, the defendant's own evidence tendered by their own skilled man power DW1 and production of exhibit D6 goes to fill up the void that was to be left by the discounting of PW1's evidence if the same is to be discounted Exhibit 6 and DW1's evidence confirms PW1's findings of there having been a mismatch. The defendant has gone further to show documentary proof that that error was rectified by the defendant giving a credit in favour of the plaintiff.

6. Issue 12 and 13 of the defendant is interrelated to issue number 11 and 12 of the plaintiff relating to the assessment of damages and will be assessed together.

The plaintiff has asserted in his amended plaint that as a result of the escalation of the electricity bills afore said, he suffered damage and losses particularized in paragraph 11 of the amended plaint. The defendant took issue with this claim as laid and wondered whether it was laid under contract or in

negligence. The plaintiff has responded to this doubt by stating that the claim is laid in negligence to which the defence alleges that it was not spelt out in the plaint.

This court has given due consideration to the rival arguments on this issue of the uncertainty of the plaintiff's claim and finds that the answer is found in the pleadings in paragraph 5 of the amended plaint that the defendant acted without due care when handling the change of the meter a matter admitted by the defendant conduct. Indeed they are entitled to carry out routine inspection of their installations on their customer premises but that does not entitle them to carry out the inspection, change meters negligently resulting in mismatching of the meters and the current Transmitters leading to escalation of bills to the detriment of the consumers. There has been no assertion by the defendant that had care been taken in the performance of that duty by their agents a mismatch would not have arisen. Neither have they contended that this was not foreseeable. The court therefore makes a finding that the mismatch which resulted in exorbitant billings was not only foreseeable but the same could have been avoided. It therefore follows that where there is loss arising as a result of the defendant's negligence performance of duty as was in the case of **FELIX MATHENGE VERSUS KENYA POWER AND LIGHTING COMPANY LIMITED (SUPRA)** the defendant as the sole or monopolistic service provider for electricity supply to customers will be held liable to make good that loss to the customer subject to proof of course.

The defendant has argued that even if liability is established as it has been done by this court the plaintiff still stands to recover nothing because:-

- (a) The plaintiff's claim is not certain and the plaintiff has merely left it to the court to make an assessment.
- (b) That the defendant is the author of his own misfortunes by reason of him having been issuing bouncing cheques which led to numerous disconnections of the supply to the plaintiff's premises from time to time.
- (c) That the plaintiff should have mitigated his loss which he did not.
- (d) That the plaintiff was compensated for the loss if any by being given a credit resulting from over payments arising from the mismatching of the bill.
- (e) That the plaintiff has merely left to the court to make the assessment of what is due to them instead of them specifying to the court their losses and then ask the court to confirm it.
- (f) That the plea for general damages is not available as the dispute arises from the performance of a contract.

In response the plaintiff has asserted that the claim is clear, that the credit given was not compensation for the loss suffered, that they mitigated the loss by closing down the business, and all that was required of them to prove their claim was to state the facts, adduce evidence in support of those facts and then ask the court to assess what is due to them.

Due consideration has been made by this court to the afore set out rival arguments and the court makes a finding that the plaintiff's claim is set out in paragraph 11 and prayer (a) of the amended plaint and the court finds the same ascertainable. With regard to bouncing cheques, indeed these were produced in evidence as exhibit D 3(a)-(f). A perusal reveals that these were issued between 1999 and 2000 the period during which the plaintiff was a victim of high electricity bills arising from the wrong billings as a result of the mismatch. The figures on them are huge. There is no other bounced cheques produced for the other period when there was no mismatch. It therefore follows that although they were discounted by PW3, these show nothing but a desperate effort made by the plaintiff to try and stay afloat with a hope to make profits and then meet his obligation to the defendant. It therefore follows that there is nothing to show that if the plaintiff had been receiving normal and correct billings from the defendant they could not have met the same just as previously done. These do not override the fact that if there had been no mismatch high billings would not have occurred to attract the issuance of the bouncing cheques. Secondly the defendant

admitted its wrong and agreed on its own volition to make good that wrong.

As for the credit given for the wrong billings, the court finds this was not meant to compensate the plaintiff for past losses but to cushion the plaintiff with regard to future billings. Secondly the defendant has not pleaded a set off in their favour as against any award that the court may find due and payable to the plaintiff and so it cannot be treated as a set off.

As for mitigation of damages, indeed this is a mandatory requirement. The plaintiff says he mitigated the loss by shutting down the business. All we have on this assertion is the oral testimony of PW2 and 3 that the business was shut down. There are no records for daily activities of the business to show the last day of full operation, half operation until closure. This would have been proved by production of staff registers, purchases, ledgers for room, ledgers for sales or audited accounts for the period from start upto the end of the mismatch.

The above findings notwithstanding, the court is of the opinion that since the issue of mismatch could only be detected and rectified by the defendant considering that in their own testimony they have stated that the customer is not permitted to touch their equipment installed on a customer premises, there is nothing the plaintiff could have done to mitigate that loss save to close down as he asserts but which assertion he has not demonstrated to exit.

On the issue of whether an award of general damages is available to the plaintiff or not, the court is satisfied with the submission of the defence that the law is very clear that this is not available in causes of action anchored on contract.

On quantum, the court is of the opinion that what the plaintiff has quantified under paragraph 11 and prayer (a) is a global figure of Kshs.300, 000,000.00 meant to cover the items specified there in of loss due to closure of catering, boarding and lodging, private board rooms, hotel rooms, good will, reputation, qualified staff and depreciation of assets PW2 ad PW3 attempted to give some figures of daily earnings. In addition PW3 furnished audited accounts for the years 1995, 1996, 1997 and 1998. There were no Audited accounts for 1999, 2000, 2001 and 2002 the years affected by the mismatch. When challenged to explain how he came to be paying for electricity during the period of closure; PW3 explained that they had security on the ground to guard the place. Records of these were not also produced to court.

The plaintiff's claim having been quantified. It has to be determined in accordance with the applicable principles governing assessment of quantum claims. These were set in the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 292** by a court of concurrent jurisdiction and then crystallized by the court of appeal in the case of **HANN VERSUS SINGH (1985) KLR 716** wherein the court stated that **“special claims must not only be specifically claimed but also strictly proved. The decree of certainty and the particularity of proof required depend on the circumstances and the nature of the Acts themselves”**

When applied to the plaintiffs claim herein the court finds that these have been indeed pleaded and particularized. As for proof, the plaintiff produced payments receipts for huge amounts produced as exhibit 8 for the period in question. The court is of the opinion that these will not count towards the resulting award because they were covered by the revised credit given to the plaintiff by the defendant as compensation for the over billings.

As mentioned, PW2 and 3 attempted to give oral testimony of the losses during the period of closure. This does not hold because the plaintiff being a business concern good prudence expects the management to have records of the day to day running of the business or alternatively Audited accounts. The Audited accounts produced as exhibit 12 show that indeed the plaintiff used to make profits. But in the year 1998 they made a loss because the high cost of electricity and water ate into their profits save that billing for water was minimal.

The Audited accounts for the period of closure are not availed and no explanation was given for their non availability. PW4 the witness who prepared and tendered them in evidence showed clearly that in 1998

the plaintiff suffered a loss of Kshs.3, 361,538.00 because the high bills ate into the profits. It therefore follows that if the huge bills had not eaten into the plaintiffs profits they would have had a profit. That loss was occasioned by the defendant who has to make it good save that it will have to undergo a certain percentage reduction to cover the loss of water which is not an issue herein since PW4 said that the net or billing was minimal. The court allows 5% figure percentage reduction. This will work out as  $Kshs.3,361,538.00 \times 5/100$  which comes to Kshs.168, 676.90 which when reduced from the main leaves a balance of Kshs.3, 193,461.50 found to have been proven.

For the reasons given in the assessment the court proceeds to make the following final orders in the disposal of this matter.

1. The plaintiffs suit is competent and the same will be ruled upon on its own merits because:-

(a) Although the defendant pleaded that they would raise it as a preliminary issue they did not take it up to fault the suit.

(b) PW3 produced exhibit being memorandum and Article of Association duly registered showing that the plaintiff is a legal entity and it has capacity to sue and be sued.

2. By reason of the use of the words “**without due care**” in paragraph 5 of the amended plaint there is clear proof that the plaintiff’s claim is based on negligence.

3. The plaintiffs claim is certain because it is sufficiently laid out in paragraph 11 and prayer (a) of the amended plaint.

4. As for liability, the court finds the defendant liable to make good to the plaintiff the loss suffered because:-

(a) There is no proof that the plaintiff and or its agents tampered with the meter leading to the issuance of high bills. This is further fortified by the fact that notwithstanding that the defendant admitted that tampering with their meter was a criminal offence; no explanation was given for non prosecution of the culprit.

(b) The high bills which led to them eating up the plaintiff’s profits were as a result of a mismatch of the meter and the CT current transmitter which were solely under the control of the defendant.

(c) A mismatch where change of meter is not done with care is not only foreseeable but also probable and could be avoided by careful performance of work by the defendant’s agents.

(d) Drawing inspiration from the case of **FELIX MATHENGE VERSUS KENYA POWER AND LIGHTING COMPANY LIMITED (SUPRA)** the only proper party to make good that damage to the plaintiff is the defendant.

5. General damages are not awardable as the dispute arises from a contractual relationship.

6. For the reasons given in the assessment, the plaintiff has only made out a case for the loss suffered in the year 1998 when there was a mismatch where by the high bills ate into the profits to the total tune of Kshs.3, 361,538.00. This will suffer 5% (five) percentage as assessed reduction to cover the minimal water charges of Kshs.168,076.90 leaving a balance of Kshs.3,193,461.10 awardable to the plaintiff as compensation for loss of profit.

7. The credit of Kshs. 2.7 million given to the plaintiff as a re worked figure to compensate for the over payment of the high bills will not be reduced from the resulting award of compensation in number 6 above because:-

(a) It was meant to cover the future consumption of the electricity supply by the plaintiff and not to pay

for past losses.

(b) The defendant did not claim a set off equivalent to this figure in its amended defence.

8. On mitigation of damages, the plaintiff was not in a position to ameliorate the high billings as the power to do that lay with the defendant who had the technical staff who should have ensured that there was no mismatch in the suit premises and secondly that it is detected during their routine check as soon as possible.

9. No award will be made for the loss of business during the closure of the business as PW2 and PW3s evidence should have been backed up by documentary proof or audited accounts.

10. The sum awarded under item 6 will carry interest at court rates from the date of filing till payment in full

11. The plaintiff will have costs of the suit.

12. The delay in the drafting and delivery of this judgment which is highly regretted has been occasioned by systemic work constraints.

**SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA.**

**DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 28<sup>TH</sup> DAY SEPTEMBER, 2012.**

**JUDGE.**