



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL CASE 115 OF 2000**

**GEORGE NYANGOR OBONDO ..... PLAINTIFF**

**VERSUS**

**THE KENYA POWER & LIGHTING COMPANY LIMITED .... DEFENDANT**

**JUDGMENT**

By a plaint filed on 23<sup>rd</sup> October, 2000, the plaintiff stated that he was a tenant in premises known as Homa Bay Municipality **Plot No. 1432/250** where he had set up a business of a posho mill. He was paying a monthly rent of Kshs. 1,400/= from 1994 to April, 2001. In these premises, the plaintiff had a contract with the defendant for supply of electric power. The contract was said to have been entered into in August, 1994, and the supply account number was

0548490-01 through meter number 470715. The parties also had another electric power supply contract in premises known as **KANYADA/KOTIENO-KATUMA'B'750** under supply account number 2041146 through meter number 9470944 in respect of a Posho Mill. The plaintiff averred that it was an express term of the said contracts that the defendants would install and maintain a meter recording of the units of power consumed by the plaintiff and thereafter render a true statement of account for settlement. The plaintiff further stated that in breach of the said contracts, the defendant failed to render true statements of account and forwarded to him bills showing nil consumption and giving estimated figures for settlement. The plaintiff added that sometimes in April 1996, the defendant's employees', servants and/or agents wrongfully removed meter number 470715 and replaced the same with meter number 465579 in the plaintiff's business premises at Homa Bay, plot No. 1432/250 without duly adjusting the supply account.

Sometimes in October, 1990 or thereabout the defendant's employees, servants and/or agents disconnected power supply to the plaintiff's aforesaid premises and as a result the plaintiff's posho mill could not operate. On 4<sup>th</sup> October, 2000 the defendant also disconnected power supply to **KANYADA/KOTIENO-KATUMA'B'750** where the plaintiff's other posho mill was and it also ceased to operate.

By reason of the defendant's action of disconnecting power supply as aforesaid, the plaintiff averred that he had suffered loss of earnings and profits. He contended that he used to earn an average of Kshs. 1500/= per day from 1996 to 1997 and the same had risen to an average of approximately Kshs. 2,500/= in 1998 to 1999 from each of his posho mills. The plaintiff prayed for loss of earnings and profits as

special damages but did not specifically quantify his loss. He further prayed for general damages and aggravated damages and taking of accounts to determine the actual bills payable to the defendant. He further prayed for an injunction to restrain the defendant from arbitrarily removing power supply from his premises.

The defendant filed a statement of defence and denied having ever entered into any agreement with the plaintiff for supply of electricity to plot number **KANYADA/KOTIENO-KATUMA'B'/750**. In respect of the plaintiff's other business premises at Homa Bay, the defendant admitted that it supplied the plaintiff with electricity and fixed a meter but the plaintiff refused or neglected to pay his power bill and as a result the defendant lawfully disconnected supply to the premises. The defendant denied the plaintiff's claim for loss of earnings and profits.

Only the plaintiff testified. He did not call any witness. The defendant did not adduce any evidence but both parties filed written submissions which I have perused and taken into consideration.

Although this case was filed on 23<sup>rd</sup> October, 2000, hearing did not commence until 29<sup>th</sup> January, 2003. The plaintiff closed his case before Wambilyangah, J. on 3<sup>rd</sup> June, 2003. The proceedings indicate that many exhibits were produced by the plaintiff but when I perused this file in 2008 for purposes of writing this judgment I did not trace the exhibits in the court file. However, copies of some of them exist by way of annexures to various affidavits that are on the record.

The plaintiff testified that the defendant wrote to him on 12<sup>th</sup> October, 1993 and was required to pay Kshs. 24,014/= for the first power supply contract. He was also required to pay account deposit of Kshs. 2,500/=. He paid the two sums of money and was issued with receipts and assigned account number 435522090. He was then supplied with a meter. This was in respect of premises situate on plot No. 1432/250. In 1997 he applied for another meter in a different location, **Kanyada/Kotieno-Katuma'B'/750** and was given a quotation of Kshs. 160,000/=. He paid a deposit of Kshs. 16,000/= and was given a hard quotation of Kshs. 48,155/= and Kshs.10,000/= for a meter. He alleged that he paid the said sums of money and was issued with receipts. However, it appears that there was no formal power supply contract with regard to the latter premises. In 1994 there was a fire outbreak in an adjacent building to one of his business premises and a group of people broke into his building to save the property from the fire, the plaintiff averred. His posho mill was pulled out of the premises it was in. The plaintiff suggested that in the process of so doing the electric meter got cracked. However, in 1996, the defendant's inspectors alleged that he had tampered with the meter and debited his account with Kshs. 11,000/=. A new meter was then installed. The plaintiff began to receive bills which showed mere estimates. The bills showed zero consumption even though the posho mill was still operating.

After about seven months of receiving such bills, the plaintiff's power supply was disconnected and he was served with a power bill of Kshs. 251,766.40. He complained to the defendant and after several meetings with the defendant's agents and/or servants, the bill was adjusted to Kshs. 123,016.40. He agreed to liquidate the same by monthly installments and paid Kshs. 15,000/= plus Kshs. 200/= reconnection fees. He agreed to pay the balance within a period of twelve months at the rate of Kshs. 9,200/= per month. That notwithstanding, the defendant did not reconnect the power supply but after some time the defendant disconnected power supply from the other premises where he was also running a posho mill. The defendant sent a formal demand letter, asking the plaintiff to pay Kshs. 114,145/=.

The plaintiff testified that the average gross earning from one posho mill was Kshs. 2000/= per day. He sought to recover loss of earnings. The plaintiff also sought general damages for breach of contract; taking of accounts and an injunction to restrain the defendant from interfering with his business.

In cross examination, the plaintiff stated that he did not report about the alleged fire incident to the defendant. The plaintiff also conceded that he did not have any documents in support of his claim of Kshs. 2000/= per day for loss of earnings.

From the foregoing, it is not in dispute that the plaintiff was operating two posho mills, one on plot No. 1432/250 within Homa Bay Municipality while the other one was on plot No. **Kanyada/Kotieno-**

**Katuma 'B'/710.** Each premise had been connected to electric power supply by the defendant.

For sometime, the plaintiff's bills in respect of premises standing on plot No. 1432/250 showed nil consumption though his posho mill was still operating and thus consuming electricity. The plaintiff kept on paying some small amounts of money.

The defendant's servants realized that the plaintiff's meter had been tampered with. The defendant wrote to the plaintiff on 20<sup>th</sup> May, 1996 and advised him that his account had been debited with Kshs. 11,000/= being the cost of the spoilt meter. The letter indicated that the plaintiff accepted responsibility and signed a liability form. Thereafter the meter was replaced.

After negotiations regarding the bill of Kshs. 251,766.40 that had been slapped upon the defendant, the same was agreed at Kshs. 125,395/=. On 28<sup>th</sup> December, 1999 the plaintiff wrote a letter addressed to the defendant's Commercial Engineer at Kisumu and stated as hereunder:

**"Dear Sir,**

**RE: CREDIT FACILITY FOR BILL PAYMENT ON A/C NO. 0548490-01**

**I would like to be considered for credit facility to pay outstanding power bill amounting to Kshs. 125,395/= which was accumulated in this account after a meter No. 470715 was replaced with another one No. 465579. There was a delay in effecting this change for billing for a long period of time (3<sup>1/2</sup> years). It was given the correct bill this year in 1999 October. The replacement took place in 1996. I have put down the following arrangements to clear the bill once I am connected. I will be paying the company Kshs. 9,200/= every month for 12 months. I will also pay Kshs. 15,000/= and reconnection fee of Kshs. 200/=. Thirdly I will be paying my monthly bill together with the agreed amount of Kshs. 9,200/= until the accumulated bill is completed."**

It appears that at the time of writing the aforesaid letter, power supply to the premises on plot no. 1432/250 had long been disconnected in October 1990. (see paragraph 8 of the plaint). The disconnection of power supply to the plaintiff's other premises, Plot No. **Kanyada/Kotieno-Katuma'B'/750** was done sometimes in the year 2000. It appears that the defendant did not agree to the proposal that was given by the plaintiff in his above quoted letter of 28<sup>th</sup> December, 1999.

In response to an affidavit sworn by the plaintiff on 11<sup>th</sup> January, 2001 where he alleged that the defendant's employees and or agents wrongfully removed meter No. 470715 from plot No. 1432/250 and replaced it with meter No. 465579, the defendant's Senior Customer Engineer in charge of Western Kenya, Robert Borter, gave a different view.

He stated that prior to 1<sup>st</sup> April, 1996, the meter on sight was No. 548490 and had accumulated arrears of Kshs. 111,456.50 and the plaintiff applied for a new meter. Since it was for the same customer, a notice was given transferring the outstanding balance to the new account.

On 29<sup>th</sup> September, 2000 the plaintiff was given notice that unless he paid the aforesaid sum immediately his power supply would be disconnected. There is no evidence that the plaintiff paid the aforesaid sum. The power bills that were sent by the defendant to the plaintiff shortly before disconnection of power supply clearly reminded him that he had an outstanding bill and unless payment was effected he was due for disconnection without any further warning.

It therefore appears to me that disconnection of power supply to the plaintiff's premises was occasioned by non payment of outstanding bills for power that had been supplied to him. By his letter of 28<sup>th</sup> December, 1999, the plaintiff acknowledged the outstanding sum of Kshs. 125,395/= and gave a payment proposal. He cannot therefore dispute the aforesaid debt and blame the defendant for disconnecting power supply to his premises. The doctrine of estoppel applies in this matter, see **HAAS –**

**VS- WAINAINA** [1982] KLR 17.

The plaintiff cannot succeed in his claim for the aforesaid reason.

But even if the plaintiff had succeeded in proving that the disconnection of power supply was unlawful, he would only have been entitled to general damages but not damages of loss of earnings and profits because these are special damages which must be specifically pleaded and strictly proved, see **JIVANJI –VS- SANYO ELECTRICAL COMPANY LIMITED**, [2003] KLR 425. The plaintiff failed to prove the alleged losses. He did not produce his statement of accounts or any other record of his earnings and nothing would have been awarded in the circumstances.

All in all, I find no merits in the plaintiff's case and dismiss it with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 28<sup>TH</sup> DAY OF JULY, 2009.**

**D.K. MUSINGA**

**JUDGE.**

**28/7/2009**

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for Mr. Okoth for the Plaintiff.

N/A for the Defendant

**Court:** Judgment delivered in open court on the 28<sup>th</sup> day of July, 2009.

**D.K. MUSINGA**

**JUDGE.**