REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 17 OF 2019

KENYA POWER & LIGHTING CO. LTD....APPELLANT

VERSUS

NELSON OSIEBE.....RESPONDENT

(Being an appeal from judgment and decree of the Chief Magistrate court at Kisii in Kisii CMCC NO. 77of 2003 on the 23rd January 2019 by Honourable N.S. Lutta)

JUDGMENT

1. In this appeal, the appellant has challenged the trial court's judgment entered against it. The appellant was the defendant before the subordinate court while the respondent was the plaintiff. The respondent filed a cross appeal on the 11th May 2020.

RESPONDENT'S CASE

2. The respondent before the subordinate court, through a plaint which was subsequently amended instituted a suit against the appellant herein claiming that the appellant had breached its contractual obligations for the supply of electricity. According to the respondent he entered into various agreements with the appellant between 1984 and 1986 and the appellant agreed to supply electricity to his business premises at Itibo and Nyambunwa. The appellant opened accounts No. 435078050, 548000-01 and 05611172-01.

3. The respondent claimed that it was an implied term of the contract that upon installation of electricity the appellant was to further install a meter that was in good working condition. The appellant installed meter number 295333 but in 1987 the respondent realized that the meter was faulty and he made a formal complaint to the appellant. The appellant demanded the payment of Kshs 20 for installment of a check meter and the respondent paid the sum on 4th June 1987. Despite making the payment in 1987, the check meter was installed in March 1996 with the reading of 000000. He contends that at the time the check meter was installed, the faulty meter was reading 247912.

4. According to the respondent, on 10thApril 2002 the appellant through its agents secretly and dishonestly removed both the check meter and faulty meter each reading 139278 and 432250 respectively upon discovery of the discrepancy in the faulty meter. The respondent claims that it suffered loss due to the appellant's failure to carry out a proper test on the meter and failing to speedily rectify the defective meter.

5. The respondent contends that on 20th January, 2003 the appellant without justifiable cause disconnected the power supply causing the respondent's businesses to suffer loss at an average of Kshs 2,000/- per day. The appellant contends that although the electricity was reconnected in February 2003 it was once again wrongfully disconnected on the 10th October 2006, however the appellant continued to issue electricity bills for the months of October 2006 to April 2007 totaling to Kshs 64,602.10 for consumption of 1,482 units notwithstanding the disconnection

6. The respondent also claimed that prior to the disconnection; the appellant issued him with bills for various strange accounts (account Nos. 4059368, 435075080, 756838, 9561172-01, 0561171-01 and 0561171-02) and demanded payment.

7. The respondent further contends that he paid electricity bills for his account no. 548000-01 situated in Itibo however the appellant placed his payment amounting to Kshs 184,000/- into a suspense account. The respondent thus sought for the following orders;

a. The defendants do render to the plaintiff a true and full account of the consumption of electricity supplied to the plaintiff

b. A declaration that the defendant's disconnection of electricity energy supply to the plaintiff's premises situated on parcel Nos. 1754 and 1515 at Itibo and Nyambunwa areas respectively is unlawful and in breach of contract

c. Order that the defendant do comply with the law and contract by facilitating reference of the dispute to the breach

d. Mandatory injunction to restore the supply of electricity energy to the said premises situated on parcel No. 1754 and 1515 at ITIBO and NYAMBUNWA areas respectively and otherwise to restrain the defendant from interfering with the supply of the said electrical energy unto the plaintiff's premises unless otherwise lawfully and rightly disconnected.

e. Overpayment of 625 units per month at current between March 1986 and March 2002

f. Damages for breach of contract, loss of business and profit

g. Special damages

8. At the hearing before the subordinate court Nelson Omwenga Oisebe (Pw1) adopted his witness statement and testified that he did not owe the appellant any money.

APPELLANT'S CASE

9. The appellant filed its defence and amended defence denying the respondent's allegations. The appellant admitted to have lawfully disconnected power supply to the respondent's premises and that in doing so it did not require the respondent's consent to disconnect the power supply after he failed to pay his bills and other outstanding charges that were due. The appellant alleged that as at 5th January the respondent owed the appellant unpaid bills in the amount of Kshs 172,162.37 which sums it claimed in its counter-claim filed against the respondent.

10. The respondent in its reply to the amended defence and defence to counterclaim denied owing the appellant Kshs 172,162.37.

11. On 23rd January 2019 **Hon. N.S. Lutta** having heard the evidence by the respondent against the appellant arrived at his a decision and made the following orders;

a. That the defendants do render to the plaintiff a true, correct and full account of the consumption of the electricity supplied to the plaintiff

b. A declaration that the defendant's disconnection of the electricity energy supply to the plaintiff's premises situated on parcel Nos. 1754 and 1515 at Itibo and Nyambunwa areas respectively is unlawful and in breach of contract

c. That the defendant do comply with the law and contract by facilitating reference of the dispute to the breach

d. That a mandatory injunction is issued to restore the supply of electricity energy to the said premises situated on parcel Nos. 1754 and 1515 at ITIBO and NYAMBUNWA areas respectively

e. That the defendant is restrained from interfering with the supply of the said electrical energy unto the plaintiff's premises, unless otherwise lawfully and rightly disconnected

f. That overpayment of 625 units per month of current rate between March 1986 and March 2002 be reimbursed

g. Damages for breach of contract, for loss of business and profit in the sum of Kshs 4,000,000/-

h. Costs of the suit

i. That the counter-claim by the defendants is hereby dismissed

12. Dissatisfied with the subordinate court's decision, the appellants were necessitated to file an appeal challenging the Judgment of the trial court on the following grounds;

1. The learned trial magistrate erred by arriving at finding on general damages against the appellant based on breach of contract which is not awardable in law nor was it supported by evidence at the hearing

2. The learned Magistrate erred in law and in fact in basing findings on the irrelevant matters.

3. The learned magistrate erred in law and in fact in failing to appreciate or take into account the Appellant's defence, counterclaim and submissions

4. The Respondent's case was not proved on a balance of probability as required by law

5. The learned trial Magistrate failed to abide by the applicable principles/authorities in arriving at the decision

6. The learned trial magistrate failed to attribute full liability against the respondent despite fats of the case and existence of a

counter-claim by the appellant

7. The learned trial Magistrate erred on all points of facts and law in so far as the whole judgment and the decision is concerned

8. That the learned trial magistrate erred on law by failing to give basis/reasoning for the findings and only gave a blanket award of general damages against the appellant

9. The award on general damages against the appellant though not awardable is inordinately high excessive and unfounded.

13. The respondent on 11th May 2020 filed a cross appeal on the following grounds;

1. The Order that the Appellant do comply with the law and contract by facilitating reference of the dispute to the board was spent.

2. Damages for breach of contract, loss of business and profits awarded in the sum of Kshs 4,000,000/- were inordinately low in the circumstance of the case.

3. The final judgment and decree of the court is incomplete

14. This court directed that the parties to file their respective written submissions and both parties complied.

15. The appellant submitted that the respondent did not produce any evidence to prove that the appellant had illegally terminating his power supply. They contend that the respondent did not also produce any receipts to show that his bills had been paid and that the disconnection was unlawful. It was argued that the respondent could not claim to have suffered loss as he breached the terms of the contract by failing to pay electricity bills that he had been using illegally. They relied on the Court of Appeal's decision in **Kirungi & Another v Kabiya and 3 Others [1987] eKLR 347** where it was held that *the burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard on formal proof.*

16. On whether the appellant was entitled to the sums claimed in the counterclaim, it was argued that Dw1 gave clear testimony that the respondent owed the appellant Kshs 206,962.80 being unpaid charges on account Nos. 05488000-02 and 056117101-01.

17. It was also submitted that the respondent was not entitled to the award of 625 units per month between March 1986 and March 2002 as the respondent did not avail any receipt to indicate that he made the said payments. It was submitted that the trial court erred in awarding Kshs 4,000,000/- as general damages for breach of contract as the same was not awardable. It relied on the case of **Kenya Power &Lighting Company v Fridah Kangeni** that cited the decision of **Joseph Ungadi Kedewa v Ebby Kanisha Kavai (personal Representatives) of Ephraim Kavai (Deceased) CA No. (KSM) 239/1997** where it was held that;

"There can be no general damages for breach of contract, damages arising from breach of contract are usually quantifiable and are not at large where general damages can be quantifiable they cease to be general damages."

18. It was also advanced that the respondent did not tender evidence to prove that his business suffered loss. In any event the loss was a special damage claim and the same ought to have been specifically pleaded in the plaint and proved by genuine receipts. It was submitted that there was no proof of loss and that the respondent's claim was for general damages for breach of contract.

19. The respondent in his submissions argued that the general legal principle is that courts do not normally award damages for breach of contract, but pointed out to the exceptions, such as, when the conduct of the appellant is shown to be oppressive, high handed, outrageous, insolent or vindictive. It relied on the case of **Felix Mathenge V. KPLC (2008) eKLR where the Court held as follows;**

"It is true that the appellant suffered loss of income because of the unreasonable and capricious behaviour of the respondent…

As the appellant was not at all a man of straw, it was, unreasonable for him to wait for four (4) years before re-connecting the power supply to the suit premises. We think that he could have done so within a period of twelve (12) months of which period the appellant should be entitled to damages. These work out to:-

Kshs.17,000/-x6x12 months = Kshs.1,224,000/=.

We award the appellant the sum of ***Kshs.1,224,000/-*** as general damages for loss of rental income together with interest at court rates from the date of filing suit until payment in full."

The appellant also cited the cases of **Gedion Mutiso Mutua v Mega Weath International Limited (2012) eKLR;** and **Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016) eKLR** to buttress its argument.

20. It argued that from the amended plaint at paragraph 12, electricity was disconnected on 10th October 2006. It explained that it was difficult to quantify the number of days the respondent was without power supply because as at the time of filing the amended plaint electricity had not been restored since its disconnection on 10th October 2006. He contends that since he made a profit of Kshs 741,776 in the year ending 2000, then Kshs 2,000/- per day was fair compensation.

ANALYSIS AND DETERMINATION

21. This being the first appellate court I am required to reconsider the evidence, evaluate it and draw my own conclusions making an allowance for the fact that I neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd*** **[1968] E.A. 123, 126**).

22. I now turn to consider the respondents were entitled to an award of general damages. In **Gedion Mutiso Mutua v Mega Wealth International Limited (2012) eKLR** cited by the respondent, Odunga J made an award for aggravated damages of Kshs. 250,000.00 based on the inconvenience the defendant caused to the plaintiff. In the **Felix Mathenge v Kenya Power & Lighting Company Ltd [2008] eKLR** also cited by the respondent the plaintiff therein had sought judgment against the respondent for loss of rental income; a declaration that the appellant was not liable to pay the outstanding electricity bills; an order for immediate restoration of power supply to the suit premises and punitive and exemplary damages for negligent conduct. The Court of appeal awarded the appellant the sum of *Kshs.1,224,000/-* as general damages.

23. The Court of Appeal in **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR, CIVIL APPEAL NO. 189 OF 2014,** held as follows;

> "On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the Nigerian case of Marine Management Association & Another vs National Maritime Authority (2012) 18 NWLR 504.

The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa (supra), and Joseph Ungadi Kodera vs Ebby Kangisha Kavai, KSM C. A. No. 239 of 1997 (ur).

The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above. In this case the mere fact that the appellant wrote several letters to the respondent without remedial measure being undertaken immediately cannot amount to oppressiveness, insolent or vindictive behaviour."

24. In this case the respondent did not adduce any evidence to show that the appellant's actions/behavior were oppressive, insolent or vindictive behavior nor was there a claim for exemplary or aggravated damages. On the contrary it was proved that the respondent had not been paying his electric bills and had not been forthright. There was no evidence of receipt tendered by the respondent as proof of payment. Dw1 in gave evidence in his witness statement as follows;

> "Account 548000-01 was opened after the customer filled the forms and paid a deposit of Kshs 2,500/- for domestic. He operated a Posho Mill which later KPLC discovered the mischief and requested him to reapply by paying the requisite deposit. He had defaulted payment of 181271.60. As a policy of KPLC had to put this amount under write off status…"

25. The respondent having failed to prove the exceptions listed in the **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited case (*supra*)** his claim was in the nature of special damages.

26. Secondly, I will consider the issue of special damages. The principles that guide courts on the award of special damages have been crystallized over a period of time that it is trite law that special damages must be specifically pleaded and proved. The Court of Appeal in ***Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716***, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved….for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

27. In Ouma v Nairobi City Council (1976) KLR 304 Chesoni, J (as he then was) observed as follows:

> "Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

28. In regard to loss of business the court in Peter Njuguna Joseph and EARS vs. Anna Moraa Civil Appeal Number 23 of 1991(UR), where it was held that:

"Special damages must be pleaded with particularity and must be strictly proved. Loss of income is special damages, which must be pleaded and proved."

29. Where damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages (see **Siree –v- Lake Turkana El Molo Lodges (2002) 2EA 521**).

30. Guided by the principles pronounced from the above cases, I find that the respondent pleaded special damages with particularity and he was therefore required to prove his claim for special damages *by evidence.*

31. The respondent alleged that meter number 295333 relating to account number 548000-01 was faulty and he therefore claimed for compensation of 625 units per month at the rate of Kshs. 10/- each between March 1986 and March 2002.The correspondence between the parties reveal that on 25th May 1987 the appellant advised that they will investigate the respondent's complaint and further directed that he deposits Kshs 20/- for installation of a check meter. The appellant vide its letter dated 6th October 1987 confirmed that the voltage fluctuations complained of had been contained and eliminated.

32. He explained that on March 1996 the check meter No 8936750 was installed with a meter reading of 000000 while the meter read 247912. In 10th April 2002 the appellant discovered that the meter was defective and removed both the check meter and meter. At the time the check meter had consumed 139,278 units compared to 184,338 units consumed by the faulty meter.

33. On 8th January of 2003 the appellant wrote to the respondent as follows acknowledging that meter 295333 was defective:

> "We refer to the metering verification carried out at your premises in March 2002 during which our meter (Meter No. 295333) was found faulty thereby not accurately measuring your consumption. The meter was thus replaced with a new meter No 20160265 which has provided the basis for determining your normal average monthly consumption.
>
> An analysis of your account's consumption has revealed that the meter became faulty/stopped in June 2001.
>
> Arrangements are underway to debit your account with the cost of 13674 units lost from this time onwards as a result of the meter fault/stoppage. A computation schedule is hereby enclosed for your reference. The charge will appear in one of your future bills for settlement."

34. Although the appellant admitted that the meter had been faulty as from June of 2001, the appellant in its letter dated 28th January 2003 informed the respondent that he should pay **Kshs 134,471.94** for the cost of **13674 units** that un-charged from June 2001 to April 2002.

35. The respondent claims for payment 625 units per month from March 1986 to March 2002.

36. The evidence led by the appellant and respondent shows that meter no 295333 was faulty. The respondent alleges that the meter was faulty as from 1987 and paid for a check meter on 4th June 1987. However, the installation of a check meter or payment for installation of a check meter does mean that the meter was faulty. The letter by the appellant dated 6th October 1987 confirmed that the voltage fluctuations complained of had been contained and eliminated. Therefore, the meter was not defective from 1987 as alleged by the respondent.

37. The meter became faulty in June of 2001 as per the appellant's letter. The issue for consideration is who is to cover the 13,674 units lost between June 2001 and April 2002.The Court in **Diniz Holdings Limited v Kenya Power & Lighting Co. Ltd [2019] eKLR** held as follows;

> "30. In my considered opinion, the Defendants were under a contractual duty to supply and install the property instruments for power reading and send the Plaintiff correct bills as and when they fell due. That was not done. The Defendants have admitted that there was a problem in the meter and transformer installed. That mistake attributed purely to the Defendant and not the Plaintiff. For it to have taken the Defendant six (6) years to discover the mistake and even after discovering the mistake, it took them another three (3) years to notify the Plaintiff, is a clear indication that the Defendants were negligent. I note from the ruling delivered herein on 19th June 2007, that the Court found the Defendants in disconnecting the electricity supply to the Plaintiff's premises on 17th May 2007, did so contrary to the provisions of Section 66(1) and (2) of the Electric Power Act.
>
> 31. However, the Plaintiffs were also under a contractual duty to pay for the power supplied and consumed. The fact that the Defendants may have been negligent, does not absolve them. In this regard I find that, two principles of Equity apply herein. That "he who comes to equity must go with clean hands "and "equity looks at that done which ought to have been done". Therefore the Defendant cannot lay blame on the Plaintiff when their hands are not clean and the Plaintiff cannot escape liability for power consumed and not paid for."

38. In this instant case it took the appellant around 9 months to discover that the meter 295333 was defective and 10 months to communicate to the respondent the defect found. Dw1 during cross examination testified that a check meter should be removed after 7 days; in this case, it was removed after 6 years after installation on realization that the meter was faulty. The appellant had a duty to inform the respondent of his electricity bills free of any errors or mistake. On the other hand, the respondent must pay for the consumed power.

39. In light of the appellant's obligation to provide the respondent with the correct bill, the amount **of Kshs 134,741**charged as a result of the defective meter shall be covered by both the appellant and respondent at the ratio of **50:50.**

40. Although the respondent claimed that he is entitled to 625 units per month at the rate of Kshs 10 each between March 1986 and March 2002, he did not provide any proof that the discrepancy between the check meter and meter 295333 was 45,060 units. He also failed to prove that the meter was faulty from 1987 having found that installation of a check meter does not necessarily mean that a meter is defective. In any case the respondent was not an expert to determine that the meter was faulty.

41. The respondent also claimed that he had been billed Kshs 64,602.10/- between 10th October 2006 and April 2007 despite the fact that the appellant had disconnected the power supply. I find that the appellant should not have billed the respondent with consumption of power for the months that his power supply had been disconnected. Having looked at the respondent's documents, no evidence was led to show that the respondent paid the amount of Kshs 64,602.10/- and the claim for Kshs 64,602.10/- as an award for special damages is hereby dismissed.

43. I now turn to whether the appellant was justified in disconnecting power from the respondent's premises. The respondent having failed to tender evidence of payment of the bills by the appellant, I find that the appellant acted in its mandate to disconnect the power supply. In **Kenya Power & Lighting Co. Ltd v Muhia Mutega [2015] eKLR** the court held that;

> "40. On the lawfulness of the disconnection of the electricity supply to premises where there are outstanding bills/arrears, I find that Section 64 of the former Electrical Power Act, 1997 (repealed) useful. The Section provides:
>
> **"The Licencee may refuse to supply electrical Energy to any local authority, company, person or body to persons whose payments for the supply of electrical energy are for the time being in arrears (not reasonably being the subject of dispute)""**

43. Having found that the disconnection of power supply to the respondent's premises was lawful he is thus not entitled to the award of loss of business. I also find that the respondent failed to tender evidence of sums paid to the 'suspense account', his claim for compensation of the amounts paid there under is dismissed.

44. I shall now consider the appellant's counter claim before the subordinate court. The appellant contends that the respondent was in arrears of Kshs 159,456.56/- as at 5th January 2005 in respect of account no. 0548000-01. However Dw1 gave evidence in his written statement that the respondent had defaulted in paying 181,271.60 and the appellant had written off the amount in line with the appellant's policy. The appellant also claimed that the respondent was in arrears of Kshs 12,705.81 as at December 2002 in respect to account number 561171-01. However Dw1 in his examination in chief did not testify that the respondent owed the appellant Kshs 12,705.81 nor did his statement indicate that the respondent was in arrears of Kshs 12,705.81 in respect to account number 561171-01. The claim for Kshs 12,705.81 is also dismissed.

45. The respondent filed a cross appeal dated 8th April 2020 on 11th May 2020. Despite the appeal having been filed on 12th February 2018 the cross appeal was filed more than a year later, that is, on 11th May 2020. At the time the cross-appeal was filed, the parties had already been directed the appeal to be canvassed by way of written submissions. In **Kenya Bus-Rapid t/a Kenya Bus Services Management Co Limited v Patrick Irungu Gichure [2018] eKLR** the court observed as follows;

> "The Civil Procedure Act and the Civil Procedure Rules do not expressly provide for the filing of a cross-appeal before this court unlike the Court of Appeal where the Court of Appeal rules provides. Under Section 79G of the Civil Procedure Act, a party who wishes to file an appeal may do so within 30 days. The court may extend time for filing of an appeal upon sufficient reason(s) being given. The appellant filed this appeal on 5th September 2014 and had the same served together with an application dated 12th September 2014 upon the respondent. The respondent waited until 28.10.2016 when he filed the cross-appeal. I hold the view that Section 79G Civil Procedure Act provides any party who is aggrieved by the decision of the subordinate to file an appeal within 30 days from the date of delivery of the decision. However, I am of the view that as regards cross-appeals, time i.e 30 days being to run from the date of service of the memorandum of appeal. In this appeal the respondent filed the cross-appeal way after the lapse of 30 days from the date of judgment. Time begun to run as from the date of service of the memorandum of appeal i.e. from 12th September 2014. By the time of filing the cross-appeal more than two years had lapsed from the date of service. The respondent did not seek for leave to file a cross appeal out of time. With respect, I agree with the submissions of the appellant that the cross-appeal is incompetent for want of leave. In my humble view, it was filed as an afterthought. Consequently the cross-appeal is hereby ordered struck out with costs for being incompetent."

46. I find therefore that the cross appeal filed by the respondent was an afterthought and is hereby struck out.

47. In conclusion, the position of the matter the subject of this judgment as I have found it is as follows:

1. I hereby set aside the subordinate court's judgment dated 23rd January 2019 in terms of orders (b), (c), (d), (e), (f) and (g).

2. The bill amounting to Kshs. 134,741 shall be covered by both the appellant and respondent in the ratio of 50:50.

3. The cross appeal is hereby struck out.

4. Each party to bear its own costs. It is so ordered.

Dated, signed and delivered at Kisii this 6th day of October 2020.

R.E. OUGO

JUDGE

In the presence of:

Miss Sitienyi h/b for Mr. Kibichiy For the Appellant

Respondent Absent

Mr. Chomba Court Assistant