REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Appeal 31 of 2002

KENYA POWER AND LIGHTING CO. LTD ::::::::::::::::::::::::::::::APPELLANT

VERSUS

DANIEL MWANGANGI MANG'ARA :::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

1. The Appeal herein arises from the judgment and the decree in Mwingi SRMCC No. 41/1999. In that suit the Plaintiff, David Mwangangi Mang'ara pleaded that he is the proprietor of a plot within Mwingi Township where he had constructed twenty (20) lodging rooms and one large room where he kept anti-rabbies vaccine in a refrigerator.

2. That on 26.3.1997 the Plaintiff received an electricity bill amounting to Kshs. 38,502.79/= which he found to be excessive and after he lodged a complaint, it was reduced to Kshs.3,000/= which was duly paid. That the electricity metre was also found to be defective and it was verbally agreed that no new bill would be raised until the issue was settled but on 18.2.1999, electricity to the premises was disconnected and the Plaintiff thereby suffered loss and damage.

3. At paragraph 14 of the Plaint, the particulars of special damages were given as that the twenty (20) lodging room were

rendered uninhabitable and the anti-rabbies vaccine was destroyed. The Plaintiff then sought general and special damages, a permanent injunction to restrain the Defendant or its agents from disconnecting the Plaintiff's electricity and an order directing it to rectify the electricity meter or refix it. Costs and interest were also sought.

4. In a Statement of Defence dated 27.7.1999 and filed on 3.8.1999, the Defendant denied the Plaintiff's claim and averred that the Plaintiff owed Kshs. 125,989.95 for electricity supplied, because he had made no payments for electricity consumed since 27.6.1997. That when the Defendant attempted to disconnect the supply of electricity on 13.5.1999, the Plaintiff obstructed the Defendant's agents from disconnecting the electricity which disconnection was justified and lawful.

5. After evidence was tendered by both parties, the learned magistrate, O. Ondambu Esq. SRM, found that the Plaintiff had proved his case on a balance of probabilities and ordered the Defendant to "*rectify and/or refix a new good working meter in the Plaintiff's premises*" and awarded Kshs.100,000/= as general damages and Kshs. 92,000/= being the alleged value of the anti-rabbies vaccine that was destroyed. He also granted the Plaintiff costs and interest of the suit.

6. The grounds of appeal as set out in the memorandum of Appeal are as follows:-

"*1. The learned trial magistrate erred in law by*

awarding general damages of Kshs.100,000/= to the Respondent even when such damages were not available in law to the respondent.

ii. The learned trial magistrate erred and misdirected

himself when he awarded to the respondent special damages of Kshs.92,000/= even when the said damages were not specifically pleaded and proved in evidence.

iii. The learned trial magistrate erred and misdireced

himself by relieving the respondent from paying the past unpaid bills even when the respondent had admitted in his evidence his indebtness to the appellant in respect of the bills.

iv. The learned trial magistrate erred and misdirected himself on the law governing the contractual relationship between the appellant and the respondent as laid out in the Electric Power Act a misdirection which led the trial magistrate to reach an erroneous decision.

v. The learned trial magistrate erred and misdirected himself when he failed to dismiss the respondent's suit with costs to the appellant even when there was sufficient evidence to do so."

7. I have taken into account submissions by advocates appearing and my determination of the issues raised is as follows:-

8. On special damages awarded, the law on the subject was well stated in Hann vs Singh [1985]KLR 716 where the Court of Appeal held that;

"*Special damages must not only be specifically pleaded but also strictly proved. The degree of certainly and the particulars of proof required depends on the circumstances and the nature of the acts themselves."*

9. In this case, the Plaintiff pleaded that for 87 days the lodging rooms were uninhabitable due to lack of electricity but no specific loss was either pleaded or proved. As for the anti-rabbies vaccine it was pleaded that it "*shall be supplied, assessed proved during the hearing hereof."* No specific sum was pleaded but in evidence, a receipt dated 10.5.1999 issued by Mumbuni Chemists Ltd was produced as exhibit 10. Its particulars we as follows:-

"22 Anti –Rabbies Vaccine – @ 3,000/=

Kshs.66,000/=

10 anti Snake Bite Vennon - @ 2,000/=

Kshs. 20,000/=

2x1000 Erythromycin Cap Kshs. 6,000/= 92,000/=

10. I agree with Counsel for the Appellant that neither the pleading nor the exhibit fit the expectation of Hann (supra). I say so because the specific sum of Kshs. 92,000/= was not pleaded in the Plaint and it is not enough to state in the Plaint that the same will be proved at the trial. Further, what was pleaded was the loss of anti-rabbies vaccine and the inclusion of anti-snake bite and other items was clearly in error. Lastly, the purchase of all those items was made on 10.5.1999 when in fact the electricity was disconnected on 18.2.1999. It cannot be a sustainable averment therefore that the anti–rabbies vaccine could have been destroyed on or about 18.2.1999 when in fact the same had not even been purchased. The claim for special damages must therefore fail and ground 2 of the Memorandum of Appeal must be

upheld.

11. On the claim for general damages, in the Plaint, it is averred at paragraph 14 thereof that the Plaintiff suffered damage when the Plaintiff suffered damage when the Plaintiff refused to rectify the electricity metre or fix a new one. The problem with this claim is that the evidence on record does not support it. The Plaintiff in fact confirmed the evidence by the Defendant that he actually neglected or refused to pay his electricity bills when presented. Exhibits 1-9 are electricity bills showing the metre readings for various periods between 1997 and 1999. If indeed there was an agreement that no electricity bill would be raised, why would the Plaintiff keep receiving bills for 2 years for electricity that was consumed and yet he paid nothing for the consumption. I do not accept the proposition that the Plaintiff owed nothing because he clearly did and the disconnection of electricity was proper and lawful. He was not and is not entitled to any compensation in damages and the Kshs. 100,000/= awarded to him was clearly in error and grounds 1 and 3 of the Memorandum of Appeal must be upheld.

12. Suppose I am wrong in my findings above, then I should point out that I wholly uphold grounds 4 and 5 of the Memorandum of Appeal because I take the view that the dispute between the parties herein should have been settled under section 87 of the Electricity Power Act No. 11 of 1997 which provides as follows:-

"[1] *If any dispute arises between any consumer and the licensees as to whether any meter whereby the value of the supply is ascertained (whether belonging to the consumer or to the licensee), is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that different shall be determined upon the application of either party by the Board, and the Board shall also order by which of the parties the costs of and incidental to the proceedings before it shall be paid, and the decision of the Board shall be final and binding on all parties; and in determining the said costs the board may take into account any fee paid under section 80.*

(2) *Subject as aforesaid, the reading of the meter shall be conclusive evidence, in the absence of fraud, as to the value of the supply.*"

13. The magistrate's court was pointed to that law but dismissed it, erroneously I think, as an afterthought. A point of law can be raised at any stage of litigation and the clear provisions of the Act should have led the court to that path because in fact what was in issue was not failure to give notice of intention to disconnect but the consequences of disconnection. In any event in exhibits 1-9, Notice of intention to disconnect was always clearly given and 2 years was more than enough period for the Plaintiff to rectify his position. Grounds 4 and 5 of the Memorandum of Appeal must be upheld.

14. The above being my findings, the Appeal is allowed and instead the suit before the lower court is dismissed.

15. The Appellant shall have costs of the suit and the Appeal.

16. Orders accordingly.

Dated and delivered at Machakos this 24TH day of November 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Musyoki for Appellant

Respondent in person

Isaac Lenaola

Judge