



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1535 OF 2000

REUBEN MUSONYE PLAINTIFF
VERSUS
KENYA POWER AND LIGHTING COMPANY LTD..... DEFENDANT

JUDGMENT

The plaintiff, who told the Court he is a retired Kenya Army Brigadier, retired Ambassador and a present Commissioner in the Electoral Commission of Kenya, filed this suit against the Defendant praying for judgment for:-

“(a) An Order directed to the defendant to unconditionally restore the power supply to the plaintiff’s premises, Nangili Wholesalers, Plot No. 34 Eldoret.

(b) An injunction restraining the defendant company by itself or through its authorized employees, servants or agents from interrupting the electricity supply to the suit premises at any time whatsoever.

(c) Special damages in the sum of Kshs 444,765/= as proved at the hearing hereof.

(d) Damages for the loss of business suffered from the date of filing suit up to the date this suit is determined.

(e) Costs of this suit with interest.

The Defendant is a limited liability company and a supplier of electricity and the plaintiff says that at all material times he was the authorized consumer holder of electricity power A/C No. 726238 in respect of his business premises situated at Nangili Market being Plot No. 34, El.doret. The Plaintiff says he carries out a number of businesses including a posho mill, a wholesale shop, a video show, a bar and welding machine at the plot and that the Defendant had been supplying electricity for about five years as the Plaintiff went on paying rent on monthly basis religiously. One day the Plaintiff received an astronomical bill of Kshs 384,099.70 on the ground that his account was in arrears. The Plaintiff could not believe his eyes as according to him, he had no arrears, and even if there were arrears, he could not see how his small monthly bill of about Kshs 5000/= could have risen to Kshs 384,099.70 especially since he was always making payments monthly.

The sum of money claimed kept on increasing with every subsequent monthly bill as the Plaintiff was talking to the Defendant’s officers to come to a solution while he continued his monthly payments which included a sum of Kshs 18, 116/= in February 1999 forwarded by Plaintiff Exhibit 2 which was replied by letter plaintiff Exhibit 3 admitting there has been an error and apologizing for the error and a check meter had been installed to find out whether the plaintiff’s meter was defective.

But despite all that, the Defendant on 16th July 1999 disconnected the electricity. Cutting an electric wire some distance away from the meter, which continued to remain at the site until the time the hearing of this suit was being completed.

It is the Plaintiff's case that as a result of that disconnection of electricity by the Defendant, the Plaintiff has suffered loss resulting from his businesses in which he had invested much money. The video, television, calculators, fridges, juke box, whole sale shop and posho mill could not function properly. Since the disconnection persisted, the plaintiff was forced to buy a generator to try and mitigate the loss which, however continued and still continues to-date as the generator could not fully replace the disconnected Defendant's electricity supply and it is expensive to run a generator.

The Plaintiff, therefore, wants the Defendant's counter claim dismissed and judgment entered for the Plaintiff against the Defendant. As at November 2000 when the Defendant's defence was filed, the Defendant was counter claiming arrears of Kshs 388,014.40. The Plaintiff does not accept that he owes the Defendant that the money the Defendant is claiming in the counter claim or any other sum of money.

The Plaintiff said that although he has two other accounts with the Defendant for the supply of electricity, he does not have any problem with the Defendant on any of those two accounts one for the Plaintiff's residential house and the other account for the Plaintiff's other posho mill.

It came out during cross examination that a bill having a letter E in brackets means that bill was based on a mere estimate, the actual meter reading not having taken place and the Defendant was pressing the case that the meter was not being read because the Plaintiff was preventing access by the Defendant's meter readers who had therefore to rely on estimated figures.

From the fact that the letter E is placed against figures under the heading.

“Consumption period”

the plaintiff countered what the Defendant was trying to advance by arguing that the letter E was being used in relation to the consumption period so that what is under estimate is the consumption period and not the meter reading although the meter reading becomes a reading for the estimated period. It be noted in the bill issued on 22nd June, 1999 where the estimated Consumption period is given as 19/05/1999-18/06/1999 an estimated consumption figure of 1191 is given. That is one of the bills in Plaintiff Exhibit 1 and it is the only bill, in that exhibit, with the letter E. There was no complaint from the Defendant that the Plaintiff denied them access to the meter.

The Plaintiff concedes that during the negotiations which followed the issuance of disputed bills he at one time agreed to pay Shs 10,000/= in addition to normal monthly payment, but decided not to abide with that agreement as he was not convinced why he had to burden himself with that extra payment. He found it punitive. He said was to pay Shs 10,000/= once and have the matter settled. But see P. Exhibit 3 for more.

The Plaintiff said that the place where the meter was placed was being locked for protection to prevent vandalism at night only. During the day, the place remained open and accessible to meter readers and officers from the Defendant company as the Plaintiff's wife was in charge of the Plaintiff's businesses and there was a full time manager at the site. The Plaintiff did not, therefore, accept the Defendant's claim that he denied access for 18 months' to meter readers. The Defendant does not accept the Plaintiff's case and avers that the electricity supplied to the Plaintiff was bound to be paid for and that the Plaintiff failed to pay hence the disconnection to curb further loss of revenue to the Defendant.

It continued that for a period of 18 months the Plaintiff was receiving bills that were not reflective of actual consumption. The Defendant said that when it migrated its computer system from one system to another, the computer made an error in keying in the right digits that were fed on it. Consequently, the Plaintiff received bills that were not reflective of actual consumption.

The Defendant claims to have notified the Plaintiff of this fact and that the Plaintiff refused to pay saying that the amount was large.

The Defendant who had earlier during the hearing, tried to advance a defence that the consumption on which it was claiming payment was estimated because the Plaintiff was not allowing the Defendant's meter readers access to the meter to take actual readings, concluded its defence on the basis that the consumption on which the Defendant was claiming payment of Kshs 388,014.40 from the Plaintiff was "NOT an estimate." It was actual.

It is the Defendant's case that the Plaintiff having actively sought an amicable settlement in the matter should not have failed to pay the money claimed by the Defendant and should not have come to court. The Defendant, therefore, submits that the Plaintiff seeks to set a dangerous precedent of refusing to pay for what he has consumed. This is not a case of loses to lie when they fail because the Plaintiff consumed electricity, made a proposal and defaulted. He is the author of his own misfortune, emphasizes the Defendant.

It points out that even the evidence of the Plaintiff's alleged loss cannot stand as no receipts or banking records were tendered as evidence. The Defendant further points out that the Plaintiff paid for a check meter that was placed alongside his meter to ascertain the correctness of the meter. The results were that his meter was in proper working order. He should not now run away from his obligation to pay for what he has consumed.

While the Defendant says that it is clearly established that there was a genuine mistake which was caused by a computer error the Defendant asserts that this is an excusable mistake because when it was detected the plaintiff was informed.

The Defendant, therefore, prays that the Plaintiff's suit be dismissed with costs and judgment entered for the defendant as prayed in the counter claim.

That is the case before me as presented by both parties. One or two observations to be made before I proceed further. Firstly, in the pleadings and the evidence before me the parties have completely failed or refused to disclose to the court the status of the Defendant company.

The plaint in paragraph two merely says that the Defendant is " limited liability company duly incorporated as such under the relevant provisions of the law ...". That law is not revealed. The Defendant in paragraph one of its defence merely says "The defendant admits paragraph 1 and 2 of the Plaint ..."

That is all I have as to who the Defendant is. The question I am left with is under which specific law is the Defendant registered? Wanting to know better I would also ask whether that law has any specific provisions governing the type of dispute between the parties in this suit. If such provisions are there, why are the parties silent about those provisions and if we are not applying those provisions, are we doing the right thing?

The second observation I have to make is that the pleadings and evidence before me show clearly that the parties entered into an agreement for the supply of electricity. The said agreement has also been kept away from the eye of the court. Are there no clauses in that agreement relevant to the dispute in this suit bearing in mind the prayers in the plaint and the counter claim?

Thirdly, the important letters exchanged between the Plaintiff and the Defendant have been kept away from the eye of the court. But the court would like to know what the parties were talking about in those letters before this suit was filed. That is important in view of changing pattern the Defendant's defence has been taking. Did the Plaintiff's counsel capture those changes? In her written submissions she comes out with the notion that the dispute in this matter is over the reading of the meter. Yes, at some stage that seemed to be so. But was it so at the time the hearing closed? It follows that the three case authorities she cited are a little off the point.

That closes the observations I wanted to make. I now turn to the evidence before me. While the Plaintiff's case remained constant, the Defendant's defence kept on changing. At first it was that there was nothing wrong with the meter reading and the billing and that it was the Plaintiff who was simply refusing to pay for the electricity he has actually consumed. Look at the filed defence and counter claim. Nothing about a mistake or error by the meter reader or the computer or the meter itself. I think that is the position which made the Plaintiff insist on the installation of a check meter and had to go to the extent of paying for its installation.

The original meter was found to have nothing wrong. As the Plaintiff still persisted in finding out what had happened, the Defendant may have told him something and then apologized but as I have said earlier, those letters have been kept away. In the court before me however, the second line of defence was that the Plaintiff was denying meter readers access to the meter. What they had been doing, therefore, was to give estimated figures which were used to bill the Plaintiff. When later access was allowed and actual readings done, the correct figures were now available for the Plaintiff to be correctly billed and that resulted into the claims the Plaintiff came to court to dispute. It was explained that a letter E in a bill meant that that bill was based on estimated figures.

However, when it was pointed out with strong probability that the letter E concerned the period covered by the bill, the Defendant's defence shifted to be that it was the meter reader who was reading the meter wrongly recording a reading of four figure instead of five figure digits.

The Court laboured with that line of defence for sometime before the Defendant came to the last line of defence that it was the computer, and not the meter reader, which was making mistakes by keying in a reading of four digits instead of five digits which the meter reader had correctly recorded at the meter reading.

The Defendant produces exhibits 3 and 5 to show what happened. The former exhibit is a bill where a four digit previous reading came to be against a five digit current reading. The figures were 7786 and 79868 respectively. The former was then subtracted from the latter figure to result into 72082 which was said to be uncharged during the period of 18 months of four digit error.

It was said that that figure attracted arrears of Ksh 386,421.60 as at 21st October 1998 growing to Kshs 388,014.40 as at 24th October 2000 about the time the Defendant's defence and counter claim were filed. Assuming that those figures are correct, it means that the figures in the Defendant's exhibit 5 are figures taken from the computer record only. Corresponding figures as recorded by the meter reader were not produced and corresponding bills sent to the Plaintiff were not produced to prove the uncharged figure in each bill to see whether the total could come to 72082 uncharged. In other words, it should have been something like this: This is the five digit figure recorded by the meter reader on date A. This the corresponding four digit keying in the computer and this is the resulting four digit bill sent to the Plaintiff. In that bill, therefore, the number of consumption units left out and uncharged were

That kind of thing not having been done, the evidence adduced by the Defendant left a lot to be desired and cannot convince me that these are reliable figures. That evidence is insufficient as those figures could easily be cooked.

On the other hand and allowing for changing tariffs, how much money was the Plaintiff paying every month before the problem which led to this suit arose? Was it, on the average, more than Ksh 10,000/= per month? For 18 months at 10,000/= per month the amount comes to Kshs 180,000/= only. That is less than half the sum of Kshs 386,421.60 said to have been due on 21st October 1998 before interest was added. Was the Plaintiff, before this dispute arose, paying more than Kshs 20,000/= the arrears for 18 months should have been Kshs 360,000/=. Was the Plaintiff not paying anything within those 18 months? Where is the Credit? The Defendant had the duty to adduce evidence to satisfy the Court on those questions. It was not done.

Further still and assuming that the Defendant's evidence so far on record is sufficient to establish that it is claiming the correct amount from the Plaintiff, what justification is there to burden the Plaintiff with

the arrears?

Clearly, from the evidence the Plaintiff is innocent. He did not contribute to the mistake or error made by the Defendant's employees who captured the figures as four instead of five and continued to do so for 18 months. During that period he was promptly paying the Defendant's bills for electricity consumption which were being sent to him. The fact that during the shocking period of the extra ordinarily large bill the Plaintiff tried to find a solution together with the Defendant does not obliterate his innocence. The Defendant owed the Plaintiff a duty to act diligently and to let him have a quiet consumption of the electricity supplied without inconveniencing him, rudely surprising him and shocking him with large bills which pass to him the burden of paying for the mistakes or errors of the Defendant, its employees or agents.

That duty has and is not being discharged in this suit where, in addition to the payment of arrears being demanded by the Defendant from the Plaintiff, the Defendant has already disconnected electricity supply to the Plaintiff. I think this is negligent, unfair and oppressive and there is no justification for making the innocent Plaintiff pay the money even if he consumed the electricity especially in this case where the Plaintiff has suffered unwarranted disconnection of electricity supply. Having said the above, it would appear that the Plaintiff should succeed. But the law under which the Defendant is operating and the agreement between the parties having been kept away from the eye of the court the prayers in the plaint have give me a lot of anxiety.

In addition, I do not see how prayer (b) can properly be granted to-day when electricity supply is disconnected. An injunction to stop inturrption of electricity supply which is not there to-day. Even if prayer (a) is granted, the restoration will not take place at the very moment I pronounce this judgment to make the granting of prayer (b) legally proper and effective. Moreover I do not see the propriety of tying the hands of the Defendant, a public company, with this mandatory and indefinite injunction when the Plaintiff is left free. How about if after the restoration of electricity the Plaintiff refuses to pay electricity bills? With regard to damages, special or general, there is insufficient evidence on record. Records in the two exercise books produced by the Plaintiff as exhibit 6 and exhibit 7 could be written by any body any time.

These records should have been backed by other evidence such as receipts and banking slips. What I am saying here is in addition to what I said earlier about lack of evidence concerning the law under which the Defendant is operating as well as evidence of the agreement between the parties. I face a similar situation with regard to prayer (a) but have the feeling that it may safely be granted.

In conclusion, therefore, the Defendant's counter-claim in the Defendant's defence be and is hereby dismissed in its entirety. Prayers (b), (c) and (d) in the Plaintiff's plaint each dismissed. And prayer (a) in the Plaintiff's plaint granted.

The Defendant to pay costs of this suit.

Dated at Nairobi this 30th day of November 2001.

J.M. KHAMONI

JUDGE