



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.34 OF 2018

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

VERSUS

PETER GEDA AKELORESPONDENT

(Being an appeal from the Judgment of Hon. T. Obutu, SRM delivered on 15th November, 2018 in CMCC No.69 of 2017)

JUDGMENT

[1] **KENYA POWER & LIGHTING CO. LTD.** (Appellant) was aggrieved by the judgment and decision of the Senior Principal Magistrate's Court at Homa Bay made on 15th November 2018, in favour of **PETER GEDA AKELO** (Respondent) on the basis of his claim against the company vide a plaint dated 22nd September 2017 and filed in court on the 10th October 2017.

[2] It was pleaded in the plaint that on or about the 23rd May 2015 the respondent (plaintiff) applied for supply of electricity for a plot of land situated at an area known as Kawadhgone and was advised by the appellant that a single/three phase 3KVA service line would be installed as required. The connection costs as assessed by the appellant amounted to a sum of Kshs.19, 676/= which was duly paid on 3rd April 2016.

[3] It was on the same date that the appellant surveyed and made attempts to connect electricity supply but due to sub-standard workmanship and/or materials two of the electrical poles fell down and blocked the access road leading to the respondent's home. Several requests to remove the fallen poles were ignored by the appellant thereby exposing the respondent to danger, damages and costs.

[4] The respondent therefore prayed for judgment against the appellant for removal of the fallen electric poles and connection of electricity supply to the respondent's property and for general damages together with cost of the suit and interest.

The entire claim was however denied by the appellant in its statement of defence filed herein on 28th February 2018 but dated 27th February 2018 and which called for the dismissal of the claim with costs.

[5] At the trial, the only testimony was that of the respondent (**PW1**). He produced a letter from the appellant company (i.e. **P. Exhibit 1**) acknowledging his request for the supply of electricity on the material plot at Kawadhgone and the applicable conditions in facilitating the supply. He also produced a payment receipt for the sum of Kshs.19, 676/= issued on 3rd April 2016 (**P. Exhibit 2**) by the appellant company and photographs of the fallen poles blocking a road (**P. Exhibit 3**). He further produced a demand letter dated 26th July 2017, addressed to the appellant by his advocates (**P. Exhibit 4**).

[6] It was contended by the respondent that the poles fell down and blocked the road leading to his home due to the rains in the months of March/April 2016.

That, six poles had been erected with the last pole being thirty (30) metres away from his home. That, he reported the matter to the appellant through its office at Kisii. A team from the appellant company was sent to the scene on two occasions or so but failed to remove the poles and wires which continued to block the road to his house.

[7] The respondent also contended that he experienced problems accessing his house and was disturbed by his building materials being kept far away from the house such that he had to pay extra labour costs. He also had to hire people to carry his sickly father to where he could be picked by a Taxi Car, three hundred metres away from his home.

[8] The appellant did not lead any evidence in support of his defence against the claim.

The trial court therefore considered the respondent's evidence on its own and arrived at the conclusion that the respondent had succeeded in

establishing his case against the appellant.

Accordingly, judgment was entered against the appellant to remove the fallen electricity poles and/or wires and connect the electricity supply in favour of the plaintiff. In addition, a sum of Kshs.100,000/= was awarded to the respondent/plaintiff as general damages for suffering underwent by him in using alternative means of transport for the duration the road remained blocked. Costs of the suit and interest were also awarded to the respondent against the appellant.

[9] The judgment aggrieved the appellant and prompted this appeal which is based on the grounds contained in the memorandum of appeal dated 26th November 2018.

At the hearing of the appeal, learned counsel, **MR. ANDIWO**, appeared for the appellant while learned counsel, **MR. AYAYO**, appeared for the respondent.

[10] In his oral submissions, the appellant's counsel concentrated on grounds one, two and three of the appeal without necessarily abandoning grounds four and five. In that regard, he argued that the case was not rife for trial as the provisions of **Order 11** of the **Civil Procedure Rules** had not been complied with and the purported invitation to them to fix a hearing date was never served upon them. That, they were served with a hearing notice on 12th October 2018, three days prior to the date of hearing i.e.. 18th October 2018, such that they did not have enough time to prepare for hearing of the suit.

[11] Learned counsel for the appellant also argued that the trial court erred in failing to consider that the appellant had filed a notice of preliminary objection which was so crucial as it touched on the jurisdiction of the trial court to hear and determine the dispute. That, the judgment was delivered in the absence of the appellant on 15th November 2018, and although it was within the mandate of the trial court to deliver the judgment, the appellant was notified of a judgment date stated for 22nd November 2018 and was informed that the court was not sitting on 15th November 2018.

[12] For all the foregoing reasons, the appellant urged this court to allow the appeal with costs incurred at this stage and in the lower court. The respondent opposed the appeal and argued through his counsel that the record of appeal does not contain the impugned order and decree. That, the record shows that the appellant walked out of the court after the commencement of the trial but now comes back to the court via this appeal.

[13] Learned counsel for the respondent argued further and implied that the appellant did not come to this court with clean hands. That, the alleged preliminary objection was never served upon the respondent and it is doubtful as to whether it was indeed filed in court. That, there was no opportunity for the trial court to adjudicate on a non-existent preliminary objection or one which was deemed as having been abandoned.

[14] The respondent contended that the appellant was properly served with a hearing notice and indeed appeared for the hearing on the scheduled date but walked away without asking for extension of time for the hearing of the case. That, the appellant decided to be unco-operative on realizing that the respondent had a good case against it.

That, the award of damages made by the court was not high. Therefore, this appeal lacks merit and is an abuse of the court process only fit for dismissal.

[15] Having carefully considered the appeal and the rival submissions by the parties, the duty of this court was to re-consider the evidence and arrive at its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (see, **SELLE –VS- ASSOCIATED MOTOR BOAT COMPANY [1968] E.A 123**).

[16] In that regard, the evidence by the respondent was re-visited by this court hereinabove and found wanting in terms of establishing the claim on a balance of probabilities and in terms of the prayers sought against the appellant.

As to the claim, there was no proof that the falling down of the electric poles was as a result of the appellant's negligence in carrying out a shoddy job or in providing sub-standard material. If anything, there was clear and strong suggestion from the respondent that what actually caused the poles to fall down was heavy rain. This was a natural occurrence, an act of God, for which the appellant could not be held responsible.

[17] Further, a look at the appellant's letter of acceptance (**P. Exhibit 2**) shows that some of the works were to be undertaken by contractors independent of the appellant. It was therefore not satisfactorily established that the electric poles erected towards the respondent's premises were indeed erected by the appellant and not an independent contractor.

Although the appellant did not lead any evidence at the trial, its defence was a denial and the duty to prove the case against itself lay with the respondent on a balance of probabilities.

[18] This court is not satisfied that the respondent succeeded in his obligation with or without any evidence in rebuttal from the appellant. He was therefore not entitled to judgment against the appellant as prayed in the plaint.

[19] With regard to the prayers sought by the respondent in the plaint, the first prayer for removal of the electric poles and connection of electricity supply to the respondent's premises was clearly a misconception as this was not a claim for a mandatory injunction. In any event, the appellant could not be held responsible for the fallen poles nor could it be compelled to connect electricity supply to the respondent's premises if the respondent had not discharged his part of the bargain as indicated in the acceptance letter issued by the appellant (**P. Exhibit**

2).

[20] As to the prayer for general damages, there was no basis for that as no breach of contract was demonstrated against the appellant. Besides, such damages would not issue due to use of alternative transport. If anything, the damages sought by the respondent on account of alternative means of transport or extra labour costs would fall under the head of special damages which must not only be specifically pleaded but also specifically established.

[21] For all the foregoing reasons, this appeal is allowed although none of the grounds of appeal preferred by the appellant save ground Five (5) tallies with the said reasons. The majority of the appellant's grounds (i.e. grounds one, two, three and four) are on issues which should have been raised in the trial court as they involved matters of procedure and conduct of the trial.

[22] It was unfortunate that rather than deal with issues of substance, the appellant through its learned counsel made an attempt to convert the hearing of this appeal to a forum for personally attacking the trial court in the manner it conducted the trial while ignoring the fact that if (appellant) was deliberately delaying the trial by its procrastination and don't care attitude towards the case. The less we say about this, the better.

[23] Otherwise, the appeal is allowed to the extent that the judgment of the trial court is hereby set aside and substituted with a judgment dismissing the respondent's case against the appellant.

Each party shall bear their own costs of the appeal and costs of the trial.

Ordered accordingly.

J.R. KARANJAH

JUDGE

09.04.2019

[Delivered and signed this **9th** day of **April, 2019**]