



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 555 OF 2007**

**1. MARY MARGARET WEJULI &**

**AGNES NAWIRE WEJULI (Suing as administrators**

**of the estate of the late FANUEL OLUNGA WEJULI)**

**2. MARY MARGARET WEJULI**

**3. AGNES NAWIRE WEJULI.....PLAINTIFFS**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED..... DEFENDANT**

**JUDGMENT**

1. On the night of 24<sup>th</sup> October 2006 a huge fire burned down a house standing on all that piece of land known as Scheme 305 Ngong LR No. 14151(**formerly 305/36**) (the suit property). It is the case for the Plaintiffs that the fire was caused by an electrical fault which they attribute to negligence on the part of Kenya Power and Lighting (KPLC **or the Defendant**).

2. The suit property was at all material times registered in the name of Fanuel Olunga Wejuli (**the Deceased**). The Plaintiffs are the widow and daughter of the deceased respectively and hold a limited grant of letters of administration ad litem to the estate of the deceased.

3. On that material night, the Plaintiffs together with one Abraham Egesa Weyula (PW 3) were in the house. It was the evidence of Margaret (PW1) and PW3 that at about 7.30p.m the lights started to flicker and there was eventually a black out at around 8.30pm. Later in the same night they were woken up by the smell of a burning item. They noticed that the house was on fire and had to exit the house quickly. From the outside of the house they observed a big fire on the roof of the house. Their evidence is that the entire house was razed to the ground and not only did they lose the building but contents therein. Further that they incurred great cost in establishing alternative abode and have thus suffered great pain, suffering and mental anguish.

4. In paragraph 10 of the Further Re-Amended Plaintiff the Plaintiffs set out the particulars of negligence on the part of KPLC. These are;

**a) Fitting/fixing the electrical connection without taking reasonable or proper care.**

**b) Failing to install the proper safety or insulating material to prevent the fire.**

**c) Failing to have proper and due regard for the safety of the Plaintiff or for the Plaintiff's property.**

**d) Failing to respond to the numerous complaints made by the Plaintiff and other residents within the neighbourhood concerning the said faulty connection.**

5. At the hearing, one James Mutinda Mulika (PW4) gave testimony in respect to the cause of fire. Mulika prepared a report on behalf of Raybridge Surveyors and Loss Assessors. Mulika is an electrical engineer and holds a Class A license in electrical engineering. The license is issued by the Energy Regulatory Commission. He worked for the Defendant for 11 ½ years prior to going into private practice.

6. In his report he blamed the fire on an electrical fault associated with the distribution and service network of the Defendant. He elaborated that it was the duty of KPLC to provide quality electricity power supply free from surges and outages. Further that it was the duty of KPLC

to design a good system capable of offering maximum protection to property and life. His report and evidence are critical to the Plaintiffs' case and are discussed in further detail later in this decision.

7. On the loss, one Patrick Kithome (PW2), a quantity surveyor by training and practice prepared a report dated 7<sup>th</sup> November 2012. In his view it would cost a sum of kshs.7,000,150.00 to reconstruct the bungalow and another sum of Kshs.2,240,000.00 to reconstruct the guest wing.

8. Ultimately the Plaintiffs seek special damages of Kshs.22,485,250.00 which is comprised as follows:-

<b><u>Item</u></b>	<b><u>Amount (Kshs.)</u></b>
<b>The building</b>	<b>3,800,000.00</b>
<b>The contents</b>	<b>7,500,000.00</b>
<b>Other personal</b>	<b>875,250.00</b>
<b>Consequential loss from loss of guest room</b>	<b>240,000.00</b>
<b>Loss suffered by guests room tenant</b>	<b>270,000.00</b>
<b>Costs of reconstruction of house damaged by fire</b>	<b>10,100,000.00</b>
	<b><u>Total 22,485,250.00</u></b>

They also seek general damages and cost of the suit.

9. KPLC filed a statement of Further Amended Defence on 18<sup>th</sup> August 2008. It denied any responsibility for the fire that caused the damage on the night of 24<sup>th</sup> October 2006. Instead, KPLC blames the deceased, the Plaintiffs and the inhabitants of the suit property for solely and/or substantially contributing to the fire through acts of negligence. In a long list it sets out the particulars of negligence;

- a) **Failing to install and or installing defective and low quality electrical devices for controlling power surges.**
- b) **Failing to switch off electrical equipment and or the main power switch in time or at all despite eminent danger which they knew or ought to have known.**
- c) **Having loose connections in their electrical equipment.**
- d) **Fixing/fitting loose electric connections in their premises without taking any reasonable care for their safety and that of the suit premises.**
- e) **Installing faulty electrical devices and appliances within and inside the suit premises.**
- f) **Installing and having worn out electrical wire insulation within and inside the suit premises.**
- g) **Failing to replace faulty electrical devices and appliances and the worn out electrical wire insulation within and inside the suit premises.**
- h) **Leaving heating and cooking equipment on and unextinguished.**
- i) **Allowing the suit premises to be set on fire.**
- j) **Failing to install proper ad or insulating safety materials to prevent fire and or any emergency occurrence.**
- k) **Using faulty electric heating and cooking equipment.**
- l) **Causing the accident.**
- m) **Failing to report in time or at all of any electrical defect and or power surge to the Defendant.**

- n) Using substandard electrical devices that are not meant to be installed and or authorized to be used on the electrical power supply lines.
- o) Making or permitting alteration to be made in the permanent electric installation system without the previous approval of the defendant.
- p) Supplying third parties with the electrical energy supplied by the Defendant, without the prior consent of the defendant.
- q) Knowingly overloading the electrical power supply lines.
- r) Constructing buildings using highly inflammable and substandard materials.
- s) Storing and/or using highly inflammable materials and or goods in a negligent manner that they caused the fire and the resultant damage.
- t) Storing and/or using firewood, charcoal and/or paraffin in a negligent manner that they caused the fire and the resultant damage.
- u) Allowing an unauthorized electrical installer to install electrical appliances and or conduct electrical wiring on his premises.

10. In the alternative the Defendant alleges that if there was any electrical fault then the same did not originate from its electrical transformer, supply line and/or meter box but as a result of defects or internal wiring system of the said residence.

11. At the hearing, the Defence lined up four witnesses namely; Andrew Njoroge (DW1), Luke Chelanga (DW2), Titus Kaluka (DW3) and Kigo Kariuki (DW4)

12. At this juncture the Court wishes to highlight the evidence of DW4 who is a risk manager. Just like PW4, he gave expert evidence. DW4 holds a Bachelor of Commerce (Finance). He is a Fire Engineer and is a member of the Institute of Risk Managers. He proudly told Court that he is a Fire Expert ranking number 5 in registration with the Department of Occupation, Health and safety under the Ministry of Labour. His firm namely Safety Surveyor Limited were instructed by KPLC to give an opinion of the cause of the fire. In a report dated 30<sup>th</sup> April 2007 the witness returned an opinion that the cause of fire could either be heating and cooking equipment like a charcoal jiko which was left un-extinguished and therefore ignited combustible material. He also proffered an opinion that a cigarette butt left un-extinguished may also have caused the fire. He however took an alternative view that worn out electrical insulation could cause two or more conductors to get into contact causing the short circuit which would manifest into an intense heat that could ignite combustible materials.

13. The Court heard eight (8) witnesses, four for each side. As it is common cause that there was a fire on the night of 26<sup>th</sup> October 2014 that completely gutted down the suit property, the issues for determination were agreed by the parties to be :-

- i What caused the fire on the Plaintiffs' premises on or about 24<sup>th</sup> October 2006?
- ii Who was negligent?
- iii Did the Plaintiffs suffer loss and damage and if so what is the extent thereof?
- iv Are the Plaintiffs entitled to compensation?
- v Who bears the costs of this suit?

14. As to the cause of fire, this Court received the evidence of two expert witnesses; James Mutinda Mulika (PW4) for the Plaintiffs and Kigo Kariuki (DW4) for the Defence. Although the Court will not solely depend on their evidence in attempting to establish the cause of the fire, the fact that the two witnesses profess expertise in determining causation of fire requires this Court to give their evidence some keen attention.

15. Yet the task of this Court has not been made any easier because the experts reach strikingly different conclusions as to what caused the fire. Thankfully, however, courts have over time developed the approach and manner of receiving, assessing and making use of expert. This was discussed at length by Mativo J in **Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR.**

16. I find the exposition by the learned Judge extremely useful and I am obliged to reproduce it in extenso:-

**The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.[8]**

**Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of the experts is to give their opinion based on their analysis of the available evidence.**

The court is not bound by that opinion, but can take it into consideration in determining the facts in issue...Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.[15]

A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine the expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd. and Another* [16] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.” A court should not therefore allow an expert merely to present their conclusion without also presenting the analytical process by which they reached that conclusion.

17. Let me start with some uncontested facts and thesis. The suit property was supplied with electricity from a terminal service pole situated outside the house. It run through a service line cable supported at roof of the house and eventually terminating at a KPLC cutout and meter board which were mounted on a wall outside a bedroom that adjoins the sitting room.

18. After the fire, the service pole was intact. However, from it the service wire hang loose. The insulation to the service line had completely burnt or peeled off. On the other hand the cutout and meter board were intact.

19. Mr. Kariuki (DW4) explained to Court that the scene of fire could speak to the cause of fire; where it incepted, manner of spread and point where attacked for extinguishment. He further explained that the manner of determining inception to extinguishment is scientific with the following three features:-

i The combustion at the point of inception would require more energy to start. Akin to striking a match stick. For that reason the immediate surroundings would be heated in a manner that the plaster would crack and 90 per cent of the times fall off. The substrate would be heated and stained by carbon (smoke). A sign of incomplete combustion.

ii Once the seat of fire is identified then one can follow the pattern of spread or direction.

iii The pattern of spread can be sketched to where the fire was extinguished.

20. On his part Mr. Mulika (PW4) did not explain how he would identify the seat of fire. He however opined that the fire started at the top of the living room. He then stated;

**“The S/R and D/R caught fire first. I concluded this because the area was completely burnt”.**

**S/R stands for sitting room and D/R for dining room.**

21. PW4 was of the view that the cause of fire was as a result of an electrical fault associated with the Defendant’s distribution and service network system. In his report he states:-

**“To us the high voltage surges and voltage fluctuations on the power system distribution was the fault which in turn caused the burning of the service line cable insulation which connects the victims’ house and hence causing the fire which burnt their house”.**

22. In justifying his opinion Mr. Mulika stated that the fault was not in the electrical installed wiring in the house because there were fault protective devices at the consumer unit where fuses and circuit breakers would afford protection. Further that if it was due to electrical wiring fault in the house, KPLC main cut-off fuses would have burnt and been damaged.

23. For Mr. Kigo (DW4), the fire incepted at the kitchen where the fire intensity would appear to have concentrated. The witness showed the Court pictures of the kitchen to show badly cracked walls. A sign, it was proposed, of intense heating.

24. In ruling out that the cause of the fire was associated with electricity, DW4 observed that the supply equipment at the meter point was intact after the fire and so was the service line. However, that the insulator mounted on the GCI roof had gone down with the GCI roof.

25. These are the two competing accounts that are placed before this Court by two experts. The Court may choose to believe one or none of them. What am I to make of this?

26. First, I need to make an observation as to the area of expertise of the two witnesses. PW4 is an electrical engineer with training in that field. While he told court that he could identify the cause of fire but only if the fire was an electrical fire and caused by an electrical fault. And as to his knowledge about fire, he stated that;

**“I have not studied anything to do with fire”**

His knowledge in respect to fire was limited in that manner.

27. On the other hand, DW4 was a Risk Manager with learning in the field of Fire Engineering. He is a fire expert ranking No. 5 in registration with the Department of Occupation Health and Safety under the Ministry of Labour. Yet he too had one handicap in respect to the matters at hand. He was not an expert in the field of electricity although he told Court that one Wambui together with whom he prepared the report had expertise in electrical matters.

28. Unlike PW4, DW4 gave an explanation of how one identifies the seat of fire. His explanation was unshaken in cross-examination and this Court has no reason to doubt it. In terms of where the fire incepted, DW4's evidence would perhaps be more helpful than that of PW4 whose knowledge of fires, their inception, spread and extinguishment was more limited.

29. DW4's testimony that the fire first started in the kitchen was based on his perception of the intensity of the fire at the kitchen which caused significant cracks to the wall. Cracks that were either missing or less pronounced in other rooms. The pictures of the various burnt rooms to the house shown to this Court and attached to the report show the extent of damage to each room. According to PW3 these cracks did not exist before the fire. This corroborates the account of the expert as to the extensive damage to the kitchen.

30. Compare this with PW4 makes of the how the fire spread. Other than the statements of witnesses he interviewed, he does not give a scientific opinion of why he reaches the conclusion that the fire started above the sitting room.

31. I turn to consider the evidence of those who were in the house on that fateful day. From the evidence of PW1, her mother (Mary) went to her room and alerted her of something unusual up in the roof. In her evidence to court she stated that it was the roof that was in fire and that she noticed flames on the power service line cable. In her statement to PW4, this witness had stated;

**“At around 11.30pm my mother whose bedroom was next to the kitchen came knocking at my bedroom door and woke me up shouting there was fire and smoke from the ceiling after noticing sparks and smell of burning materials. At that time I woke up to respond to the call of FIRE. I switched on my bedroom light and it didn't light at all. We walked out through the kitchen door as it was not easy to go through the main door because the room was locked and not easy to look for the keys to open as a result of high concentration of fire and smoke”.**

32. As for PW3 he woke up to smoke that engulfed his room. His instinct was to save his mother and grandmother. On reaching their rooms, he found that they had already left. He had to make his way out from the kitchen but not without difficulty. In his statement too PW4 he said;

**“I then decided I should be brave and try and walk out and on reaching in the kitchen I was grabbed and pushed out of the burning house by Mr. Jack Muraya”.**

33. The evidence of the persons in the house on that fateful night was that they woke up to a burning house and there was fire from the ceiling and the house was burning. Indeed, they were unable to exit from the main door because the room was locked and they were unable to look for the key as a result of the high concentration of fire and smoke. It would seem that by the time Pw3 exited from the house, the fire was fierce and had spread.

34. As to whether there was fire in the kitchen, the evidence of the two witnesses is less clear. However, from the statement of PW3 that he had braved his way through the kitchen before been grabbed and pushed out by Mr. Muraya, it would seem that there was a fire at the kitchen as well.

35. This Court holds therefore that only because the witnesses saw fire at the ceiling in roof of the house is not inconsistent with the proposition of DW4 that the seat of that fire was the kitchen. From the layout of the house the kitchen adjoins the dining room and to a smaller extent the sitting room. So, even if the witnesses saw fire on the roof above the sitting room or dining room, that does not rule out that the fire incepted from the kitchen. The fire may have spread to the ceiling and roof as it had in fact spread to other rooms.

36. Again, the evidence emerging from the extent of damage to the walls of the rooms, the walls to the sitting room and dining room were less damaged. Although the paint work to the walls of the sitting room had been consumed by fire the walls were intact and had fewer cracks than those on the kitchen wall. DW4 testified as follows;

**“I saw cracks in other rooms (other than the kitchen) but of different formation. D. Exhibit Page 13. The electrical and gas cooking equipment were in the kitchen. The fire would behave different at point of inception. If there is a gas explosion it would ignite in the air causing loose items (windows etc) to be blown but would not mimic a fire inception point”.**

A question to be asked is why the fire was not as intense in the sitting room if indeed the fire began on the roof above it. Second, this

evidence rules out that the intensity of the fire in the kitchen was for any other reason other than because it was the point of inception.

37. DW4 ruled out cause associated with the power supply of KPLC because the fuses at the metering point were intact after the fire. Granted DW4 is not an electrical engineering, however, Andrew Njoroge (DW1) who has some knowledge in this field stated;

**“electrical faults are ruled out where meter board is intact”.**

He had also noted in his written statement that;

**“The fuses at the transformer were also intact indicating that there was no fault in the power supply”.**

38. PW4’s evidence on this was as follows;

**“No cut off in the meter room had tripped. The meter was intact. The consumer unit was completely burnt.**

.....

**The meter was intact. It was protected and secondly if there was a problem emanating from the internal wire, the cut-off fuse and meter would have been damaged”.**

39. For sure the evidence of PW4 is at odds with that of the Defence witness as to whether the unscathed meter board was a sign that the fault was external or internal. Yet even if I was to put that aside, I have already found that the evidence of DW4 was credible as to where the fire inception. In the kitchen and not at the roof.

40. It is of course not lost to this Court that the Plaintiffs attempted to attribute the fire to electricity surges and fluctuations on that night. What PW4 was not able to explain is why two other consumers drawing from the same transformer did not suffer the same fate as the Plaintiffs’. On a balance of probability, this Court believes the Defence when it posits that the fire caused cannot be attributed to an electrical fault arising from the supply of electricity by KPLC to the suit property.

41. Even if I find the Defendant blameless, the law still requires me to give my decision on quantum if I had found for the Plaintiffs. I hold that the cost of reconstructing the house at Ksh. 10,100 000.00 has been proved on the basis of the evidence of PW2. As to the contents I have no reason to doubt that the house was fairly well furnished and had the appliances set out in the inventory prepared by the Plaintiffs. As this was their home I would think that they also lost personal items. It may very well be too much to expect that the Plaintiffs would keep receipts for every item in the house. For this reason I can only make an award which appears reasonable in the circumstances. The Plaintiffs ask for Kshs. 8,375.250.00 .The Defendant does not give an opinion other than stating that the damages have not been proved. On my part I would award Ksh 4,000,000.00 under this heading.

42. Otherwise for the reasons given the suit lacks merit and is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 6<sup>th</sup> Day of December 2019**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Otieno for Kiplagat for Defendant

Musebe for Kinyanjui for the Plaintiff

Court Assistant: Nixon