



**Orthodox Archbishopric of Kenya v Eagle Africa Insurance Brokers Kenya Limited (Civil Appeal 224 of 2020) [2024] KEHC 5880 (KLR) (Appeals) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**APPEALS**

**CIVIL APPEAL 224 OF 2020**

**HI ONG'UDI, J**

**MAY 24, 2024**

**BETWEEN**

**ORTHODOX ARCHBISHOPRIC OF KENYA ..... APPELLANT**

**AND**

**EAGLE AFRICA INSURANCE BROKERS KENYA LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable D. M Kivuti Senior Resident Magistrate in Nairobi CMCC No. 4947 of 2017, delivered on 8<sup>th</sup> May, 2020)*

**JUDGMENT**

1. This appeal arises from a judgment and decree entered in Nairobi Chief Magistrate's Civil Suit No. 4947 of 2017. In the said suit, the respondent sued the appellant for some computation error on car-pack licensee agreement in line with a lease agreement. Additionally, the appellant filed an amended counterclaim seeking mandatory injunction compelling the respondent to pay Kshs. 5,558,454/= as outstanding electricity bills.
2. The matter was fully heard and the trial Magistrate delivered Judgment on 8<sup>th</sup> May, 2020 dismissing the respondent's case while allowing the appellant's counterclaim in terms of prayer 1 and 2 only. He dismissed prayer 3 of the counterclaim on the basis that there was no sufficient evidence on the issue of payment of electricity bills.
3. Being aggrieved with the judgment the appellant lodged the appeal dated 8<sup>th</sup> June, 2020 on the following grounds:
  - i. That the Learned Magistrate erred in law and fact in failing to find that the Appellant had adduced sufficient evidence to prove its claim in paragraph 3 of the amended counter claim dated 11<sup>th</sup> March, 2019.



- ii. That the Learned Magistrate erred in Law and fact in dismissing prayer 3 of the amended counterclaim dated 11<sup>th</sup> March, 2019.
4. The Appeal was canvassed through written submissions.

### **Appellant's Submissions**

5. The appellant's Submissions were filed by Kiarie & Githii Advocates and are dated 18<sup>th</sup> April, 2023. Counsel gave a background of the case and submitted that the property consists of six floors in exclusion of the ground floor. She added that the respondent occupied two floors, the 5<sup>th</sup> and 6<sup>th</sup> floors measuring 12,378 square feet while the 1<sup>st</sup> to 4<sup>th</sup> floors measuring 24,756 square feet were occupied by Energy and Petroleum Regulatory Authority (EPRA).
6. She submitted that the electricity bill is not separated and each tenant was required to pay electricity *pro rata* to the space occupied. Counsel submitted that the respondent's share of the billed electricity was 33.33%. She further submitted that it was not in dispute that between December 2015 and February 2018 the appellant paid the electricity for the premises.
7. It was counsel's Submission that the trial magistrate erred in her finding as the terms of the lease agreement were clear and unambiguous. She submitted that the terms were that the respondent was to pay for the electricity it consumed for which the appellant produced evidence by quoting the relevant clauses in the lease produced by the respondent. She added that the appellant produced electricity bills and proof of payment.
8. She submitted that the appellant's prayer on the electricity payment refund was dismissed merely because the lease relied upon was produced in the respondent's bundle of documents. Counsel argued that it is trite law that once a document is produced by a witness in evidence, that document becomes part of the judicial record and can be referred to by any of the parties to the suit.
9. She further argued that there was nothing wrong when the appellant relied upon a lease agreement that was part of the record. Counsel relied on the case of *Gatobu M'ibuutu Karatho v Christopher Muriithi Kubai* [2014] eKLR where it was held that,  
  
"...the court cannot re-write a contract between parties."  
  
She also relied on the case of *Powerware Systems Limited v Sociabelec (EA) Limited* [2020] eKLR.
10. She submitted that the respondent had a clear responsibility to pay for electricity prorated to the space occupied. It was her argument that the respondent's share totaled to Kshs. 5,558,454/= which was refundable to the appellant.
11. In conclusion, counsel submitted that it was worth noting that the respondent is still a tenant at the premises albeit occupying a smaller space and paying its prorated share of electricity to Kenya Power.



## Respondents' Submissions

12. The respondent's submissions were filed by Hamilton Harrison & Matthews Advocates and are dated 19<sup>th</sup> March, 2024. Counsel cited the case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR on the duty of the first appellate court where it was held:

“Whereas the duty of the first appellate court is to analyze and re-evaluate the evidence tendered in the trial court, the court should refer to the findings of fact of the trial court unless it can be shown that the findings of the trial court were made without any evidence.”
13. He submitted that the trial court was right in holding that the appellant's claim being a special damage claim ought to have been specifically pleaded and strictly proved. He further argued that there was no evidence to support the contention that the respondent and appellant agreed to share the electricity costs and that the appellant's share was 33%. He added that the appellant failed to produce the said agreement which ought to have been agreed on by way of correspondence or contract. Further that the claim ought not be speculative but proved by evidence being tendered of the agreement showing what the respondent will pay, for what period and how it should be paid.
14. Counsel relied on clause 4.4 of the lease at page 149 of the Record of Appeal which provides that the landlord has a duty to provide the services set out in the third part of the first schedule to the lease. He argued that electricity bill to the common parts of the building including lifts and staircases is to be paid by the appellant but the same was paid by the respondent.
15. He further argued that clause 3 part 4 of the first schedule of the lease was not relevant to the matter at hand as it provides for the mode of calculation of the cost of electricity. He added that the same relates to the “floor area applied” to the Kenya Power and Lighting Company and not the floor area occupied by the tenant. It was his argument that the said clause does not impose an obligation on the respondent to pay electricity used in the provision of services set out in part 3 of the first schedule.
16. He submitted that there was no evidence to show that both parties agreed that the appellant would pay electricity for the respondent and thereafter seek reimbursement. It is his contention that the appellant is claiming a reimbursement of electricity paid towards the common parts and not for the space occupied by the respondent. He added that electricity consumed in the common parts is paid as part of the service charge.
17. In conclusion counsel relied on Section 107 of the *Evidence Act* and submitted that the appellant failed to discharge its burden of proof and thus its counterclaim was properly dismissed.

## Analysis and Determination

18. This being a first appeal, this court has a duty to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. It must bear in mind that it did not see nor hear the witnesses testify, and must give an allowance for that.
19. In the classicus case of in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 the Court of Appeal stated as follows on the power of the first appellate court:

“I accept counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence,



evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).[emphasis added]. Also see *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR

20. Having considered the grounds of appeal, record of appeal, the parties submissions and the authorities relied on by them, I opine that the issue for determination is:
  - i. Whether the appellant's claim in paragraph 3 of the amended counter claim dated 11<sup>th</sup> March, 2019, was proved to the required standard.
21. This court has perused the amended counterclaim under paragraph 3 and it is a fact that the appellant claimed that it had made payments of Kshs. 5,558,454/= to the Kenya Power and Lighting Company on account of the respondent's electricity bill from December 2015 to February 2018.
22. The appellant therefore claimed refund of the same from the respondent for the said period. The respondent on the other hand argued that there was no evidence to show that they had agreed that the appellant would pay the respondent's electricity and thereafter seek reimbursement. The respondent further argued that the appellant is actually claiming reimbursement of electricity paid towards the common parts and not the space occupied by the respondent. The trial court in its finding held that the appellant needed to specifically prove the electricity payments as a special damage.
23. It is this court's view that the root of the issue boils down to the lease agreement dated 12<sup>th</sup> November, 2015 between the appellant and respondent. Under The Tenant's Covenants Clause 3.4 on Electricity and other services consumed, it is provided as follows:
  - “ 1. To pay the relevant service providers all charges for electricity and water consumed in the Premises as per the electricity and water meters installed in the Building for the Premises and to pay for installing and maintaining meters.
  2. To pay to the suppliers of and to indemnify the Landlord all charges for electricity water conservancy telephone, telex, facsimile, or other communications equipment and use and conservancy consumed at or in relation to the Premises.”
24. From the above, it is not in dispute that the obligation for electricity payment was on the respondent. It is also not in dispute that in the event the appellant paid for the respondent's electricity, the respondent was to reimburse the appellant.
25. This court has perused the court proceedings in the trial court where the appellant testified that it had made payment to the Kenya Power and Lighting Company (KPLC) through their counsel based on the 33% occupancy. These statements were not proved. It was also the respondent's argument that the said amount paid for electricity by the appellant was for the common areas and not the rented space.
26. It is worth noting that the respondent referred to clause 4.4 of the lease at page 149 on the Landlord's Covenants which provides as follows:

“ To provide the Services



To exercise its best endeavors to provide the services specified in the Third Part of the First Schedule to this Lease”

The said part provides for water and electricity in the common areas necessary for keeping the said areas lighted”

27. The respondent argued that electricity bill to the common parts of the building including lifts and staircases was to be paid by the appellant.
28. In the instant case, the appellant claims refund of electricity payments it paid on behalf of the respondent for its premises. The respondent on the other hand claims that the appellant should not be refunded as the said were payments for the common areas.
29. It is this court’s view that indeed it was the appellant’s obligation to pay electricity charges for common areas, however, the court at this juncture cannot confirm whether the said cheques were for common areas or for the respondent’s space in the premises. In addition, neither the invoices from KPLC nor cheques were specific to confirm that the monies paid were for electricity consumption for the respondent’s space, and not the common areas.
30. In civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored under section 107 of the Evidence Act which provides guidance in this area. It states as follows: -  
Section 107 of the Evidence Act states that;
  - i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
31. In the instant case, this court finds that the onus was on the appellant to specifically prove that the said electricity bill payments paid via cheques through its advocates were for the respondent’s premises and not the common areas.
32. The appellant failed to do so and this court cannot grant it the prayers sought for a refund of Kshs. 5,558,454/=. Consequently, this court finds that the appellant did not establish a case for reimbursement of electricity of the above payments against the respondent, as sought in the counter claim.
33. The upshot is that the appeal lacks merit and is hereby dismissed with costs. The lower court Judgment is upheld.
34. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

