



**Lyamula t/a Glomally Investment Limited v Kenya Power and Lighting Company Limited  
(Civil Appeal E029 of 2021) [2024] KEHC 2217 (KLR) (4 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E029 OF 2021  
DAS MAJANJA & OA SEWE, JJ  
MARCH 4, 2024**

**BETWEEN**

**MATHEW HIPOLITI LYAMULA T/A GLOMALLY INVESTMENT  
LIMITED ..... APPELLANT**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. E.K. Makori, CM dated 3rd  
February 2021 at the Magistrates Court at Mombasa, in Civil Case No.116 of 2017)*

**JUDGMENT**

**Introduction and Background**

1. By a plaint dated 27.01.2017, the Appellant filed suit in the Subordinate Court claiming that on or about 28.01.2015, a short circuiting at the Respondent's overhead electricity cable near the Appellant's premises caused fire at the said premises which completely destroyed the Appellant's goods, stock in trade, equipment and assets therein. The Appellant claimed that this loss was as a direct result of negligence and/or failure in the Respondent's duty of care and regular maintenance and inspection of their electricity cables and lines and the Appellant thus held the Respondent fully liable for the damage and losses suffered. The Appellant assessed its loss at Kshs. 6,030,607.00 comprising of Adjusted Loss, Loss Adjusters Fee and Investigation Fees which it claimed together with interest and costs of the suit.
2. The Respondent filed a defence denying the Appellant's claim and urging the court to dismiss the claim. It stated that it had no control in the manner in which the accident happened because as claimed by the Appellant, the accident was caused by sudden heavy winds which caused the wires to come into contact with one another. It averred that the alleged injuries occasioned to the Appellant were caused and substantially contributed to by the said acts which were not contemplated nor foreseeable as the Respondent's electricity cables are built on clearly marked wayleaves and which cables are periodically



and regularly serviced. That the fact that the gusts of the wind interrupted their normalcy was beyond its control and contemplation. Without prejudice, the Respondent stated that the accident was wholly caused or substantially contributed to by the negligence of the Appellant in building and erecting its premises on wayleaves and under direct electrical lines and/or a transformer.

3. The matter was set down for hearing where the Appellant called Mohammed Juma, his security guard (PW 1), Benedict Mutua, an Insurance Investigator (PW 3), George Munene, a Loss Adjuster (PW 4) and Mark Washe, a Claims Officer (PW 5). The Appellant also testified (PW 2). On its part, the Respondent called Ezra Chweya Oyunge, its officer for Qualities and Maintenance (DW 1).
4. In the judgment rendered on 03.02.2021, the Subordinate Court found that from the evidence of PW 1, the fire commenced from the neighborhood but he was not sure what could have caused it. That it was 2.00 a.m by night or thereabouts and the fire seemed to have emanated from a third party's yard which then spread to the Appellant's yard and that whether it was the third party who interfered with the power lines was not clear. It observed that the PW 4 alluded to the fact that the fire started from a neighborhood and he ascertained the damage of the fire rather than the cause. The Subordinate Court held that the appropriate persons to have known the cause were experts from the County Government Fire Department and the Respondent and that the latter did their bit and contended that it was beyond their scope. It concluded that the Appellant had not met and discharged its burden proof as it was not clear how the fire started.
5. The Appellant is dissatisfied with the judgment and has challenged the finding based on his memorandum of appeal dated 05.03.2021 which is now the subject of the court's determination.

### **Determination**

6. As this is a first appeal, I am aware that the court has a duty to re-evaluate and re-assess the evidence before the subordinate court and at the same time, keep in mind the fact that the trial court interacted first hand with the parties (see *Selle v Associated Motor Boat Co.* [1968] EA 123).
7. The Appellant is aggrieved with the Subordinate Court's findings that he had failed to prove the Respondent was to blame for the fire that destroyed the Appellant's property. The Appellant contended that the Respondent was negligent by carelessly fixing the circuits of the electrical cable, failing to exercise due care when placing the cables, failing to provide regular maintenance and inspection of their electricity cables and lines and failing to take all precautions for the safety of the third party property adjacent or near the Respondent's cable lines, the Appellant's property included.
8. While the Respondent did not dispute the fire, its case was that that it was caused by sudden heavy winds which caused the wires to come into contact with each other, hence the fire. It pleaded the defence of vis major and for which the Respondent claimed it had no control. The Respondent's position of the heavy winds was supported by the County Government of Mombasa Fire and Ambulance Services Fire Report dated 28.01.2015 that was produced by the Appellant which stated that the fire was caused by, "short circuit on loose overhead cables that came into contact when by heavy wind produced sparks causing the cables to break and fall...".
9. After evaluating the testimony of the witnesses, I agree with the trial magistrate that none of the witnesses presented by the Appellant was able to demonstrate that the fire was caused by the Respondent's negligence. PW 1 responded to the fire after it had started and all he saw was an electrical wire that had already been cut but he could not explain how. He admitted that he could not tell what could have caused the fire and that he was the first and only person at the scene when the fire broke out. PW 2 also stated that he was informed of the fire by PW 1 and that he did not witness the same. The investigation report dated 12.03.2015 produced by PW 3 relied on the statements of PW 1, PW



2 and the County Government of Mombasa. It did not add much value as to causation as it only confirmed PW 1's testimony that he did not know how the fire started and the County Government's conclusion that it was caused by short circuiting of cables as a result of heavy winds. PW 4 only assessed the loss resulting from the fire and his evidence was also unhelpful on the question of liability. The Appellant's insurer, through PW 5 also relied on the investigation report of PW 3 which as I have stated was inconclusive as to the cause of the fire and did not demonstrate negligence on the Respondent's part.

10. Turning back to first principles, it is trite that in order to prove negligence, a plaintiff has to prove that the defendant owed it a duty of care and that the duty was breached and that it suffered loss and damage as a result of such breach (see *Brite Print (K) Ltd & George Maina Kingori v Barclays Bank (K) Ltd* [2014] eKLR). In this case is it not difficult to locate a duty of care imposed on a purveyor of electricity through overhead electric cables to keep and ensure the safety of the public. In *Kenya Power and Lighting Company v Joseph Khaemba Njoria* [2005]eKLR the court held that the power company has the responsibility to ensure that the power infrastructure it has installed in the country for the purposes of electrification is properly maintained to prevent accidents. Likewise in *Joseph Kiptonui Koskei v KPL Co. Ltd* [2010]eKLR the court observed that the power company owed the plaintiff and every Kenyan a duty of care to secure its power lines so as not to cause damage to the public.
11. While the duty of care imposed on the Respondent by law is not disputed, the Appellant had the burden of proving breach of that duty of care. In that regard, it was required to prove the particulars of negligence pleaded in the plaint on the balance of probabilities. Section 107 of the *Evidence Act* (Chapter 80 for the *Evidence Act*) provides as follows:
  1. Whoever desires any Court to give Judgment as to any legal right dependent on the existence facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
12. In civil cases, such as this one, the standard of proof required is on a balance of probabilities. The burden to prove a claim is on the person who alleges it and at no instance does it shift to the defendant. The Court of Appeal in *Seasons Restaurants & Hotels Limited v Kenya Power & Lightning Co. Ltd* [2023] KECA 1379 (KLR) accepted the explanation of this standard by Lord Nicholls in the decision *in Re H C minors* [1996] AC 563 at 586 as follows:

The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
13. From the record, the Appellant did not call any evidence to prove the particulars as pleaded. In particular, it failed to show that the power lines failed because the Respondent had carelessly fixed the circuits of the electric cables, or that it failed to exercise due care when placing the cable or failed to provide maintenance and inspection of the electric cables and line or failed to take all precautions for the safety of third party property adjacent or near the Respondent's cable lines. The totality of the evidence is that Appellant failed to prove its case on the balance of probabilities.



14. Had the Appellant surmounted its burden and proved negligence on the part of the Respondent, the burden would have shifted to the Respondent to prove the defence it asserted. For completeness, I shall assume that the claim was proved and now turn to consider the defence raised by the Respondent. Through DW 1, it asserted that the cause of fire was strong winds that caused the conductor to cut and it produced a report dated 28.02.2017. This report was consistent with the findings of the County Government of Mombasa Fire Department that it was strong winds that caused the cables to short circuit.
15. From the evidence above, it is probable that the fire was caused by strong or heavy winds that caused the Respondent's cables to short-circuit. The Respondent pleaded that these heavy winds were beyond its control and thus pleaded the defence of vis major. For this defence to apply, the cause must be external and in particular involve natural disasters and it must be entirely unpredictable. The event must be so unusual that it concerns the exceptional nature to an elemental force and that it cannot be averted by economically feasible measures or by reasonable precautions (see *Redemptor Ndunge Ndawa (Suing in his capacity as the Administrator and legal representative of the estate of Christopher Muloki Masila-Deceased v Solomon Gikaru Kariri* [2020] eKLR).
16. The evidence on record shows that the strong and heavy winds were natural and a potential disaster and are entirely unpredictable. The resulting damage could not in the circumstances be averted by economically feasible measures or by reasonable precautions. I hold that that the Respondent's defence of vis major arising from the strong winds that caused its cables to short-circuit and cause the fire was proved.
17. From the totality of the evidence, I come to the same conclusion that the Appellant failed to prove that the Respondent was liable for the fire and as such, the Subordinate Court was right to hold as such.

### **Disposition**

18. The appeal lacks merit. It is dismissed. The Appellant shall pay the Respondent's costs assessed at Kshs. 50,000.00.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT MOMBASA THIS 4<sup>TH</sup> DAY OF MARCH 2024.**

**OLGA SEWE**

**JUDGE**

