REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 62 OF 2014

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

VERSUS

1. FRANCIS KIARE KINYANJUI t/a

KENOL CHANGAMWE SERVICE STATION.....RESPONDENTS

J U D G M E N T

1. In this appeal the appellant challenges the decision and judgment of the trial court by which it entered a declaratory judgment for the Respondent, as plaintiff at trial, and dismissed the counter-claim by the Appellant in the sum of Kshs.406,722.00

2. The grounds of the Memorandum of Appeal are four (4) but in essence raise only two issues; That there was misapprehension of the evidence led on both sides regarding proof of meter tempering and the stand of proof expected on the suit and counter-claim.

3. In coming to the decision it arrived at, the trial court made the following observations and findings:-

> **"From the inspection report and from the defence evidence it is very clear that no Notice was issued instead the defendant hurriedly disconnected the electricity. The defendants agents failed to adhere to the law as stipulated in the Energy Act. If the plaintiff had in the opinion of the defendant agents tampered with the meter as it is alleged, the Energy Act has explicit provisions on how the defendant's agents ought to have resolved the issued, instead they chose to operate outside the provisions of the law. Meter tampering was alleged, it is a criminal offence and no charges were filed against the plaintiff. DW 1 told this court no further investigations were carried out. The check meter was to be removed six months after the installation, at the time of hearing this suit which is almost over 2 years, the check meter was at the suit premises. It is my finding therefore that the plaintiff has proved his case on a balance of probability. I therefore find that there was no tampering of the meter box by the plaintiff".**

4. This being a first Appeal the court is mandated and obligated to re-evaluate and re-assess the entire record of proceedings at trial and to come with own finding without the feeling of being bound to agree with the trial court of course with the cautions that in its evaluation it should be cautious and hesitant to freely and readily interfere with decisions reached on exercise of judicial discretion and those factual finding grounded on the evaluation of evidence. The evaluation and decision should equally be confined to the evidence on record without invitation of new and extraneous matter.[1]

5. In the written submissions filed and orally highlighted in court, the Appellant did not say much to challenge the judgment on the suit by which the plaintiff was granted a declaration as to the propriety of the disconnections of the electric power supply only opting to dwell on the order dismissing the counter claim.

6. The submissions on the dismissed counter-claim was largely based on the provisions of Section 59(2) of the Energy Act to the effect that a license is entitled to rebill and demand payment from the customer from the date of the licensee determines that the meter became defective by way of interference by the customer. That provision was then reproduced for the court's interpretation that the liberty was wholly upon the licensee.

7. For the respondent submissions were offered to the effect that at trial no iota of evidence was led to prove meter tempering and that disconnection was done without notice as the law dictates under Section 58(8) and that even after disconnection and check meter installation there was no evidence of any variance between the recording of consumption between the consumer meter and the check meter and that there was no evidence on how rebilled figure was reached at.

8. It was then pointed out that the inspection report did not identify any defeat in the matter as the check box was never ticked to confirm tempering and that even the photographs produced did not evidence meter tempering as they did not have any association with the subject meter. It was then conceded that meter tempering is a grave criminal offence under Section 58 (13) of the Act and that if there was indeed

evidence of tempering the same should have invited a report to the police and possible prosecution. That submission was made as an invitation to court to find that there was no proof of tempering hence no probable cause to pursue prosecution.

9. I have had the benefit of reading the pleadings and proceedings taken at trial as well as the submissions offered to court in this appeal and I consider that four issues arise for determination by the court. The issues are:-

a) Did the appellant act within the law in disconnecting the Respondents power as it did on the 21/9/2010?

b) Did the Appellant avail evidence of meter tempering.

c) Did the Appellant avail evidence of rebilling to prove the counter-claim within the balance of probabilities?

d) What orders should be made as to costs?

Analysis and determination

10. The three substantive issues being intertwined, I propose to deal with all together. The Energy Act under which the Appellant in licensed to supply electric power with the license from to Energy Regulation Authority has an elaborate regulatory and control regime to protect both the consumer and the supplier of the energy. The elaborate procedure is that the instrument for measure of the power supplied must be approved by the Kenya Bureau of Standards, the licensee has the right to provide the meter on hire but with the option that if the consumer so desires, he can avail his own meter but in all events, whether the meter belongs to the licensee of the consumer, the license has the right and duty to secure the same with seals bearing the licensee's brand or mark impressed thereon. Those provisions serve to protect the integrity of measure of the electric power consumed. The need for the licensee's seal is to ensure that the functionality of the meter is not interfered with by a consumer who may wish to pay less than his consumption.

11. There is then the criminal sanction under section 58(13) which by virtue of the penalty prescribed underscore the gravity the legislature though should be imposed against transgression by meter tempering. As explained by DW 1, a professional in the area, tempering portends grave danger and damage to the premises supplied including the neighbourhood owing to the intrinsic danger mishandling of electric power. By clear and elaborate provisions of Section 58 the transgression by meter tempering must be seen and treated for what is -A grave matter not to be taken lightly but very seriously. And since it has a criminal face, the proof thereof, like the proof of fraud in civil proceedings must take and invite higher threshold beyond the ordinary balance on a balance of probabilities even though it need not be beyond reasonable doubt[2]. Accordingly when the Appellant sought to assert meter tempering and pointed a finger at the Respondent as burden was higher than proof on a balance of probabilities. It was not sufficient for DW1 to merely produce photographs which had no correlation with the meter subject of the dispute and leave it to the court.

12. That standard and proof would affect the finding on whether the Appellant was entitled to disconnect on account of meter tempering and therefore be entitled to recalculate the value of the consumed and not billed power.

13. I have re-evaluated the evidence of the Appellant as regards meter tempering and I entertain no doubt that the burden to prove tempering, which rested with the appellant, was never discharge. The evidence of DW 1 was that they, him and team, detected meter tempering and took photographs before disconnecting power and leaving an inspection report. That report in the words of the witness did not indicate the meter to have been faulty. In his own words as recorded at trial, the witness said:-

"…..we have not ticked that the equipment was faulty, we tick what we find…in the document there is no evidence of meter tempering … he did not say the customer.

….the photos do not indicate time.. the fuse of meter was intact. Fuse is placed to avoid tempering … the customer did not accept liability".

14. The whole corpus of evidence in my view established that there was no evidence of meter tempering. If indeed there was no meter tempering then there was no basis to disconnect without notice just as much there would be no justification or reason to

conduct a re-billing. To that extent the Appellant was clearly in error when it disconnected the respondents power and purported to demand the rebilled sum.

15. But then there was more evidence that pointed to the unlawful acts by the Appellant than any wrongdoing by the Respondent. In further cross-examination the witness **(DW 1)** added the following:-

"The power is disconnected, he did not give notice… we disconnected the same day and issued a report. We did not disconnect because of bills. He had no bill. The customer was disconnected on 21/9/2010. Prior to 29/9/2010 the customer was getting usual bills".

16. Having regard to this evidence and the documents produced to support the defendant case on the justification for disconnection and rebilling. I cannot fault the trial court on its finding that tempering was not proved and further that there was no evidence on how the rebilling was done.

17. As said before, tempering is a polite word for saying that one has sought to fraudulently and unlawfully obtain and consume electric power without paying for the due value. It is to this court a fraud and dishonest conduct that attract criminal sanctions. It was not enough for

the Appellant to merely present a bill and scribbled notes at page 216 of the Record of Appeal to prove that there had been loss of power. He needed to do much more

18. Having installed a check-meter, which the witness said was installed without knowledge of the Respondent, the easiest thing for the Appellant would have done would have been to avail to the court the recording by such check-meter with an explanation that the check-meter readings were higher than the meter used to record consumption. That was not done. That failure can only heard this court to draw an inference that had the readings been availed the same would have proved adverse to the Appellant's case.

19. In short, I do find that the entire evidence produced at trial showed that the Appellant was rush and acted in haste and in violation of Section 58(8) of the Act. For that reason the trial court was perfectly right to make the declaration as it did.

20. That there was no meter tempering proved disentitled the Appellant from insisting on rebilling and therefore the sum claim in the counter claim was never proved to have been legally demanded from the Respondent as to warrant a judgment being entered against him. The Appellant flatly failed to discharge his burden and there is no error principle, law or evaluation of evidence disclosed to entitle this court to reverse the findings by the trial court.

21. For the foregoing reasons, I do find no merit on the appeal and I order that it be dismissed with costs to the Respondents.

Dated, signed and delivered this 5th day of April 2019.

P J O OTIENO

JUDGE

---

[1] Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, ***Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212***

[2] In ***R.G. Patel v. Lalji Makanji [1957] EA 314,*** the former Court of Appeal for Eastern Africa stated thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."