



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI LAW COURTS)**  
**CIVIL APPEAL 886 OF 2003**

**JOHN D. SKODA.....APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....RESPONDENT**

**J U D G M E N T**

1. John D. Skoda, (hereinafter referred to as the appellant), is dissatisfied with the judgment of a Senior Resident Magistrate delivered in Milimani Commercial Court in RMCC No.1558 of 2003. According to the memorandum of appeal, the judgment is said to have been delivered on 23<sup>rd</sup> October, 2003. However, the record of the lower court shows that the judgment was delivered on 16<sup>th</sup> October, 2003. In the judgment dated 16<sup>th</sup> October, 2003, the magistrate dismissed the appellant's claim for a mandatory injunction and damages for breach of contract and breach of statutory duty against Kenya Power & Lighting Company Ltd (hereinafter referred to as the respondent).

2. The appellant has filed a memorandum of appeal raising 3 grounds as follows:

- (i) The learned magistrate erred in dismissing the appellant's suit against the weight of the evidence.
- (ii) The learned magistrate erred in failing to find that the respondent acted in breach of Section 63 of the Electric Power Act.
- (iii) The learned magistrate erred in failing to find that the respondent acted in breach of its statutory duty and in breach of its contractual obligations towards the appellant.

3. I have reconsidered and evaluated the evidence which was adduced before the trial magistrate. The appellant's evidence was that although he owns a house on LR No.778831 Rosslyne Close and has an account with the respondent company, at the material time he was out of the country. He had an agent who used to pay the power bill. The appellant learnt from the agent that there was a problem with the meter as a result of which the power was disconnected. The appellant paid Kshs.11,500/= and the power was reconnected.

4. In June, 2003, the appellant learnt that the respondent was demanding Kshs.6,000/=. The

appellant tried to find out why the money was required but he did not receive any answer. Previously, in the month of January, 2003, the appellant had received a bill of Kshs.42,331.04 which he disputed. The respondent alleged that the bill included consumption for previous months but the appellant disputed this. The respondent disconnected the appellant's power on 14<sup>th</sup> February, 2003. The appellant came to court and obtained orders. The appellant claimed that the disconnection was unlawful and prayed for general damages.

5. Under cross-examination the appellant admitted that from 1999 to July, 2001 he had rented out the premises, first, to a junior school, and secondly, to a tenant who used to do a lot of training. The appellant also admitted that he had one Joseph, an electrician who used to work on the electrical systems in his house. He conceded that Joseph had signed a form acknowledging that the meter had been interfered with. The appellant maintained that he was out of the country and did not therefore know about the problem with the meter. He denied having tampered with the meter.

6. George Mukuya, an engineer who was at the material time working as the respondent's Senior Head in charge of Parklands/Kisiwani also testified. He explained that on 27<sup>th</sup> May, 2002, during the course of normal duties, he was in the company of a team of technicians who visited the appellant's premises. The technicians found that the meter had broken seals. The appellant was informed through his agent Joseph Lihinji Uhinda, who acknowledged the notice. It was found that between November, 2001 and August 2002, the meter was under-recording. The loss was captured and it was established that the average consumption was 764 units per month. The appellant was therefore billed for the extra units which came to about 42,331.54 for the ten months excluding VAT.

7. Under cross-examination the witness explained that the appellant's meter had to be replaced and that the sum of Kshs.11,800/= paid by the appellant was for deposit of a new meter. The witness maintained that the appellant's power was disconnected after a notice was served on him.

8. In her judgment, the trial magistrate found that the appellant's agent, Joseph, signed admitting that the appellant's meter had been tampered with. It was on the strength of this admission that the appellant paid for and was given a new meter. The trial magistrate found that the appellant's meter which was tampered with was under-recording. She further found that the appellant's agent having admitted that the meter was tampered with, took full liability for the under-recording. The trial magistrate came to the conclusion that the appellant had failed to prove his case against the respondent and therefore dismissed the suit.

9. In support of the appeal, Mr. Ndegwa submitted that the respondent wrongfully disconnected the appellant's power when there was a dispute on, contrary to Section 63(2) and Section 87 of the Electric Power Act. In support of this contention, counsel cited ***HCCC No.837 of 2000 Palace Drycleaners & Another vs Kenya Power & Lighting Company Ltd.*** Counsel maintained that the respondent was in breach of his statutory obligation. He therefore urged the court to allow the appeal.

10. Mr. Kajwang who appeared for the respondent submitted that there was sufficient evidence to support the finding of the trial magistrate. Mr. Kajwang maintained that the appellant was misinterpreting the provisions of the Electric Power Act. He submitted that the provisions cited are only applicable where there is a dispute between the consumer and the respondent, which has been referred either to the Electricity Regulatory Board or Arbitration. He maintained that in this case, there was no dispute referred to either the Electricity Regulatory Board or Arbitration or Tribunal. Mr. Kajwang distinguished the authority of ***Palace Drycleaners & Another vs Kenya Power & Lighting Company Ltd.***, which was relied upon by the appellant, arguing that unlike the matter before court, the disconnection was done when the matter was *sub judice*.

11. Section 63(2) of the Electric Power Act states as follows:

**“Where any difference or dispute in respect of any such charge or sum as aforesaid has been referred to the Board or to Arbitration under this Act, or has otherwise fallen sub judice before notice of disconnection as aforesaid has been given by the licensee, the licensee shall not exercise any of the**

***powers conferred by this Section in respect of the said charge or other sum until final determination of such difference or dispute.” (underlining added)***

12. In this case, there was a dispute between the appellant and the respondent, regarding the billing arising from the under-recording caused by the meter in respect of which the seal was broken. As at the time the respondent disconnected the electric supply, that dispute had not been referred to the Electricity Regulatory Board or the Court or Arbitration. The appellant cannot therefore rely on Section 63(2) of the Electric Power Act.

13. With regard to Section 87 of the Electric Power Act, disputes as to accuracy of the meter is only settled by the Electricity Regulatory Board upon an application being made to the Board by either party. In this case, there was no evidence before the trial magistrate that the dispute concerning the accuracy of the meter was referred to the Electricity Regulatory Board.

14. From the evidence which was adduced before the trial magistrate it was clear that the appellant’s agent admitted that the meter had been tampered with. The appellant also admitted that during the period of the disputed consumption, the premises were partly occupied by a school and a person who was doing a lot of training. The appellant therefore failed to prove on a balance of probability that it was not liable for the alleged consumption of power which was under-recorded. For the above reasons, I find that the trial magistrate was right in dismissing the appellant’s suit. I find that this appeal has no merit and do therefore dismiss it with costs.

**Dated and delivered this 20<sup>th</sup> day of May, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Kabaru Ndegwa for the appellant

Ms Ngare H/B for Kajwang for the respondent