REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL APPEAL NO 46 OF 2003

KENYA POWER & LIGHTING CO. LIMITED.....APPELLANT

VERSUS

WYCLIFFE ANGU KITIGIN.....
.....RESPONDENT

(Being an appeal against the Judgment of the Senior Principal Magistrate's

Court in Civil case No.1156 of 2000, by P.N.Ngigi (Miss) Resident Magistrate, delivered on 22nd April 2003 in Eldoret.)

JUDGMENT

Wycliffe Angu Kitigin whom I shall hereinafter refer to as "the plaintiff" is an established advocate in Eldoret. In July 1999, he entered into a Power Supply Agreement with Kenya Power and Lighting Company (hereinafter called 'the defendant') after which the defendant connected his premises with power and he was provided with an electricity meter. On 27.9.2000, the defendant disconnected the power and though the plaintiff alleges that it was done without notice, the defendant avers that it was done as a routine safety precautionary measure. However, on the same day the defendant informed the plaintiff in writing that "your supply has been disconnected due to energy meter body seals warning", and he was required to go to their offices with his identity card, for advice, which he did, but upon arrival, he declined to sign what he refers to a self incriminating agreement by virtue of which, he would have "admitted fraud and damage to the defendants property".

The power was not reconnected and he moved the subordinate court seeking inter alia, an order to compel the defendant to reinstate power and damages for defamation and consequential unlawful disconnection.

He also moved the court simultaneously by way of a chamber summons under order XXXIX rule 2, 2A and section 3A of the Civil Procedure Act and obtained orders to restrain the defendant from acting in breach of the contract of supply, and to compel it to reinstate the power supply, pending further orders.

After a lengthy trial, the learned trial Magistrate found that the disconnection was illegal and awarded the plaintiff a sum of K.shs.100,000/- as damages for the said illegal connection. She however declined to find that he had been defamed as no sufficient evidence had been led to prove the point, as none of those who shunned

him because of the defamation, were ever called to give evidence.

Being dissatisfied with the judgment, the defendant has now preferred this appeal which is based on eight grounds namely that:-

1. The learned Magistrate erred in law and in fact in holding that the respondent had proved his case when there was no evidence to support that conclusion.

2. The learned Magistrate erred in law and in fact in basing her judgment on irrelevant considerations.

3. The learned Magistrate erred in law and in fact in awarding general damages for alleged breach of contract contrary to law.

4. The learned Magistrate erred in law and in fact by disregarding the Appellant's submissions.

5. The learned Magistrate erred in fact and in law in awarding damages, which were neither specifically pleaded nor proved.

6. The learned Magistrate wholly misapprehended the case before her.

7. The learned Magistrate erred in law and in fact in granting orders not prayed for and or hitherto compromised and abandoned.

8. The learned Magistrate erred in law and in fact in failing to dismiss the Respondent's case.

The date for the hearing of the appeal was fixed by consent. Though the plaintiff who is the respondent in this appeal was therefore aware that the appeal would proceed for hearing, he was not represented and the matter proceeded ex-parte.

Mr. Manani, learned counsel for the appellant chose to combine his grounds 1,4,6 and 8, then grounds 3 and 5 together, then 2 and 7 as one. It was his submissions on grounds, 1,4,6 and 8, that paragraph 10 of plaint, was for reinstatement of power and also, for damages for defamation but that the issue of metres had been sorted out during the hearing of the suit and hence the sole issue, which the plaintiff raised during trial was purely on defamation.

It was also his submissions on grounds 3 and 5, that the plaintiffs claim was based on contract whose breach was alleged, yet particulars were not pleaded, and that though that general damages for breach of contract, should never be awarded, he was awarded damages for the alleged breach and that in any event, if they were special damages, they had not been specifically pleaded.

Finally, on grounds 2 alone, as ground 7 had been urged together with others hereinabove, he made submissions to the effect that having given the reasons for disconnection the issue really was whether there was breach by either party and that the issue of prosecution was not relevant at that stage.

I have as expected of me, this being the 1st appellate court reevaluated the evidence on record and also taken the judgment of the learned trial Magistrate into account.

It is clear that by the time when the matter went for trial the plaintiff whose power had already been reconnected, was not interested in pursuing his prayer for illegal disconnection. Indeed he seems to have abandoned it and he did not make any mention of it when asked to state what orders he sought from the court against the defendant. A look at the submissions made on his behalf also reveals that damages for illegal connection did not part of the said submissions, I am therefore inclined to agree with the learned counsel that the court was not required to determine the issue pertaining to the alleged illegal disconnection and in any event, no basis had been laid in the body of the plaint for such a prayer.

But even if then for special damages to be awarded, they must be specially pleaded and specially proven again. It is trite law that "Plaintiff must understan d that if they bring actions for damages it is for them to prove damage, it is not enough to note down the particulars and to speak, throw then at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to pro ve it" (DAVID BAGINE V MARTIN BUNDI CA No. (Nai) 283/1996, the court of appeal referring to Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177).

I find that he could only have claimed an award for expenses incurred or loss sustained, and further, the damages, which were special in nature, were not specially pleaded and should not have been granted.

It is on record that though one of the prayers which was combined, was for damages for defamation and consequential unlawful disconnection, the learned trial Magistrate was right in disallowing the first limb of the prayer as there was no evidence to support it.

But as stated earlier, this is not one of the grounds of appeal I shall therefore deal with the learned trial Magistrate's findings on the second limb of the prayer. Short of citing it in the reliefs in the plaint, it had not been alluded to at all, in the main body of the plaint, yet it is trite law that the plaint must disclose a cause of action. It cannot lie to refer to a relief in the prayers, whose cause has not been established in the plaint itself.

On that account alone, his prayer was bound to fail, but even if the pleadings were proper, was the learned trial Magistrate award of damages for unlawful disconnection, proper?

In my mind all damages which the plaintiff would have incurred during the five days, when his office remained without power would be fall under the category of special damages arising from breach of contract, in which case, which would be special damages which would be quantifiable.

It is trite law that general damages cannot be awarded in a matter of contract. Such a proposition is to be found in the Court of Appeals decision in JOSEPH UNGADI KEDERA V EBBY KANGISHA KAVAl (personal representative of EPHRAIM KAVAl (deceased) CA No. (Ksm) 239/1997 where the reiterated the fact that *"there can be no general damages for breach of contract 'damages arising from a breach of contract are usually qualitifiable and are not at large "where damages can be quantifie d they cease to be general"*

But that is not all, I do agree with learned counsel for the defendant that though the suit was filed in October 2000, after the amendment of Order VII vide Legal Notice 36/2000, the mandatory requirement that pertains to filing of suits was not

complied with as there was no averment in the plaint, that “there have been no other suit pending and that there have no previous proceedings in any court of law”, between the plaintiff and the defendant over the same subject matter, which rendered the suit a nonstarter. It should have been struck out for contravening the mandatory requirement.

The upshot of all this is that the defendant’s appeal is hereby allowed on all grounds, the judgment of the subordinate court is set aside and the plaintiff’s suit is hereby dismissed with costs.

The appellant shall also have the costs of this appeal.

Dated and delivered at Eldoret this 9th day of June 2004

JEANNE GACHECHE

JUDGE

Delivered in the presence of:-