



**SYLVENUS WASHE MWATUA :::::::::::::::::::: APPELLANT**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY :::::::::::::::::::: RESPONDENT**

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**JUDGMENT**

This appeal arises from the ruling of the Chief Magistrate delivered on 21<sup>st</sup> April 2004 in Mombasa CMCC NO. 1198 of 2003 in which she dismissed with costs the Appellants application for summary judgment.

The law is clear beyond peradventure and our law reports are replete with authorities on the cliché proposition that before a court adopts the draconian summary procedure thus denying a party his right to a plenary hearing, the Applicant's claim must be plain beyond argument and there should not be even one triable issue.

The Appellant's contention in this appeal is that despite having placed before the learned Chief Magistrate proof that he paid a total sum of Sh.1,739,433.60 to the Respondent for the supply of electricity which admittedly was not supplied, the Chief Magistrate erred in holding that the Respondent's defence raises at least one triable issue and dismissing his application for summary judgment.

It was further contended for the Appellant that proof of that payment was contained in the banking slip annexed to the Appellant's affidavit in support of the application showing that he deposited into the Respondent's account No. 0104020018800 at Standard Chartered Bank Kenya Limited, Malindi Branch, of a sum of Sh.730,000/- on the 15<sup>th</sup> June 1998 and the balance by uneven and irregular installments evidenced by receipts copies of which were also placed before the learned Chief Magistrate.

In total disregard of the clear provisions of Order 6 Rule 6(1) of the Civil Procedure Rules requiring any allegation of fraud to be supported by particulars thereof, Mr. Odhiambo for the Appellant also further submitted, the learned Chief Magistrate erred in entertaining a further replying affidavit purporting to give those particulars when not even a whiff of those particulars was made in the defence.

For the Respondent it was contended that after considering the Appellant's application for supply of electricity to his residential house at Msabaha at Malindi, it only demanded payment of Sh.120,000/- from the Appellant, Sh.12,000/- of which was to be made before any supply work would commence. The Appellant never paid even a penny of that amount hence the Respondent's failure to supply him with power. Mr. Njenga for the Respondent dismissed the said banking slip for Sh.730,000/- and the purported receipts for the balance of Sh.1,006,433.60 as forgeries.

After perusing the record and considering these submissions I am satisfied that the learned Chief Magistrate was perfectly entitled to dismiss the Appellant's application for summary judgment. As explained in the further replying affidavit of Nyamori Walter Philip, prior to 15<sup>th</sup> November 1999, all customers' payments to the Respondent at its Malindi office were made through its bank account at Standard Chartered Bank Kenya Limited, Malindi Branch. In the case of a new service line installation, upon production of a banking slip a customer was issued with a Buff Card or a Certificate of Payment by the Respondent's Malindi Office and waited for a receipt that would be issued from the Mombasa office.

Apart from the fact that the Appellant's alleged deposit of Sh.730,000/- into the Respondent's Account on

15<sup>th</sup> June 1998 does not appear in the Respondent's Bank statement, the alleged banking slip itself is questionable. It contains numbers of six Certificates of Payment, one of which was purportedly issued a day before, which Certificates were supposed to be issued after and not before the banking. Looking at that slip it is as though what was banked were those certificates and not cash or cheques. As I have said the Respondent also denied receipt of any other payment and dismissed the purported supporting receipts as forgeries. The internal memo of 14<sup>th</sup> February 2003 allegedly admitting receipt of the amount claimed, which the Appellant made heavy weather of, was also dismissed by the Respondent as a forgery as its author had resigned from her employment with the Respondent company prior to the date it was written.

All these were clearly triable issues that the learned Chief Magistrate was entitled to consider as she did and dismiss the application. That the Respondent did not plead in its defence the particulars of fraud is a minor issue which could and can still be remedied by an amendment. This is a hopeless appeal and the same is hereby dismissed with costs.

**DATED and delivered this 17<sup>th</sup> day of January 2008.**

**D.K. MARAGA**

JUDGE