



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 177 OF 2006

THE KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

VERSUS

SAID N. NADHIR.....RESPONDENT

J U D G M E N T

1. The Respondent by a plaint dated 31/5/2002 sued the Appellant, as defendant then for the recovery of the sum of Kshs.134,647.50 made up of Kshs.124,647.50 sum paid to the Appellant allegedly upon coercion and to enable reconnection of the power supply and Kshs.10,000/= on account of destroyed medicine when the power was disconnected.

2. To the plaint the Appellant filed a statement of defence in which description of the parties and the contractual relationship between them was admitted but the defendant denied any wrongdoing in disconnection of the power supply and maintained that the supply was lawfully disconnected on account of non-payment of bills that were justly due. The Appellant in particular denied any demand off any bribe by this employees, denied that the admission by the Respondent of liability was made under duress or without prejudice and maintained that the power was disconnected on account of bills due after the Respondent was found to have tempered with the metering equipment, otherwise any damage to Respondents goods due to disconnection was denied together with the entire claim in the sum of Kshs.134,647.50 with an assertion that due to tempering with the meter the Appellant was entitled to claim the sum of Kshs.124,647.50 being the undercharge worked but on the basis of average power consumption between the period 26/8/1999 and 29/5/2001 the period the Appellant contended the tempering was in effect.

3. Having taken evidence by the parties during which documentary evidence was tendered, the trial court allowed the claim, found that the Respondent had no otherwise but to accept liability of his power be disconnected and therefore entered judgment from the Respondent for the sum of Kshs.124,647.50 together work costs and interests.

4. That decision has no proved the consent appeal in which the appellant sets out some ten (10) grounds. Even so if so enumerated the fault on the trial court is centered on failure to adequately consider the evidence and submissions offered; inconsistency on the finding on signing admission under duress; shifting the burden of proof or otherwise failing to lay it where it ought to have rested; making a decision based on no pleading on record.

Issues for determination

5. Based on the grounds of appeal, the record of Appeal and the submissions, I have come to the view and opinion that the follow issues being determined by its court:-

- i. Did the Respondent as the plaintiff at trial discharge the legal burden to be entitled to the judgment be obtained.**
- ii. Did the trial court error as to entitle this court to interfere with its findings of facts based on evidence led at trial.**
- iii. What orders should be made on costs?**

Analysis and determination

6. I do appreciate that being first appellate court the court proceeds by way of a retrial by which there is a mandate and obligation to re-examine, re-evaluate and re-appraise the entire evidence with a view to coming to own conclusions based on such exercise and being well aware that on matters of fact, this court should not freely and lightly overturn the trial court except if it be demonstrated that in coming to the conclusion it did the trial court misapprehended the evidence in material aspects and short of that the decision arrived at is not supportable by

evidence on record or is just perverse.

7. The burden upon the Respondent at trial was that within a balance of probabilities not higher. The evidence led was that on the 7/5/2001 he saw a gentlemen who asked him to sign a form accepting tempering with the meter or his power supply be disconnected. He signed the form without prejudice and after the power was disconnected he paid the contested sum by a cheque sent under the cover of our advocates letter dated 23/5/2002 that letter told the Appellant on what terms the payment was being tendered and the appellant did receive the payment and acknowledged same without any reservation. However, on cross examination the witness said even though he signed the letter on 7/5/2001 the disconnection was on 22/5/2002 after the bill dated 03/04/2002 was served demanding payment by the 10/4/2002 and giving a notice that there would be a disconnection by the 24/4/2004 if payment bills not made.

8. On cross examination, the witness said that he got into a contract with the Appellant in 1998 taking over from a previous tenant. He denied any tempering with the metre and that he signed so as to get power and not be disconnected.

9. For the defendant evidence was led by four witnesses basically how the anomaly was defeated, how the meter was normalized, how the Respondent signed the admission form and how the surcharge was calculated.

10. In my view what was before the court was the duty to investigate whether the meter employed to ascertain the consumption was accurately measuring such supply.

11. At the time the events giving rise to the suit and the appeal took place, the law applicable was the Electric Power Act.

12. That law had elaborate provisions on whose duty it was to avail have a meter certified and how to settle disagreements on consumption. Those provisions were to be found at Sections 95 – 105 of that Act.

13. For purposes of the dispute before the trial court, the particular provision that was all important was Section 101, which provided;

“101. (1) If any dispute arises between any consumer and the licensee as to whether any meter, whereby the value of the supply is ascertained (whether belonging to the consumer or to the licensee) is or is not in proper order for correctly registering that value, or as to whether that value has been correctly registered in any case by any meter, that difference shall be determined upon the application of either party by an electrical inspector, and that electrical inspector shall also order by which of the parties the costs of and incidental to the proceedings before him shall be paid, and the decision of the electrical inspector shall be final and binding on all parties; and in determining the said costs the electrical inspector may take into account any fee paid under section 94.

(2) Subject as aforesaid, the reading of the meter shall be conclusive evidence, in the absence of fraud, as to the value of the supply”.

14. It was therefore not open to the Appellant as licensee to unilaterally declare the meter tempered with as it purported to do. To the extent that no inspector was involved, I do find that the determination of defects in the meter and its ability to accurately ascertain the power used was unlawful and being unlawful could not have been the basis to burden the respondent.

15. To that extent I do find that the trial court cannot be faulted for having found that assessment and demand for Kshs.124,647.50 was illegal. I find no merit in the appeal and dismiss the same with costs to the Respondent.

Dated and delivered at Mombasa this 9th day of November 2018.

P.J.O. OTIENO

JUDGE