



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
Civil Appeal 119 of 1999

KENYA POWER & LIGHTING CO. LTD APPELLANT

VERSUS

OSIEMO NYAMWEYA ALEX RESPONDENT

JUDGMENT

The appellant Kenya Power and Lightning Company was sued by the respondent OSIEMO NYAMWEYA ALEX for special and general damages arising from the appellants disconnection of power to his Posho Mill.

The appellant's case was that he owned two posho mills at NYAMAGWA SHOPPING CENTRE. The appellant supplied him with electric power to run the same. He maintained two accounts with the appellant. A/C No.0607845-01 and 0609812-01 for each Posho mill. In 1996 he ran into arrears on account No.0607845-01 and it was disconnected. He continued to run the other account. However on 24th June 1998 the Appellant's servants disconnected power to the other Posho mill. By then he was not in arrears in respect of account No.0609812-01. He wrote to the appellant to reconnect power but he did not do so until 28th August 1998 – after 65 days. He told court that each day he was earning an average of shs.4500/= and he claimed loss of that money for 65 days. He also claimed his reputation was ruined and he demand general damages. The court entered judgment in his favour and stated that the average earnings were shs.2,500/= per day. He was therefore awarded shs.165,000/= as Special damages. Court found he had not proved any general damages.

The appellant in his defence stated that the Respondent was in arrears and that its servants could not get access to the meter but to take readings. In the written defence it stated that power was reconnected on 1st August 1998 though DW2 said it was reconnected on 1/7/98.

Mr. Magari who presented the appeal told court that the magistrate erred as he awarded the Respondent general damages for breach of Contract. Further he stated that the Respondent admitted that he was in arrears of shs.140,000/=.

Both parties were in agreement that power was indeed disconnected on 24th June 1998. There was a dispute as to whom it was finally reconnected. Respondent said it was on 28/8/98. DW1 said he did reconnect the power on 1/7/98. In defence it was pleaded that reconnection was on 1/8/98. DW2 also had said it was reconnected on 1/7/98. This could not have been true as on 3/7/98 the Respondent went to court and made an application asking court to order appellant to reconnect the power. He could not have done so if they had reconnected.

DW2 admitted giving to the Posho Mill on 17th August 1998 after Respondent complained that power had not been reconnected and connected power at the poles, yet he had earlier said the reconnection was

on 1/7/98. Obviously he was not telling the truth as can be seen from contradictions in his evidence. The learned magistrate was proper to believe the Respondent that power was reconnected after 65 days.

There was the issue whether the disconnection was lawful and the magistrate found it was not. This again was a proper finding. The Respondent stated that he had no arrears in respect of account No.0609812- 01 which was disconnected on 24th June 1998. He admitted that his other account was disconnected in 1996 due to arrears. He said Appellant had not given him any Notice of disconnection or told him that account was in arrears. He had paid the last bills on 21st May 1998 and he had not received any other bill from the appellant. The evidence was not challenged. It was not contravened by the appellant. If indeed that account had arrears the appellant would have produced the bills to show so, or even a demand Notice. One can only conclude that account No.0609812 – 01 was not in arrears at the time of disconnection. Perhaps there was money onward on the other account disconnected in 1996 but even if both were in his names the accounts were different. This explains why the appellant did not even put a counterclaim in his defence for the amount he alleges were in arrears. The magistrate therefore reached a proper conclusion that the disconnection was unlawful.

The last issues were about damages. The magistrate did not award any general damages for breach of contract. What was awarded were special damages. In Par. 12(a) of the Complaint he clearly stated that he lost shs.4500/- per day. That was specific. Of course he could not state the final amount because this was to be determined by the number of days the power remained unconnected. They were therefore specifically pleaded. As to prove of the same he produced a receipt book used in the Posho Mill. True some receipts were not dated but there was no objection to their production. The magistrate considered these receipts and concluded that the loss was shs.2500/= day. This figure was not plucked from the air as the receipts were there. The appellant had not called any evidence to show the figures were wrong. The special damages were therefore proved. Once the court concluded the loss per day and the days involved it arrived at the figure of shs.162,000/=. The finding was proper.

From the above therefore I find the appeal has no merit and the same is dismissed with costs.

Dated this 13th day of April 2005.

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Kamau H/B for Mr. Magare for Appellant

N/A for Respondent

KABURU BAUNI

JUDGE