Kenchic Limited v Kenya Power & Lighting Co Ltd (Civil Appeal E022 of 2021) [2024] KEHC 6545 (KLR) (Civ) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E022 OF 2021

DKN MAGARE, J

JUNE 6, 2024

BETWEEN

KENCHIC LIMITED ..... APPELLANT

AND

KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT

(Being an appeal against the entire Judgment and Decree of Honourable D.W. Mburu (Mr.), SPM, delivered on 18th December, 2020 in Milimani CMCC No. 1373 of 2015)

JUDGMENT

1. This is an appeal from Judgment and Decree of the Hon. D. W. Mburu given on 18/12/2020 in Milimani CMCC 1373 of 2015. The Appellant was the Plaintiff in the lower court.

2. The court found that the Appellant had not proved their case. He dismissed the suit with costs to the Respondent herein.

3. The Appellant filed an 8 paragraph Memorandum of Appeal. The memorandum is repetitive and prolixious and unseemly. A Memorandum of Appeal should be concise. The appeal raised the following grounds of appeal. Grounds 7 and 8 are not proper grounds of appeal.

    a. That the learned trial magistrate erred in law and in fact when he dismissed the Appellant's case in its entirety without considering the merits of the claim.

    b. That the learned magistrate erred in law and in fact when he failed to consider that the Respondent's witness (DW1) admitted that the Respondent does not record telephone calls for quality purposes and therefore the Respondent's Report that the Appellant never made a complaint regarding grid power outages was inaccurate, incomplete and selective as the same did not contain complaints made via telephone calls.

c. That the learned trial magistrate erred in law and fact in failing to consider the Respondent's Witness (DW2) admission that power fluctuations would have occasioned selective damage to the Compressor components.

d. That the learned trial magistrate erred in law and fact in holding that the Appellant had not established its claim under the doctrine of subrogation on a balance of probabilities notwithstanding the evidence produced in that regard by the Appellant.

e. That the learned trial magistrate erred in law in imposing a greater burden of proof than is required in civil cases.

f. That the Judgment was contrary to the principles known in law and failed to consider the pleadings and evidence on record.

g. That the learned trial magistrate erred in failing to consider the Appellant's submissions and legal authorities relied on.

h. That the learned trial magistrate erred in failing to consider the Appellant's submissions and thereby arrived at findings that have absolutely no basis in law and fact.

Pleadings

4. The Appellant filed suit that they rear one day old chicks, chicken and process for international market. They state that they have a cold room for storing premium products. The cold room runs on electricity from the Respondent. They stated that the Respondent supplies electricity. In the case of the Appellant they were supplied via meter number 0531534-01.

5. They stated that between 25/1/2013 and 27/1/2013 there were outages in the grid power at the Appellant's premises. It was reported that technicians were working on the same. They stated that as a result of inadequate grid power the cold room compressor was destroyed. They gave particulars of loss as follows:

    a. Damaged Cold Room Compressor & Products – Kshs. 418,079/=

    b. Con-loss following breakdown at cold room -Kshs.6,124,491/=

    c. Loss assessors and adjustors fees -Kshs. 38,000/= Kshs.6,580,970/=.

6. They blamed the Respondent for allowing power fluctuations. They set out 8 particulars of negligence. The particulars however appears to equate the Respondent to the Almighty God. I do not think that heaven can still be there if we surrender the divine role of salvation to the Respondent.

7. Nevertheless, they claimed a sum of Kshs. 6,580,970. This was supported by the statement of Duncan W. Situma, a Chief Accountant and Samuel Ngaiya from ICEA Lion. This was because the claim was filed on the backbone of the doctrine of subrogation. To be able to problematize, conceptualize and contextualize subrogation, it is important fathom what it is. It is not a direct claim by the plaintiff but obliquely on behalf of the insurer. In the case of Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR , the Court of Appeal posited as doth: -

    > " 26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the

rights and remedies the insured might have against a third party in respect of the loss compensated....

28. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co. [1994] eKLR and Michael Hubert Kloss & another vs. David Seroney & 5 others [2009] eKLR."

8. In essence subrogation as properly understood the insured is fixing himself in a case for purpose of recovering money already paid by the insurance company to its insured. However to succeed, it must be shown that the alleged tortfeasor is liable. In the case of Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 the Court defined the basis of the doctrine of subrogation as follows:

> " The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation."

9. The defendant filed a defence through Munene Wambugu & Kiplagat Advocates dated 29/5/2015. They stated that electrical supply were of good quality and their duty ends at the client's meter board. They denied that the compressor was destroyed due to inadequate power supply. They denied particulars of negligence and invited the Appellant to strict proof. They also stated that the doctrine of subrogation is not applicable to the class of insurance and as such it should be insured by way of re-insurance.

10. They stated that the loss if any was caused by the negligence of the Appellant. They stated that they failed to carry out wear and tear in the premises for the electrical appliances, fittings, compressors and equipment.

11. A reply to defence was filed on 4/6/2015. A list of 13 issues were filed by the Appellant. The Respondent filed a statement of Robert Otieno. It is indicated that it is the 1st Defendant's witness. It is a lexical ambiguity. The same was for the Defendant's 1st witness. There was to be a second witness Ben Okello Omune. The Appellant substituted a statement and introduced Geoffrey Ringoti, a payable accountable.

12. The matter proceeded for hearing. The Appellant called 3 witnesses; that is Geoffrey Mwangi, Kelly Kirigo Muriuki and Samuel Maina Ng'ang'a. The Respondent lined up Robert Owuor and Paul Waweru Kamau as witnesses. Parties filed comprehensive submissions.

13. The Appellant submitted that a suit of Kshs. 6,580,970/= was due as special damages. They stated that Geoffrey Mwangi PW1 confirmed that there were power outages at the premises on 25/1/2013. It was only till 27/1/2013 that the normal supply was restored.

14. They stated that DW2 stated that KPLC does not record telephone for quality. On the loss they stated that the loss occurred due to inadequate voltage, the motor drew higher currency which damages coils. They disputed the MClaren's report that the damage was caused by mechanical failure. They

stated that the compressor was in good working condition and was noted damaged on 28/1/2013. The damage was said to be Ksh. 418, 079.

15. However, consequential loss were said to be Kshs.6,124,491/=. They relied on the old decisions of Donoghue –Vs- Stevenson; Rylands –Vs- Fletcher and Northwestern Utilities Limited –vs- London Guarantee and Accident Company Ltd [1936] A.C. 108 as quoted in Jeremiah Maina Kagema –Vs- Kenya Power & Lighting Co. Ltd. They stated that subrogation was proved.

16. The Respondent filed submissions and set out 4 issues in paragraph 5 of their submissions. They were:

    a. Is the damage to the plaintiff's Compressor attributable to grid power loss.

    b. Did the plaintiff suffer any damage and if so is the defendant liable.

    c. Did the plaintiff (prove?) its right to subrogation.

    d. Who is to bear costs of the suit.

17. In relation to the Compressor they stated that no witness were called to demonstrate that there was a power loss on Friday 23/1/2013 and Saturday 27/1/2013 nor demonstrated that they reported the alleged loss to the defendant. They stated no such grid loss was reported. They stated that the case was premised on the report of Esther W. Kimotho who was not a witness. They stated that after checking they noted that one compressor had failed. It was stated that there were generators which go online.

18. It was stated that on the quantum, they stated that cost of repairing was 346,132 and not as pleaded. They stated that constructive costs were not proved. They relied on the case of Christopher Ndaru Kagina –Vs- Esther Mbandi Kagina & Another [2016] eKLR.

19. They stated that the claim for subrogation was not proved. They pray that the plaintiff bears costs of the suit.

Evidence

20. PW1 – Geoffrey Mwangi Ringoti testified on 3/10/2019 and adopted his statement. He stated that as a result of power outage, some compressors broke down and they suffered loss. The insurance was contacted and paid. Assessment was done and the suit filed on behalf of the insurer. On cross examination he stated that some power is from KPLC and they also have a back-up generator. It was not automatic. He stated that it is not true that it is not unusual for power to go off. He stated that there was a person to switch on the generator.

21. PW2 – Kelly Kirigo Muriuki is a Loss Adjustor. He produced a report for loss of Kshs.433,079/= and for deterioration of stock. He stated that the reports he produced were not authored by him and the final report was not signed.

22. PW3 Samuel Maina Ng'ang'a testified that he is ICEA Lion Insurance Deputy Manager. He stated that they lodged a claim which they settled.

23. DW1 – Paul Waweru Kamau of McLarens Loss Adjustors and Investigators testified that he holds a degree in Electrical Engineering from the University of Nairobi and a registered graduate Engineer Associate of Institute of Risk Management with 20-years experience.

24. He was called upon to investigate upon receipt of a complaint from the Respondent. He carried out visits and looked for circumstances of loss. The compressor had been replaced but relied on invoices for repairs. They discovered that damaged parts were mechanical and not electrical. Invoices for consumable was submitted including wiring within the cold room. They were no damages on

other equipment which were not damaged. The factory had other protective measures including phase failure protectors, stabilizers for voltage fluctuations, standby generators, which had no damages.

25. They stated that no documents were supplied to support mechanical damage and consequential loss. He stated that he visited 2 years later and was not able to see physical evidence. He stated that the report from KPLC was received on 31/10/2014. In re-examination he stated that he was able to reconstruct the events. He stated that it is odd for any one item to be damaged out of a line of equipment.

26. DW2 – Robert Owuor works with the Respondent's Limuru office. He produced 2 documents. He stated that he looked into the incident that happened much earlier. He stated that no complaint about power failure was recorded. He stated that he did not attend to any power outage at Limuru. On cross examination he stated that sometimes customers make complaints on phone.

27. The court then considered evidence and submissions and found that the Appellant's case is unbelievable. The court stated that had the case been proved he will have awarded Kshs.6,542,570/=.

Analysis

28. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

29. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

30. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

31. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

32. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

33. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

34. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

35. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

36. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

37. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

38. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure

of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

39. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

40. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

41. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

42. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

43. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

44. The Appellant relied on the cerebrated case of Rylands –Vs- Fletcher and Northwestern Utilities Limited –vs- London Guarantee and Accident Company Ltd [1936] A.C. 108. These cases relate to unusual or unnatural use of land. In this case, it is not the Respondent that brought a dangerous thing. It is the Appellant who applied for supply of power. It was for useful use by the Appellant. Electricity is not an unusual use. The claim is not based on strict liability but on proof of negligence.

45. In the case of Jeremiah Maina Kagema vs. Kenya Power & Lighting Co. Ltd (supra) THE QUOTED with approval the case of Sellars vs. Best [1954] 2 All ER 389 on the responsibility of a supplier of electric power:

> "They are responsible, of course, for bringing the electricity along their own lines and for making and continuing to have, it may be, a proper connection at the terminal supply points...It seems to me too much to say that the Board are responsible for what the occupier by himself and his contractors and agents have done or omitted to do to his own chattels on his own premises..."

46. In the case of Biocorn Products EPZ Limited v Kenya Power & Lighting Company Limited [2021] eKLR Justice OLGA SEWE stated as doth: -

> "(23) It is the duty of the defendant, by dint of Section 140(1)(a) of the *Energy Act*, to ensure its power supply lines are in a good state of repair. It provides that:
>
> "(1) It shall be the duty of a distribution licensee to—
>
> (a) Build, maintain, and keep in good state of repair suitable and sufficient electric supply lines for purposes of enabling supply to be given in the area of supply specified in that behalf in the license.
>
> (24) Thus, in Kenya Power and Lighting Company Ltd vs. Joseph Khaemba Njoria [2005] eKLR, it was held that:
>
> "There can be no question that the power company has the responsibility to ensure that the power infrastructure it has installed in the country for purposes of electrification is properly maintained to prevent accidents."

47. In this case, it was not shown by way of evidence that there was ever a report on the purported surge or outage. It is not enough for the defendant to show that it was reported. It is for a plaintiff to allege and prove that this was reported. Surely an outage that cause loss of over 6m could not escape unnoticed. The Appellant did not tender any evidence of report the incidence or even the same being rectified.

48. To make matters worse the replaced the compressors without involving the Respondent. By making changes without involving the Respondent, the Appellant kept away crucial evidence. Methinks that had that evidence been available it could have been adverse to the Appellant.

49. The engineers were only shown evidence of mechanical parts that were replaced. The Appellant made heavy weather on the answer that it is possible to have one gadget in a series be destroyed. However, there must be evidence of electrical damage. The damage must also flow from the meter. There was no evidence that there was an effect on the meter.

50. The report on loss was by someone who was not called to testify. The Appellant did not adduce primary evidence on the cause of the damages. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
>
> "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
>
> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In

Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

51. Finally, there was no evidence of the outage or its extent. Was the outage a fluctuation, a surge or blackout. If the last one, was there evidence f the generator being switched on. The holes left in the Appellant's case were so wide that nothing can fill them.

52. In Kiema Mutuku V. Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> " There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

53. In this case, I do not see any evidence on liability. The mere happening of an event does not make the other side liable. In the circumstances, it is unnecessary to go into the issue of quantum. I find no merit in the Appeal and I accordingly dismiss the same.

54. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

55. In the circumstances the respondents are entitled to costs as enunciated in section 27 of the *Civil Procedure Act*. The Appellant shall have costs of Ksh 225,000/=.

Determination

56. The upshot of the foregoing, is that I find no merit in the Appeal. Accordingly, the same is dismissed with costs of Ksh. 225,000/=.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 6TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwai Muthoni for the Appellant

Mr. Kiplagat for the Respondent

Court Assistant - Jedidah