No. 182

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 157 OF 2008

OBARA OENDO …….....……...APPELLANT

-VERSUS-

THE KENYA POWER AND LIGHTING COMPANY LIMITED……..RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment and decree of the Principal Magistrate's Court at Kisii Hon. S. Soita in CMCC. No. 582 of 2005, delivered on 5th August, 2008)

On 22nd June, 2005, the appellant commenced a suit against the respondent in the Chief magistrate's court at Kisii being Kisii CMCCC.No.582 of 2005. In the suit the appellant claimed for an injunction to restrain the respondent from in any way attaching his properties until the final determination of the suit. He also asked for costs of the suit.

The suit was triggered by the fact that in May, 2005, the respondent instructed **Messers Sadique** enterprises to attach the appellant's assets in order to recover Kshs. 161,053/= allegedly owed t it by the appellant in unpaid electricity bills. As far as the appellant was concerned, however, he did not owe the

respondent any such money or at all as such bills had been duly paid. Otherwise it was the respondent's view that the appellant's suit was in any case bad in law and it intended to raise the issue as preliminary issue for determination. It was the respondent's prayer therefore that the suit be dismissed.

The hearing of the suit commenced before **S.M.S Soita, Ag.SPM** (as he then was). The appellant testified that he had put up premises at Tabaka on plot number 23. His tenants applied and electricity was connected to the plot by the respondent. Each tenant however had separate account with the respondent. The appellant never entered into a contract with the respondent for the supply of power. However, the respondent started demanding from him the aforesaid amount and when he informed the tenants about the demand, they assured him that they had sorted out the problem. That assurance notwithstanding he received a bill from the respondent for Kshs. 155,449/=.

Cross examined, he conceded that he could see his name as well as details of his identity card on the supply agreement dated 16th September, 1991. However he denied that the signature thereon was his. He conceded as well that the electricity bills came in his name. They were however being paid by the tenants. He could not recall when the account was changed into his name. When he received the final bill form the respondent as aforesaid, he never responded to the same.

For the respondent, **Wilson Kyenzi Musieba** testified. He was a clerk in customer service department of the respondent. On 16th September, 1991, he attended to the appellant with regard to an agreement for the supply of electricity to his plot no. 24, Tabaka. He duly executed the agreement and paid the requisite fees. Thereafter power was connected. Later on it emerged that the appellant was not paying for the power supplied. The bill had accumulated to Kshs. 155,436/=. A demand letter was sent to him dated 22nd December, 2000. The amount was not paid. As at 12th October, 2008 the balance outstanding was Kshs. 161,053/37. He confirmed that the appellant was a customer of the respondent and owed it the aforesaid amount. He tendered in evidence various documents in support of the respondent's claim as aforesaid.

Cross-examined he stated that he would not know when the appellant was supplied with the electricity and or when he started receiving power. Nonetheless he was on supply until the year 2000 and he was being sent electricity bills regularly. Ordinarily, they allow a customer to enjoy service for about 2 months. If he does not pay on the 3rd month, he would then be disconnected. He could not however, explain why they allowed the appellant to enjoy power for all those years. An ordinary Kenyan cannot consume power amounting to Kshs. 155,000/= within a month for 2 rooms. For domestic use, the power should be in the region of Kshs. 1,000/=, 3,000/= a month. If the amount aforesaid was for 1 month then there was something terribly wrong with the billing.

However under re-examination, he confirmed that the bill was an accumulated bill. That was after off-setting the deposit and interest paid. Bills are sent to the customer through the post office. It was his evidence that the appellant owed the respondent the amount.

In a reserved judgment which was delivered on 5th August, 2008, and which was regrettably not included in the record of appeal but is in the original record of the trial magistrate which I have seen, the court

found in favour of the respondent and dismissed the suit with costs.

The dismissal of the suit as aforesaid did not go down well with the appellant. He therefore preferred this appeal on 4 grounds to wit:-

"1.THAT the learned magistrate erred in law and in fact in dismissing the Appellant's case when the same remained unchallenged.

2. THAT the learned trial magistrate erred in law and in fact in finding that the appellant owed the respondent money when there was no evidence in support of the same.

3. THAT the learned trial magistrate decided the case against the weight of evidence on record.

4. THAT the learned trial magistrate failed to consider the Respondent's inability to demonstrate that the appellant owed them any monies."

When the appeal came up for directions before me on 28th June, 2010, **Mr. Masese** and **Mr. Moracha,** both learned counsel agreed among other directions to canvass the same by way of written submissions. They subsequently filed and exchanged the written submission. I have carefully read and considered them.

This is a first appellate court. As such it is duty bound to reconsider and re-evaluate the evidence before the trial court afresh so as to reach its decision on the merits or otherwise of the case.

The appellant's suit was doomed to failure the moment it was filed in my view. The main prayer sought in the plaint was an injunction to last until the final determination of the suit. The relief was therefore in the nature of a temporary relief. A suit cannot be heard and determined on the basis of temporary relief. Infact when the application dated 22nd June, 2005 for temporary injunction was heard and allowed on 28th February, 2006, there was nothing left for the court to hear further. One of the prayers in the application and which was allowed was that ***"…..That the defendant/respondent, its agents or/and servants be restrained form attaching the plaintiff/applicant's properties until the final***

determination of this suit…..” This is the same prayer in the plaint word for word. Indeed it appears that the appellant merely lifted that prayer from the plaint into the application. The prayer having been granted at the interlocutory stage had the effect of disposing off the entire suit. There was nothing therefore left for the court to hear and determine.

As I understand it, prayers in the suit should be able if granted to finally and eventually determine the suit and decide on the rights of the parties. The prayers sought in the instant suit did not have that overriding objective. They did not at all seek to resolve the dispute between the parties once and for all. Once the injunction was granted as it was herein to last until the hearing and determination of the suit, what was to happen thereafter? The dispute that drove the appellant to court remained unresolved and was still there.

In any event I do not see, why the learned magistrate felt it necessary to call for evidence. From the plaint, it is quite clear, that the case being one of temporary injunction, it should have been determined on the usual known principles set out in the celebrated case of **Giella .V. Cassman Brown (1973) E.A 358**. There was therefore no necessity to call for oral evidence.

The case before the learned magistrate was simple and straightforward. It was whether or not to grant an injunction to last until the hearing and final determination of the suit. It was not for the learned magistrate to determine whether the appellant owed the respondent the money. In any event the respondent had not counterclaimed for the amount. Indeed from the proceedings it is apparent that both parties wanted the trial magistrate to grant them what they had not urged in their pleadings. In the case of **Anthony Francis Wareham t/A A.F. Warehem & 2 others V Kenya Post office Savings Bank NBI C.A. No. 5 & 48 of 2002 (UR),** the court of appeal in those kind of situations observed; ***“…….it follows that a court should not make findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings…..”*** The court went on to observe that ***“…..and the burden of proof is on the plaintiff and the degree thereof is on balance of probability. In discharging that burden the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded the party with the burden of proof should fail…….”***

The evidence led by the appellant in support of his prayer for temporary injunction was irrelevant. It was infact unnecessary. It did not support the facts pleaded. His case was therefore bound to fail. The upshot of all the foregoing is that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE