



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 102 OF 2019

BALOZI KENGA.....APPELLANT

VERSUS

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

(Being an appeal arising from the Judgment of the Chief Magistrate

Hon. Dr. Julie Oseko - CM delivered on 19th November 2019

in Malindi CMCC No. 400 of 2013)

Coram: Hon. Justice R. Nyakundi

Richard O. Advocate for the Appellant

Kiarie Kariuki Advocates for the Respondent

J U D G E M E N T

Background

The appellant in this matter Balozi Kenga filed a Plaint in court on 21.11.2013 against the Respondent Kenya Power & Lighting Company seeking permanent injunction from disconnecting, cutting off, and or interfering in any manner whatsoever with electricity supply in his premises at Kijiwe-Tanga and further for general damages, loss of business earning, costs and interest of the suit.

The Contract and its Breach

The Appellant entered into a contract with the Respondent on or about 26.6.2009 for the supply of electricity particularized as a supply of 3 phase 8 KVA service line. That at the signing of the contract, soon thereafter the respondent installed the service line with a voltage power of 3 phase 8 KVA, the implication of it was that the appellant installed a posho mill machine that on August 2009 until 16th November, 2013, the respondent cut off electricity supply without notice. The appellant remedial action outlined particulars for loss of business earning and that of breach of contract whereof he prayed for an indemnity. The trial court having heard the evidence from both parties determined the issues with a finding that the appellant had failed to prove the suit, the reliefs of injunctive orders and award of general damages. The suit was therefore dismissed on its entirety with no orders as to costs.

Feeling aggrieved with the decision, an appeal was preferred to this court based on the following grounds; in the Memorandum of Appeal:-

- 1. The learned magistrate erred in law and fact by failing to pronounce judgement given the circumstances and evidence adduced by the plaintiff.**
- 2. The learned magistrate erred in law and fact by dismissing the plaintiff's suit without reasonable cause and failing to consider grounds of destruction by the defendant's ill motive.**
- 3. The learned magistrate erred in law and fact by failing to take into consideration the issue of damages.**
- 4. The learned magistrate failed to appreciate the wrong doing occasioned by the Defendant and issue injunction thereof as**

sought hence irreparable loss and damage.

5. The learned magistrate erred in fact by failing to take into consideration the evidential report prepared and produced by an expert.

6. The learned magistrate failed to reach a conclusion that the plaintiff had suffered untold loss which cannot be compensated in monetary.

7. The learned magistrate failed to recognize that failure to consider the evidence and report tendered given circumstances and ground of the claim amounts to violation and infringement of the Appellant's constitutional rights and freedoms as enshrined in rule of law.

Evidence at the trial

According to the appellant he identified himself as a resident of Kijiwetanga carrying on business of a posho mill among other enterprises. In consideration of the posho mill business, he did apply for electricity supply to power the system. The application to apply was acknowledged and acted upon by the respondent. He indicated further in application that a three phase voltage would meet his electricity consumption needs for the posho mill and any other collateral activities.

Further, that on 16.11.2013 the supply line was disconnected without notice rendering the business imperative. Additionally he stated that when the respondent disconnected electricity, he did suffer loss of income estimated at Kshs.5000-6000 per day. He stated further that after the respondent disconnected electricity a financial loss report was prepared to indicate the extent of loss of earnings occasioned by the termination of contract to supply electricity.

In support of the appellant's case Salim Ali – an electrical contractor prepared a report of inspection of the property and the terms of the contract by the respondent to supply 8KVA voltage. In his evaluation there were no defects, misrepresentation or mistake in the contract formation between the appellant and the respondent to vitiate its enforcement.

The respondent in rebuttal adduced evidence from one Ibrahim Mbogo Mwangi – an Assistant Engineer attached to Malindi sub-station. He did acknowledge that in the year 2013, the appellant did approach their offices purposely to apply for electricity supply of 8KVA. It was further his testimony that the appellant met the set conditions and the 8KVA was installed to power among other things and installed posho mill machine.

According to the witness sometimes on or about 16.11.2013 there was power outage. It followed that a repair was undertaken but still there was loss of power which triggered a further inspection of the supply line. That is the time it came to light that the appellant was using high volts and another customer by the name Thoya. The Inspection of the appellant's premises established that the posho mill was using 26.6KV instead of the installed 8KVA. He also indicated that a disconnection was effected immediately. This resulted in lack of electricity to the premises until the anomalies were corrected.

The Appeal Submissions on behalf of the Appellant

Counsel for the appellant asked this court to consider the eight grounds of appeal which formed the foundation of their case. He submitted that there was in fact a valid contract in place but the respondent negligence acts and the deemed breach prejudiced the appellant exposing to loss and damage. On this he relied on the dicta of *Nzioka J in Diniz Holdings Ltd V Kenya Power & Lighting Co. Ltd Hccc No. 142 of 2007*. In particular counsel submitted that the respondent owed the appellant a duty of care as provided for under section 160 of the Energy Act. Further, that the respondent had a duty of care to advice and install the correct voltage, which duty it failed to discharge. Counsel, further submitted that due to the acts of negligence and omission the appellant suffered injury and loss of business, which translates to Kshs.15,120,000/-.

Counsel argued and submitted that the court ought to re-evaluate the evidence afresh to find in favour of the appellant. The appellant relevance was placed on the authorities; - (*Kenya Tourist Development Corporation V Sundowner Lodge Ltd (2018) eKLR, Capital Fish Kenya V The Kenya Power & Lighting Co. Ltd CA NO. 189 of 2014*). He therefore submitted that the dismissal of suit should be set aside.

Submissions on behalf of the Respondent

Counsel appearing for the respondent submitted that the contract issues to be determined are whether the appellant acquired interest in the property and subsequently contract for supply of electricity was barred with misrepresentation on his part. Counsel pointed out that the prayer on permanent injunction was not available to the appellant as electricity had long since been disconnected. The injunctive order could have served no purpose. Counsel also pointed out that the appellant contract terms for supply of electricity was conditioned on a three phase line of 8KVA but ended up using an extra load of 18.6KVA but ended up using an extra load of 18.6KVA which later occasioned the transformer to blow up. According to counsel's contention, it was the appellant who breached the contract and the action of disconnection was justified. Further, counsel submitted that the documentary evidence and subsequent so called expert report on proof of loss of earnings failed the threshold test. Therefore no damages should follow as this was not specifically pleaded or proved. He also pointed out that there was no evidence of breach of contract to warrant an award of general damages.

Having considered the evidence, memorandum of appeal, submissions in canvassing the appeal, it is now the duty of this court to determine the merits of the issues raised thereto impugning the judgement of the trial court. From my perspective the following issues stated out at that trial;

i. was there a binding contract between the appellant and the respondent?

ii. if indeed a valid contract existed for the supply of electricity, was this contract breached if so, by whom?

iii. did the appellant procure an illegal interest of a higher voltage in the property by fraudulent means and if so was the respondent right in discriminating the service line without notice to the appellant

Determination

This being a first appeal the note of the court is to re-evaluate and scrutinize the evidence afresh so as to draw its own conclusions and inference as stated in the case of *Selle & Another V Associated Motor Boat Co. Ltd (1968) EA 123*. I am also alive with the principles in *Mbogo Shah (1968) EA 93*.

“That an appellate court will interfere with the decision of the trial court if it’s shown that the exercise of discretion is clearly wrong because the magistrate misdirected himself or herself or acted on matters which he or she should not have acted upon or failed to take into consideration and in doing so amounted at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a magistrate unless it is satisfied that the magistrate in exercising his or her discretion has misdirected himself or herself and has been clearly wrong in the exercise of the discretion and that as result, there has been an injustice.”

It is against this background this court is enjoined to consider first whether the appellant indeed proved his case on a balance of probabilities, but the trial court turned a blind eye to that proof? In the case of *Ezekiel Ngari Wanjohi V Leba Inyangala & others CA Number 44 of 2002[2002] LLR, Chege Gitahi V Maboko Distributors Ltd CA No.65 of 2004[2005]1EA 65, Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] 2 EA – 285*.

In adversarial mode of litigation like ours burdens and standard of proof jurisprudence is well settled that the plaintiff has to make out a case against the defendant on a balance of probabilities. Proof by a preponderance of the evidence requires that the evidence as a whole show that the fact sought to be proved is more probable than not. In *Magure V Morgan (in common sense and common law [1952] 5 L. Rev 277* preponderance of the evidence is defined as evidence of greater weight or convincing force. The court can never be completely certain about what happened in the past, therefore the factual determination need only be made to a degree of probability. Therefore the standard of proof required of the plaintiff is that proof that specifies the strength of the evidence presented at the trial against the defendant. This outcome of the claim in the first place is dependent upon that evidence to prove averments in the pleadings and the defendant’s choice to defend its hinges upon the relationship between the objective merits of their claim and applicable standard of proof.

Following the litigation context, the probability that prevailed was whether a binding contract between the parties did exist. In the comparative jurisprudence the *Supreme Court of the United Kingdom in RTS Flexible Systems Ltd V Molkerei Alois Muller GmbH PCO KG [2010] UUSC 14* held; -

“The general principles are not in doubt. Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed, it depends not upon their subjective state of mind, but upon a consideration of what was communicated between them either by words and conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all terms which they regarded or the law requires as essential for the formation of legally binding relations clearly, it remains to be the law as affirmed in *National Bank of Kenya Ltd V Pipe Plastic Samkolit(K) Ltd[2001]eKLR, Samuel K.Macharia V Daima Bank Ltd [2008]eKLR*.

In the event of a dispute the court is obliged to look at the terms of the contract that parties entered and the elements of that binding agreement. The elements of the contract must be certain as to its existence are indicators that the parties had agreed on all the essential terms. The law envisages that a contract entered into between two consenting adults remains enforceable and binding unless it’s voidable under the following circumstances. In *Aziz V Bhatia Brothers Ltd [2000]1EA10 CAT*, the court made the following observations on what can be classified as operative contracts.

The first category consists of cases in which the judicial discretion is to the effect that a transaction which does not fulfil the requisite conditions is void in totality and therefore the agreement is prohibited by law and is therefore *void ab initio*. (*See Manjir V Beguin[1957]EA101, Fatal Kassan[1960] EA 1042*).

The second category of cases are those which it was decided to the effect that the transaction which does not comply with the requisite conditions is inoperative (*See Mlay V Pemesi EA (1968) EA 563*). The third category of cases is that in which it was decided to the effect that the transactions which were entered by mistake, duress, misrepresentation, coercion are unenforceable.

In that trial according to the evidence by the appellant, there was negligence on the part of the respondent’s conduct in moving into the premises to disconnect electricity without caring the impact of the injury to his business operations. He indicated further that the essential terms as contained in the agreement was on the supply of electricity based on the condition of 8KVA. They cannot therefore turn around that the phase had an overload of 18.6KVA rendering the contract in operative so as to invoke section 160 of the Energy Act. In that case, the learned trial magistrate found that there appeared to be an abundance overload to 8KVA pursuant wholly agreed as a fundamental term of the contract.

In coming to this decision, the trial court took into account the fact that the appellant occupier of the suit premises exceeded the 8KVA load without the consent of the respondent. The legal provision applicable for the respondent to act can be gleaned from the statute as section 61 (1) (c) of the Energy Act. Put it in another way, **“the respondent is empowered by law to disconnect electricity supply to the consumer who uses or permits to use such supply for any purpose or deals with or permits such supply to be dealt with in any manner so as to interfere**

unduly or improperly with the efficiency supply of electrical energy likely to endanger public safety.”

In the aforesaid judgement it's pointed out by the learned trial magistrate that the agreement reached between the parties was a supply of 8KVA and not that of 26.6.KVA as highlighted in the evidence. There are several important aspects of the agreement in question. First, it is clear from the respondent's letter of offer referenced as quoted No. 26.6.2009, it expressly states that an 8 KVA phase was to be installed within the property of the appellant Plot No. Kijiwetanga. The installation was subject to payment of a fee specified of Kshs.57, 880/-. That consideration was eventually made to the respondent who moved to the premises to effectively undertake the installation. The appellant demonstrated by way of documentary evidence the monthly bills due and payable to the respondent for the consumption upon supply as agreed in the contract. The court did accept that the respondent on or about 16.11.2013 disconnected the electricity supply pursuant to section 61(1), (c) of the Energy Act for reasons of safety and security of other persons.

Therefore I accept the account of both parties and the evidence tendered before the trial court. However, I am of the strong view that the respondent in rebuttal correctly asserted the reasons for disconnection of electricity supply without notice to the appellant. Even more critical is that the subject matter of the contract had been varied unilaterally by the appellant. Both parties had agreed for a supply of 8KVA phase. It seems that the extra overload was a stipulation of the appellant but the consideration of value paid was for an 8KVA and not the 26.6.KVA phase transformer as established by the respondent, on emergency inspection of the transformer and supply line on the title property.

According to the respondent, the nature of the breach is that in November, 2013 the appellant unlawful act of creating an overload in the premises resulted in the power outage supply to within the environs and that of the appellant. The appellant was first confronted with these allegations which he strongly vehemently denied and insisted he was operating on 8KVA phase. In my own evaluation of the evidence, it is clear that the respondent controverted the prima facie case of the appellant under section 107 (1) of the Evidence Act. When the law puts on a party the burden of proving a certain fact in issue as a condition of giving him or her judgement, the burden never shifts and must be discharged or he or she will fail to secure it.

For the sake of clarity and at the expense, perhaps of logical arrangement, I wish as far as possible to state that from the record the fact on voltage overload to the appellant's premises was directly and manifestly inferred in the circumstances of that disputed fact. As the case proceeded the evidence on this issue weighed in favor of the respondent.

Another ambiguity which continued to be displaced throughout the case for the appellant was failure to signify with minimum evidence how he came to consume electricity in excess of 18.6KVA without consent of the supplier. The true presumption then, has this effect, that the excess overload was unlawfully or illegally obtained. This means that the whole of the energy consuming, electrical fittings, apparatus, gadgets and devices so installed within the appellant's premises was associated with a corresponding 8KVA voltage. In other words, a true presumption operates to shift the evidential burden of proof to the appellant. On review of the trial court judgement, the elements to be proved dependent upon the evidence that satisfied the standard of proof imposed on the appellant on a balance of probabilities. The proximate cause limitation introspect seems to run counter to the evidence relied upon by the appellant. In submitting before the trial court there was implicit understanding of the case that the harm caused was not as direct breach of the contractual term or negligence by the respondent. The trickle of recognizable proximate cause was clearly refined by the respondent in their rejoinder in the appellant case. This evidence showed that the appellant was guilty of the misconduct that primarily involved illegal connection of a further 18.6KVA to the legal existing load of 8KVA. I acknowledge that there is an element of the respondent being vindicated on the chain of causation on the context and specific purpose the electricity supply was disconnected to the appellant's premises.

In the conclusions and findings made by the learned trial magistrate it can also be seen that in neither of the scenarios put forward by the appellant proved the electricity supply was disconnected deliberately or on grounds of non-payment of outstanding bills. Piecemeal probability trajectory by the appellant at the trial proved disadvantageous and inconsistent with the elements of standard of proof, on a balance of probabilities.

Additionally, the appellant had a duty to prove that at the time the respondent entered into this contract and during its subsistence there were elements of negligence capable of being remedied by an award of damages. In order to prove negligence and a claim for damages, the appellant had the burden to prove a number of elements to the trial court that:-

- 1. The respondent owed him a duty of care.**
- 2. The respondent breached that duty of care.**
- 3. The appellant suffered loss or damages in a direct consequences of the breach.**

For the appellant to succeed he must establish that there was proximity between the breach of care of the respondent and loss suffered. In *Anns v Merton London Borough Council [1977]* and *Caparo Industries V Dickman[1990]* simply means that the parties must be sufficiently close so that it is reasonably foreseeable that the appellant loss was a consequence in fact of the respondent's negligence. The underpinned evidence in answer to the claim is that the service line which falls within the precincts of the appellant had its transformer backfire to cause electricity outage. It's in those circumstances the respondent commenced an inspection and audit to rectify the defect in order to restore power supply. The Respondent came to the rescue of the residents along that supply line but knowingly or unknowingly, it was discovered that the appellant unarguably had been accessing power beyond the signed for 8KVA.

I accept that this was what caused the overhead on the transformer and subsequent outage. This contract is conditional that the physical connection and distribution as specified has not been interfered with by other intervening factors, which are reasonably not within the failure of the duty of care by the Respondent. Taking into account the standard of proof required and the high degree of probability, from the record the appellant failed to prove the elements on particulars of breach of contract by the respondent. I am even more stretched to find any new evidence which has a high threshold of persuasion to vary the decision by the learned trial magistrate. There must be clear evidence to support the allegations of breach of contract. In this case, not only was there no cogent or credible evidence to proof any of those elements

but equally no evidence to support the allegation that the disconnection of power was without a valid notice.

As previously cited by the respondent the whole transactions of this dispute began with power outage. An alleged failure to perform in accordance with the contractual terms had not ripened as apparently the supply line was inoperative. An attempt to assign blame under the agreement to the respondent for non-delivery of electricity to the premises is in the matter of remoteness. That such loss and damage as pleaded in the plaint of the appellant was directly and causally connected with the respondent's breach is minimally manifested in the evidence. If the appellant had managed to pass the hurdle on liability he was to be entitled to damages. In *Burnham stated in his book introduction to the law and legal system (Remedies for breach of contract)* that:-

“The most common kind of relief that is awarded in a suit for breach of contract is compensatory of damages. This type of damages is also referred to as expectation damages since such damages seek to repair the expectation of a party by awarding an amount of money that will put the aggrieved party in the same position he would have been if the contract had been breached.”

In *Muwonge V Attorney General of Uganda [1967] EA 17* the articulating reasoning of the court reckoned the following; -

“The law is that a person is responsible for the natural and probate results of his wrongful act, that is to say, those so likely to result from the act that a reasonable person in the circumstances of the wrongdoer and with his knowledge would have foreseen them.”

The measure of damages contemplated by the appellant were on account of breach of contract in regard to the fact of disconnection of electricity without a valid notice. It is important at the preliminary inquiry for the appellant to have to the root cause of disconnection of his electricity supply to his premises. As reviewed in the Court below the disconnection here was prompted by other extenuating circumstances not wholly interlinked with the breach of the contract terms between the appellant and the respondent.

The burden proof was on the appellant to discharge on the alleged accruing general and special damages. The approach on assessment of damages of the nature claimed by the appellant is explained in the case of *Livingstone V Rowyards Coal Corp [1880] 5 AC and British Transport Commission V Gortey [1956] AC 185*.

“In which the court held, in cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost or expenses which have actually been lost, or expenses which have actually been incurred up to the date of trial. The exact approximation amount can be proved and if proved will be awarded as special damages and in this category falls income or earnings lost between that time of the damage and the time of compensation. (See also *SJ V Francesco Di Nello & Another [2015] eKLR, Mumias Sugar Company Ltd V Francis Wanalo [2007] eIKLR*).

In the instant case it is appreciated that the appellant genuinely suffered loss within the spectrum owing to non operation of his posho mill, the distress, loss of enjoyment and inconvenience endured due to the effects of disconnection of electricity by the respondent. Unfortunately, the contract for the supply of electricity though operating under the principle of privity it is also made for the benefit of others within the neighborhood. I note, the claim for an award of damages is maintainable if the claimant proves a duty of care owed by the provider of electricity and the resultant breach of the disconnection without notice or negligence. This point was however not fully argued and need not be pursued on appeal given the adequate reasoning by the learned trial magistrate in her judgement dated 19th November, 2019. The respondent denied executing a contract for electricity supply comprising voltage phase exceeding 8KVA. An allegation of altering a contract term unilaterally is quite serious and, in that respect the other party may reasonably rescind his obligations for the new obligation was not in contemplation of both parties in the making of the contract. If there was a breach of contract the wrongful act by the Appellant substantially contributed to the injury suffered during the disconnection of electricity.

For the above reasons in the instant appeal the appellant being the unsuccessful party at the Court below has also failed to demonstrate that his appeal falls within the principles in *Mbogo V Shah(supra)* to set aside the judgement. That being the case the appeal is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 6TH DAY OF JULY, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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