



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 584 OF 2009

HARRISON NG'ANG'A GICHARU.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In his Complaint dated 12th October 2009 and filed on 27th October 2009, the Plaintiff sought judgment against the Defendant for:-

- a) General damages.**
- b) Special damages Kshs 12,584,023.90.**
- c) Costs of this suit.**
- d) Interest on (a) and (b).**
- e) Any other relief that the Honourable court may deem fit to grant.**

2. The Defendant's Statement of Defence was dated and filed on 19th November 2009. The Plaintiff's Reply to the Defence was dated 8th December 2009 and filed on 9th December 2009.

3. The Plaintiff's List and Bundle of Documents was dated 14th March 2010 and filed on 16th March 2010. The Joint Statement of Agreed Issues was dated 11th March 2010 and filed on 16th March 2010. The Plaintiff's Supplementary List and Bundle of Documents was dated and filed on 29th October 2010 while his List of Witnesses in which his Witness Statement and that of his wife, Florence Wachu Gicharu, were attached, was dated and filed on 18th May 2011. The Defendant's List of witnesses and List and Bundle of Documents were both dated 1st February 2012 and filed on 2nd February 2012. The Defendant also filed another List of Witnesses and List and Bundle of Documents dated 7th May 2018 on even date.

4. Parties had initially tried to negotiate the matter out of court but the same was not successful. The matter was subsequently heard by Khaminwa J (as she then was) when she took the evidence of the Plaintiff and of Harrison Mburu (hereinafter referred to as "PW 2").

5. When the parties appeared before this court on 11th April 2018, they informed it that they wished to continue with the matter from where it had reached.

6. The Plaintiff's Written Submissions were dated 20th June 2018 and filed on 21st June 2018. His List of Authorities was dated 5th September 2018 and filed on 7th September 2018. The Defendant's Written Submissions and List of Authorities were both dated 12th September 2018.

7. When the matter came before the court on 19th September 2018, both parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Both the Plaintiff and Defendant agreed that the following were the issues that had been placed before this court for its determination:-

1. **Whether at all materials times the Plaintiff was the owner of the premises known as Plot No LR 76/217 located in the Thindingua area?**
2. **Whether the Plaintiff's property was destroyed by fire on or about 14th October 2007?**
3. **Whether the fire accident was due to negligence, breach of duty and/or breach of contract on the part of the Defendant or its agents and/or servants, or negligence on the part of the Plaintiff?**
4. **Whether the Plaintiff suffered any loss or damage as a result of the fire incident on the Plaintiff's premises on 14th October 2007?**
5. **Whether the Defendant took all reasonable precautions for the safety of the Plaintiff and whether it had provided and/or maintained adequate and suitable electric power and meter facilities as alleged?**
6. **Whether the Plaintiff was entitled to damages for the loss sustained as a result of the fire incident?**
7. **What was the quantum of damages, if any, payable to the Plaintiff?**
8. **Was demand or notice of intention to sue given?**
9. **What were the Court's orders as to costs of this suit?**

I. OWNERSHIP, DESTRUCTION AND LOSS

9. Notably, both parties were agreed that the Plaintiff was the owner of the house in the premises known as LR No 76/217 located in Thindingua area, that it was destroyed by a fire on 14th October 2007 and all his property was destroyed. This court did not therefore deem it necessary to deal with Issues No (1), (2) and (4) of the Statement of Issues. The court, however, dealt with the other issues under the following heads.

II. LIABILITY

10. Issues Nos (3) and (5) were dealt with under this head.

11. The Plaintiff's called two (2) other witnesses to support his case. These were PW 2 and the Certified Loss Adjustor, Gabriel Muigai Gatoi (hereinafter referred to as "PW 3").

12. His case was that on 14th October 2017 at about 1.45 am, he was asleep with his wife, mother and house help when his house caught fire due to a power surge. His house and the contents therein were completely destroyed. He attributed this power surge to the negligence of the Defendant herein and as a result called upon it to compensate him for the loss he suffered.

13. In evidence, the Plaintiff testified that he was awoken by his watchman who told him that his house was on fire. He submitted in evidence photographs showing his house on fire. He attributed the cause of fire due to a power surge.

14. He added that on that on that day, he saw the cable that took power to his house had completely melted to (sic) the consumer box in the house. His testimony was that **"the fire started in the living room, went through the consumer box, got to the ceiling, spread over the roof and got out of the kitchen door"**. He was emphatic that there was a power surge in the underground cable. He admitted that no other house within the locality that was served with the power line caught fire.

15. PW 2 was an Electrical Contractor registered by National Regulatory Commission and held License No KI00207. He was registered under Ministry of Works under a company called Tudor Engineering Company Ltd. He was a Diploma Holder having been granted the same by East African Examination Council.

16. He testified that he went to the Plaintiff's house on 15th October 2007 after the Plaintiff called and informed him that his house had burnt down the previous night. He used very technical terms in his testimony but the essence of his evidence was that there was excessive power to the Plaintiff's house that burnt the cut outs but that all the wires in the house were protected.

17. On being cross-examined, he stated that there could be no fire if gadgets were not burnt. He confirmed that there was no fire in the metre box and that in his Report, he did not say that the metre box was burnt.

18. The Plaintiff submitted that PW 2 who was a qualified Engineer conducted tests that established that it was a power surge that must have burnt the metre box unit and that a lot of power went beyond the cut outs which led to the surge going to his house thereby causing the fire.

19. He pointed out that the particulars of negligence that he had particularised in his Plaintiff pointed to the Defendant having been negligent and causing his house to burn down. He stated that the Defendant never called a witness to rebut PW 2's evidence and that Phillip Muchungu only (hereinafter referred to as "DW 1") assessed the loss while Josephine Muchungu's (hereinafter referred to as "DW 2") role was merely supervisory to check whether service lines and transformers were in good condition.

20. He further argued that whereas DW 2 testified that the cut outs were intact, she did not file any Report to that effect. He was emphatic that the fact that no other customer complained of a power surge on the material date did not mean that the power surge did not occur.

21. It was his argument that the evidence that had been tendered by his witnesses was more consistent and credible than that the evidence that was adduced by the defence witnesses.

22. On the other hand, the Defendant denied that it had been negligent as had been alleged by the Plaintiff. It was its contention that the fire could not have been caused by a power surge because all the gadgets in the metre had been intact as could be seen from the photographs that were tendered in evidence. It argued that its responsibility ended at the cut outs which were safety gadgets that it installed to guard against any power surges. It therefore averred that it could not be held liable as the customers were responsible for internal wiring.

23. It also submitted that the Plaintiff did not adduce any forensic evidence to rule out other causes of fire and that because he had not proved that the fire was caused by a power surge, then his claim had to fail.

24. In her evidence, DW 2 stated that she worked as Supervisor in operations and maintenance of Distribution and Service lines. She was awarded a Diploma in Craftsman Electricals after she studied for four (4) years at Kenya Power Training School. Her tasks involved to check service lines, poles, fallen lines, power outages transformers amongst others.

25. She stated that it was not possible for a power surge to have occurred and for them not to have noticed because all the customers on the same service line would have been affected. She pointed out during her testimony, that the cut outs in the metre box whose photographs she was shown were intact.

26. She also contended that the Transformer was intact. She was emphatic that if the Defendant was to have been found negligent, then the fire ought to have started from the Transformers through to the cut outs in the metre box. Her evidence was that the Defendant's responsibility ended at the cut outs and customers were responsible for their wiring.

27. This was clearly a case of one party's word against the other. Each had brought an expert witness to support their respective cases. It behoved this court to critically analyse where liability would lie based on the evidence that was before it.

28. It was an undisputed fact that the cut outs in the metre box were not burnt. There was no evidence of wires or cut outs having melted. This was confirmed by PW 2 and DW 2. This court also looked at the photographs of the metre Box and noted that all the items therein were intact.

29. Although DW 2, adduced in evidence a Report dated 15th October 2007 that gave the proximate cause of fire as having been a power surge, he did not allude to there having been a power surge on that particular night. In fact, his Report appeared to have been inconclusive as to whether there was a power surge on the material date. He seemed to explain how a power surge could come about and added that the over voltage could only be detected if it lasted for a long duration to be noted by the circuit protection devices he had alluded to in his Report. This court, however, noted from his Report was that the fire was started by electrical cabling in the ceiling.

30. As was rightly pointed out by the Defendant, a cardinal rule of evidence is that any party who asserts or alleges must prove. Save from asserting that the fire was caused by a power surge, the Plaintiff who was actually woken up by his watchman, did not show how he came to the conclusion that a power surge was the proximate cause of the fire. If his evidence was that the electrical cable in the ceiling was indeed what caused the fire, he was under a duty to discharge the burden of proof to show a nexus between the fire in the ceiling and the power surge leading to the burning of his house.

31. It was therefore the considered opinion of this court that having considered the evidence that was adduced by the Plaintiff, PW 2 and DW 2, the Plaintiff did not prove on a balance of probability that the causation of the fire at his house was due to negligence, breach of care or breach of contract by the Defendant as had itemised in his Plaintiff.

32. The Plaintiff was therefore unable to prove Issue Nos (3) and (5).

I. QUANTUM

33. Issue Nos (4), (6) and (7) were rendered moot after this court found that the Plaintiff did not prove the issue of liability as against the Defendant.

34. However, in the event this court were to be wrong on the question of liability and found to have been so by the Court of Appeal, it was its view that the Plaintiff ought to have called Idiom Arch Planning Architects and Mwaura Ngugi & Associates who were the Quantity Surveyors as witnesses to justify the figures of Kshs 7,892,165/= that PW 3 relied upon to adjust the loss and prepare his Report dated 24th July 2009.

35. The evidence of the Architects and Quantity Surveyor was critical as PW 3 would have justified how the figures of reconstruction of the house had been arrived at. Indeed, DW 1 who was a Quantity Surveyor submitted his Report dated 2nd November 2010 showing the amount in the Bills of Quantities to have been Kshs 5,852,478.40/=. This was against a figure of Kshs 7,102,948.50/= that PW 3 had given after

adjusting the loss by applying a depreciation of ten (10%) per cent.

36. It was therefore the view of this court that in the absence of any evidence from the Plaintiff to rebut that of DW 1 who was an expert witness in respect of Bills of Quantities, this court would have adopted the figure of Kshs 5,852,478.40/= as the amount for reconstruction of the house.

37. Going further, as the Defendant had not adduced any evidence to rebut the evidence of PW 3 who prepared the aforesaid Report on behalf of M/S Cunningham & Lindsey Loss Adjustors on the contents that were destroyed after the house burnt down, this court would have accepted the Plaintiff's claim in the sum of Kshs 4,460,261.95/=. Appreciably, expert evidence could only be rebutted or controverted by evidence from another expert witness.

38. It is important to note that the Plaintiff did not lead evidence on the issue of loss of rental income save to rely on a letter from SEB Estates Ltd dated 17th October 2007 indicating a refund of Kshs 45,000/= to a Mr Stephen Wainaina. He did not testify for how long he stayed in House No 3 Thindigua Estate that he derived rental income from to enable the court compute the said loss. He only stated that he lost income from the rental property from October 2007 to September 2009. He ought to have demonstrated how he mitigated this loss and provided documentary proof of the rental income. Notably, the Plaintiff did not even ventilate this issue both in his evidence- in- chief and written submissions.

39. This court would therefore have disallowed this claim for loss of rental income and agreed with the Defendant in this regard.

40. Accordingly, having considered the evidence of PW 1, PW 3 and DW 1 on the issue of quantum, this court came to the firm conclusion that save for the claim of contents, the Plaintiff would have failed to prove the other claims on a balance of probability.

41. It is unfortunate that the Plaintiff lost his house and contents therein from a fire. However, the law is what it is. Every allegation must be proven and when it is not, the court has very little choice but to dismiss a case.

DISPOSITION

42. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit had no merit and the same is therefore hereby dismissed with costs to the Defendant.

43. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of November 2018

J. KAMAU

JUDGE