



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE NO. 152 OF 2005

ELECTRO WATTS LIMITED PLAINTIFF

VERSUS

WILDERNESS LODGES LIMITED DEFENDANT

JUDGMENT

1. The plaintiff's claim as stated in the plaint is that it entered into an agreement for hire of three generator as particularized herein with the defendants.

- a) 350 KVA Engine No.11814643 NTA 855 G4 Cummins Generator- SAMBURU LODGE.
- b) 275 KVA Engine No.8D28117492150 Perkins Generator – SAMBURU LODGE.
- c) 130 KVA Engine No.3306 Caterpillar Generator – KEEKOROK LODGE.

The generators were supposed to be hired to Block Hotels Limited who were managing the two lodges at the rate of Ksh.10,000/- per day plus 16% VAT.

2. Block Hotels Ltd was later placed under receivership and the defendant took over the management of Keekorok Lodge and Samburu Lodge on 15th and 20th October 2003 respectively. The defendant continued to use the generators for the period between 24th October 2003 and 4th March 2004. The defendant only paid for the use of one generator but neglected to pay a sum of Ksh.3,367,480/= for the two generators which they continued to use at Samburu Lodge. This is the claim which the plaintiff is now pursuing in this suit.

3. The defendant denied in total and specifically having entered into a contract with the plaintiff to hire its generators. It is denied that there exists any privity of contract between the defendant and the plaintiff. The defendant denied having managed the two lodges which were owned by Narok County Council or having used the plaintiff's generators. At the hearing **Mr. Steve Edward Elkington (PW1)** the Managing Director of the plaintiff's company gave evidence in support of their case. He produced a document dated 18th October 2002 which he claimed was signed by Mr. A.V. Kapila on behalf of the defendant in which it was agreed the two generators were hired to block hotels. He also produced a letter dated 14th October 2003 written by block hotels (in receivership) informing the plaintiff that block hotels had been placed under receivership.

4. There is also a letter dated 19th December 2003 addressed to the defendant in which the plaintiff

stipulated that they would wish to continue to hire the generators according to the terms stated in the letter the letter is signed on behalf of the defendant by a Mr. Kapila. PW1 also produced a document titled purchase order issued by the defendant dated 1st December 2003 where they were supposed to repair and service the generators but the defendant used to pay for the service materials and transportation. That is how the LPO's were issued to the plaintiff, and according to the plaintiff, the fact that the defendant issued the LPOs demonstrates that they were using the generators which were serviced by the plaintiff and belonged to the plaintiff.

5. According to PW1, he negotiated the hire of the generators with Mr. Kapila who was the operations director of the defendant and they agreed to reduce the charges to the sum of Ksh.9,000/- per day and the other generator for Ksh.8,000/- per day. That is how PW1 prepared the letter dated 18th October 2004. By that time the defendants were still using the generators which had been hired to block hotels. There is no electricity supply at Keekorok and Samburu Lodges and both rely one hundred percent on generators. The defendant bought one generator KVA 275, and the plaintiff is now claiming for hire charges in respect of 350 KVA and 130 KVA. These generators were taken away by the plaintiff on 4th April 2004.

6. During cross examination, PW1 confirmed that the two lodges are owned by Narok County Council. He said that he was not aware of the relationship between Narok County Council and the defendant but negotiated the hire of the generators with the operations manager by the name Mr. Kapila then working with the block hotels. When block hotels was placed under receivership, it was run by the defendant who continued with the hiring of the generators. He confirmed that the defendant fully paid for the generators at Keekorok but only paid the repairs for the Samburu generators.

7. **Gibson Kyalo Kithuka DW1** gave evidence on behalf of the defendant. He is the chief accountant of the defendant's company and before his employment with the defendant; he said that he used to work with the Block Hotels. He left Block Hotels in October 2003 when it was placed under receivership; he then joined the defendant in December 2003. He confirmed that he knew **Ajay Kapila** as they used to work together at Block Hotels and they both joined the defendant company at the same time.

8. According to DW1, it was the managing Director of the defendant who used to sign all the contractual documents relating to the defendant. He denied the authenticity of the signature said to be for Mr. Kapila on the letter 19th November 2003. He claimed that all the documents used to be signed by the Managing Director together with Mr. Kapila just the same way LPOs from the defendant clearly show there were two signatures. He further pointed out that there is a marked difference between the signature of Mr. Kapila on the LPO and the letter of 18th October 2004. He denied that there was an agreement to hire the generators to the defendant after the defendant took over the management of Samburu Lodges. He claimed that the defendant used to pay for the services rendered by the plaintiff as per the LPOs. He also confirmed that after Block Hotels was placed under the receivership, all agreements and debts were suspended and since he joined the defendant immediately after Block Hotels was placed under receivership, he was in a position to have known if there was an agreement to hire the generators to the defendant.

9. Both parties filed written submissions in support of their respective cases. The issue for determination is whether the plaintiff proved the claim against the defendant on a balance of probability. The plaintiff produced a letter dated 18th October 2004 in which it hired two generators 350 KVA and 275 KVA to block hotels limited. A letter 14th October 2003 and addressed to the defendant by the receiver manager of block hotels confirmed that Block Hotels was placed under receivership with effect from 2nd October 2003. That letter stipulated the consequences of receivership as follows:-

- a) All contracts between Block Hotels and third parties are immediately nullified or rescinded.
- b) The Receiver is not therefore bound to honour any terms of contract for supply of goods or services to this chain of hotels in pursuance of a contract which was entered into with the previous management of this chain of hotels.

- c) The Receiver, having decided to continue with the operations of the hotels, may at his discretion continue to honour any existing contract in whole or in part for other purpose of continued business relationship with some selected suppliers.
- (d) All debts payable to third parties (suppliers) by Block Hotels for goods or services before 01.10.2003 are by law classified as unsecured creditors. These will become payable only after preferential and secured creditors are paid in full in accordance with Section 311 of the Companies Act Cap. 486.
- (e) Henceforth only orders LPO's for goods or services signed by Receiver and Manager will be paid for as a preferential credit."

10. According to PW1, the arrangements with the Block Hotels continued and he confirmed this by a letter dated 19th November 2003 which was addressed to Mr. Kapila. It is not denied that Mr. Kapila was by then working with the defendant. It is PW1's evidence that the arrangements continued with effect from 1st December 2003 and they continued to service the generators as evidenced by the LPOs. This evidence has to be examined along side the defence that the defendant did not continue to hire the generators for the Samburu Lodge. That the facility was owned by the Narok County Council and the defendant paid for the servicing of the generators.

11. The letter dated 19th November 2003 is signed by Mr. A.V. Kapila the Operations Director who was then working for the defendant. However DW1 denied that that letter was binding to the defendant and he denied the authenticity of the signature appearing there under claiming that he was familiar with the signature of Mr. A.V. Kapila having worked with him at Block Hotels and also at the defendant's company. He also confirmed that the person authorized to sign for the documents was the Managing director there after the documents were countersigned by Mr. Kapila.

12. Mr. A.V. Kapila was not called as a witness to confirm whether he signed the documents on behalf of the defendant in respect of the agreement to hire the two generators. Although DW1 denied the authenticity of Mr. Kapila's signature, I am of the view that this was a mere denial. Although this Court is not a hand writing expert, merely by looking at the signatures especially LPO No.0160 and the letter dated 19th November 2003 and the letter dated 18th October 2002 there is a similarity in those signatures. There is no denial that A.V. Kapila used to work with the defendant as the Operations Director at the material time. He entered into an arrangement of hire of generators with the plaintiff and thus binds the defendant to the terms and conditions of the hire of the generators.

13. According, I find the plaintiff has been able to prove their case to the required standard, the defence by the defendant is a mere denial, it has no basis. Judgment in the sum of Ksh.3.367,480.00 with costs and interests at court rates is awarded to the plaintiff.

JUDGEMENT READ AND SIGNED ON 28TH DAY OF JANUARY 2011 AT NAIROBI.

M.K. KOOME
JUDGE