REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

CIVIL APPEAL NO. 59 OF 2016

KENYA POWER & LIGHTING COMPANY.....APPELLANT

VERSUS

TERESIA WANJIRU KAMAU.....RESPONDENT

[***An appeal from the judgment in Eldoret CMCC No. 802 of 2011***

delivered on 29th March 2016 by M. Wambani (CM)].

JUDGMENT

1. The respondent **(TERESIA WANJIRU KAMAU)** initiated a case in the lower court seeking immediate restoration of power in accordance with the contract of supply and an order of injunction against the appellant (**KENYA POWER & LIGHTING COMPANY)** from discriminating her in power supply along with general damages and costs of the suit. Judgment was delivered favouring the respondent with damages amounting to **Kshs. 457,347.00**.

APPELLANT'S CASE

2. The appellant argues that the respondent in her evidence admitted to the court that she signed the liability form. That this is a clear indication that she acknowledged the liability of the defects found on her meter supply. She further confirmed a bill of **Kshs.347,653/-** came after inspection was done by the appellant's officer. Her indebtedness came to the tune of **Kshs. 347,653/-.**

The defective installation notice having been issued to the plaintiff as evidence by DW1, the liability form having been signed by the respondent and thereafter the respondent account debiting of kshs. 347,653/- confirms that due procedure was followed hence the process of disconnection was lawfully done in exercise of demand by the appellant for the lost units illegally consumed by the plaintiff.

3. The appellant submitted that the finding that the disconnection was illegal was based on irrelevant facts. The magistrate failed to attribute full liability against the respondent despite the existence of written admission of liability by the respondent. The respondent failed to prove her case on a balance of probabilities.

The appellate submitted that the trial court erred in awarding general damages in an alleged breach of contract suit whereas the same are not awardable in such suits. It cited the case of ***Kenya Power Company Limited vs Fridah Kangeni Julius.*** There must be proof of an actual loss and there was no such proof. The plaintiff did not particularize her suffering and the loss was clearly ascertainable and quantifiable. The plaintiff ought to have specifically pleaded and proven. The appellant also cited the case of ***Kenya Power and Lighting Company Ltd. Vs Abel Mwonyi Burundi (2015)*** eKLR on the point that special damages must be specifically pleaded and proven.

The award of Kshs.800,000/- as damages was not proper and the trial magistrate did not give any reasons for awarding Kshs.800,000/- as general damages.

RESPONDENT'S CASE

4. The respondent submitted that the judgment to be appealed against was delivered on 29th March 2016 and the memorandum of appeal was filed on 7th April 2016. Further, that as per section 79 of the Civil Procedure Act, all appeals from the subordinate court to the High Court should be filed within 90 days. The memorandum of appeal was not served and was only brought to the attention of the respondent on 24th February 2017 when the record of appeal was served. The memorandum of appeal was served 13 months after the decree and there was no leave sought to enlarge time therefore due to the fact that the appellant did not serve the memorandum until 24th February 2017, it can only mean that there is no competent appeal to be litigated upon. In support of this point the respondent relied on the case of **Andrew A.**

Apiyo vs Michael A. O. Mashere (1983) eKLR. She further cited Order 42 of the Civil Procedure Rules and specifically, **Rule 12 and 13.** She also cited the case of **Gregory Kiema Kyuma v Marletta Syokau Kiema (1988) eKLR**.

5. She contends that there was no error of principles in determining liability between parties. The order for restoration of power was neither appealed against nor reviewed, and the trial court's judgment factored the special circumstances of the case and the submissions by both parties.

That the appellant should not draw benefits against the award of damages by accepting a set off and resisting to surrender the difference, because they are either unhappy with the entire judgment or they live with it.

The breach is described as having constituted an offence against a consumer as enumerated by **Section 11 of the Electric Power Act** and the court was right to sanction it with damages as it did. The section envisages prosecution and appropriate punishment. Damages awarded are described as a modest punishment.

The respondent insists that she proved her case on a balance of probabilities and the appeal is incompetent.

ISSUES FOR DETERMINATION

a) Whether the appeal is competent

b) Whether the court erred in determining liability

c) Whether the trial court erred in awarding general damages for breach of contract.

WHETHER THE APPEAL IS COMPETENT

6. The respondent's position is that the appeal is incompetent as the memorandum of appeal was brought to the knowledge of the respondent on 24th February 2017 when the record of appeal was served. This was some 13 months after the decree and was against the provisions of section 79G of the Civil Procedure Act.

Section 79G of the act provides;

> **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> > **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.**

The respondent however acknowledged that the memorandum of appeal was filed on **7th April 2016** and that the judgment appealed against was delivered on **29th March 2016.** The Appeal was therefore filed within time.

Order 42, Rule 12 of the Civil Procedure Rules provides;

> **After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.**

7. The respondent disputed that there was a memorandum of appeal served in accordance with this rule and consequently the appeal should be deemed incompetent. However, upon perusal of the proceedings it is clear that the appeal was set down for directions and the same were given for hearing of the appeal. The question that arises is whether there was any prejudice on the parties from the alleged non-service of the memorandum, I opine that there was none.

8. The court is however cognisant of the mandatory nature of **Order 42 Rule 12** bearing in mind the position adopted in **ANDREW A. APIYO vs MICHAEL M. O. MASHERE [1983] eKLR** the court struck out the appeal on the basis that the memorandum of appeal had not been served in accordance with the rules.

Should the appeal be deemed incompetent for failing to comply with order 42 rule 12? I think not, bearing in mind that the cited decision adopted a position which at the time paid fidelity to form rather than substance, and this procedural requirement should not be used to defeat substantive justice. The remedy and refuge is offered under **Article 159 (2) (d) of the Constitution of Kenya,** to the effect that substantive justice shall be administered without undue regard to procedure. More life is breathed to this by **Section 1B** of the Civil Procedure Act 2010

WHETHER THE COURT ERRED IN DETERMINING LIABILITY

9. The trial court determined that the defendant did not issue a notice before disconnecting the respondent's power from her premises making the disconnection illegal. The appellant's position is that the respondent signed the liability form and confirmed her indebtedness to the appellant. The form was however not produced as evidence in the record. Further, upon analysing the evidence there is no proof that a disconnection notice was served before the disconnection. I do not detect any error by the trial court in its apportionment of liability.

WHETHER THE COURT ERRED IN AWARDING GENERAL DAMAGES

In **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** the court held;

> **We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *DHARAMSHI vs. KARSAN [1974] EA 41*, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also *SECURICOR (K) vs. BENSON DAVID ONYANGO* & *ANOR* [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "*had suffered serious damages*" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.**

10. The upshot of the foregoing decision is that general damages should not be awarded where the loss suffered is quantifiable. The losses allegedly incurred were quantifiable yet the respondent failed to quantify the same. The loss of tenants could be calculated in terms of loss of rent. The trial court further failed to give a concrete basis for the award of general damages.

In ***Court of Appeal in Provincial Insurance Co. East Africa Ltd vs Nandwa Mwaga and Securicor Courier (K) Ltd vs Benson Onyango & Another [2008] eKLR*** the court held that:

> **General damages cannot be awarded for breach of contract because damages arising from breach of contract are usually quantifiable and are not at large and that where damages are quantifiable they cease for be general damages.**

11. In light of the afore-going, then the order for damages was erroneously made and did not take into account the legal principles which must be adhered to when there is a breach of contract where damages are quantifiable, and must therefore be set aside. The costs of this appeal are awarded to the appellant.

Delivered, Signed and Dated this 2nd day of October 2019 at Eldoret.

H. A. OMONDI

JUDGE