



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 339 OF 2001

AFRICAN COTTON INDUSTRIES LIMITED..... PLAINTIFF

VERSUS

MOMBASA WATER SUPPLY AND SANITATION

COMPANY LIMITED (substituted in place of NATIONAL WATER

CONSERVATION & PIPELINE CORPORATION).....DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint on 29th June, 2001. It later filed an amended plaint on 22nd March, 2017. The plaintiff alleges that the defendant failed to keep and maintain a water meter No. 7765358 in good and proper working order as a result of which the meter posted various erroneous and excessive meter readings between June 1995 and December 1996. The plaintiff further avers that the defendant wrongfully and arbitrarily levied a charge of Kshs. 2,104,722/= but the plaintiff claims to have continued making monthly payments of Kshs. 1,147/= which was its average consumption per month prior to June 1995. It also avers that its water supply line connected to meter No.7765358 was disconnected and sealed on 10th December, 1996 by the defendant.

2. The defendant filed a statement of defence on 3rd August, 2001. It thereafter filed an amended statement of defence and counter-claim on 8th July, 2003. On 27th April, 2017 the defendant filed a further amended statement of defence and counter-claim. The defendant avers that the meter in issue never stopped operating and is in good condition to date. It therefore denied that it was in any way culpable in negligence as claimed in the particulars set out in the plaint.

3. Edward Gemba Juma, an employee of the plaintiff testified as PW1. He stated that he was the Plant Manager, a position he has held for 17 years. He explained that the plaintiff manufactures cotton wool for hospitals, ear buds among other things.

4. It was his evidence that the plaintiff used to be supplied with water through two meters. One supplied water to the plant and the second one to the administration block (administration block meter). The number for the meter supplying water to the plant was 7765358. The administration block meter was No. 910887337.

5. He testified that meter No. 7765358 used to function well but after a certain period it malfunctioned and the plaintiff was billed on estimated figures for a while. PW1 further stated that the meter thereafter started behaving erratically and the plaintiff started receiving high bills. He indicated that the meter stopped functioning in the year 1994. He referred to 3 water bills on page 1 of the plaintiff's bundle of documents showing that water consumption for the meter in issue was 65 units. He stated that the plaintiff paid Kshs. 1,147.00 as shown on page 2 of their bundle of documents. PW1 produced the water bills on pages 1-3 of their bundle of documents as plf. exhibits 1(a)-1(f). He explained that the said bills were all estimates.

6. PW1 testified that the bill for June 1995 shows the total units consumed were 10,593. He stated that in his view, the meter was malfunctioning as the bill was too high as compared to previous months. He indicated that they did not pay the amount of Kshs. 418,967.00 which was demanded by the defendant but they continued paying an estimated amount of Kshs. 1,147.00 on a monthly basis.

7. PW1 further indicated that the plaintiff wrote to the defendant asking it to replace the malfunctioning meter. They received a response from the defendant through a letter dated 9th August, 1996 where they were informed that the water meter needed to be serviced or replaced so that the actual water consumption could be ascertained. It was however not replaced but was disconnected in December 1996.

8. PW1 produced plf. exhibits 2(a) to 2(f). He also produced plf. exhibits 3(a) and 3(d), being letters addressed to them from the defendant. He stated that there had been no threats to disconnect the administration block meter. He produced plf. exhibit 4 to show that the bill for the

said meter was paid for in full. He prayed for the orders sought in the plaint to be granted.

9. The defendant called one witness, DW1, by the name Munyi Mugo, an Advocate serving as the Legal Officer at Mombasa Water Supply and Sanitation Company (MOWASCO), the defendant herein. He produced their bundle of documents as def. exhibits 1 (a)-(q). He testified that the plaintiff consumed water which resulted to an adjusted and reconciled bill of Kshs. 1,115,382.00. He stated that the defendant filed a counter-claim with regard to the said amount. He indicated that the bill has been outstanding since 10th December, 1996 and attempts to negotiate with the plaintiff about the payment did not succeed. It was his evidence that the plaintiff still has the premises line (administration block line) and the second line is for a fire hydrant. He admitted that they threatened to disconnect the administration block water meter and that they sealed the fire hydrant one (plant meter).

SUBMISSIONS

10. Mr. Matheka, Learned Counsel for the plaintiff submitted that since the plaintiff is a factory, water is a key element in its operations. It was submitted that the defendant was under obligation to ensure that the meters installed were functional, operational and in good working order through periodic maintenance or when a customer registered a complaint.

11. It was stated that meter reference No. 7765358 became faulty and posted a constant reading of 6990 such that between June 1995 and December 1996, the defendant wrongfully and arbitrarily charged the plaintiff Kshs. 2,104,722.00. It was submitted that the plaintiff continued to pay the defendant the monthly average consumption of Kshs. 1,147.00 per month. Reference was made to the water bills produced by both parties which showed that the estimated meter reading was reflected on the bills as 'EST'.

12. The plaintiff's Counsel challenged the manner in which its water bill for the meter in issue was reconciled and scaled down from Kshs. 2,104,722.00 to Kshs. 1,115,382.00 on 21st August, 2000. He argued that the decision to adjust the amount claimed was unilateral as the plaintiff was not represented at the said meeting. He cited the case of **Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Limited** [2016] eKLR to show that the defendant failed to specifically plead and prove the special damage claim of Kshs. 1,115,382.00.

13. The plaintiff's Counsel submitted that issuance of an injunction was necessary as the defendant had threatened to disconnect water supply to the plaintiff due to an unpaid water bill. He argued that having proved that the amount claimed was not correct, it was necessary to grant an injunction restraining the defendant from disconnecting the plaintiff's water supply line on meter No. 91088737 and/or unlawfully interfering with the plaintiff's water supply on the said meter.

14. Ms Kaguri, Learned Counsel for the defendant submitted that the defendant disconnected the fire extinguisher line (plant meter) and sealed it off after demanding for Kshs. 1,115,382.00 which was not paid by the plaintiff. It was stated that the defendant notified the plaintiff that it would disconnect the said water line until payment in full was made for the outstanding amount of Kshs. 1,115,382.00. It was argued that at all times the meter in issue was in perfect working condition but it was disconnected and sealed when the plaintiff refused to pay the outstanding bills. She stated that the reason advanced to the defendant for non-payment of the water bill was that the plaintiff alleged that the meter was defective. The court was informed that the difference in meter reading in the period running from September 1994 to December 1996 was based on actual water consumption.

15. The Counsel for the defendant submitted that the plant meter water line was a stand by line which was not in constant use which meant that only standing charges were levied but if in use, the meter readings would change depending on the amount of water consumed. It was contended that the line which had a malfunction was the administration block water line, which was replaced.

16. It was further submitted that PW1 in cross-examination stated that at times they would use water from the administration block meter for the plant and they could use the plant meter water line in case of an emergency.

17. Counsel for the defendant cited the case of **Kirugi and Another vs Kabiya and 3 Others** [1987] KLR 347 as cited in the case of **Kenya Power & Lighting Company Ltd. vs Fridah Kageni Julius** [2014] eKLR where the Court of Appeal held that the burden is always on the plaintiff to prove his case on a balance of probabilities even if the case was heard on formal proof.

18. It was submitted for the defendant that the plaintiff had not been able to prove its claim that the plant meter was defective at any point and that the plaintiff used water from the said line for general purposes other than fire extinguishing services. It was contended that the allegation of negligence on the part of the defendant was unproven. Counsel made reference to the case of **Juliana Mulikwa Muindi vs Board of Management Yangua Mixed Secondary School and Another** [2018] eKLR where the court emphasized on the importance of proving facts that have been alleged in pleadings. It was stated that the court in the said case cited with approval the case of **Trust Bank Limited vs Paramount Universal Bank Limited and 2 Others**, Nairobi Milimani HCCC No. 1243 of 2001 where Lessit J stated that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.

19. The defendant's Counsel stated that the plaintiff's failure to pay the amount demanded from it resulted in breach of the agreement for supply of water. The defendant asserted that it had the intention to disconnect the administration block water meter line.

ANALYSIS AND DETERMINATION

20. On 30th June, 2017, the parties hereto filed the following list of agreed issues:-

(a) Which between water meter No. 91088737 and water meter No. 7765358 supplied water to the plaintiff's plant premises?

- (b) Whether water meter No. 7765358 was faulty and if so, whether the water bills for the period between June 1995 and February 1996 were based on estimated water consumption;
- (c) If the answer to issue 2 is in the affirmative, whether the estimated readings for water meter No. 7765358 were excessive and/or exorbitant;
- (d) Whether the plaintiff has been making payments for water consumed through water meter No. 7765358 for the period between the years 1994 and 1996;
- (e) Whether the defendant's demand for Kshs. 1,115,383.00 as water bill arrears in respect of water meter No. 7765358 is illegally justifiable and/or payable;
- (f) Whether the defendant's predecessor was entitled to disconnect water supply on water meter No. 7765358 and whether the defendant is entitled to disconnect water supply on water meter No. 91088737;
- (g) Whether the plaintiff is entitled to the prayers in the amended plaint;
- (h) Who among the parties shall bear the costs of this suit?
- (i) Whether there is breach of contract of water supply by the plaintiff as pleaded in the counter-claim;
- (j) Whether the plaintiff is duly owing a sum for Kshs. 1,115,382.00 to the defendant as pleaded in the counter-claim; and
- (k) Who among the parties shall bear the cost of the counter-claim?

21. As per the averments by the defendant, the account for meter No. 7765358 had been assigned account No. 545/046/2910/0. Meter No. 91088737 had been assigned account No. 545/729/2900/0. The account for meter No. 7765358 later changed to 71-788-29100 and at a later date, it changed to 71-729-291000. The latter meter is the one that forms the subject of this case.

22. As far back as 6th October, 1995, the plaintiff wrote to the defendant contesting the amount charged on account No. 545/046/2910/0, reporting that the meter for the said account was faulty as it was recording the water consumed in an erratic manner. In the said letter the plaintiff indicated that in June 1995, it recorded a water consumption reading of 17,583 resulting in a charge of Kshs. 418,967.00. The letter further stated that as from 15th August, 1995 to 1st October, 1995, the meter reading remained constant with a reading of 072178.

23. The letter dated 6th October, 1995 was followed by another dated 24th October, 1995 whereby the plaintiff requested the defendant to replace the water meter as it was stuck at meter reading 072178. The plaintiff protested against the meter readings given by the defendant's meter reader as 18791 and 19975 for the months of July, and August, 1995.

24. On 2nd November, 1995, the plaintiff wrote to the defendant asking how it had arrived at the total water consumption of 742 cubic meters for the month of September, 1995 as the reading on the bill was blank and the previous meter reading was 19975. The plaintiff further explained that the bill showed in the code column that it was based on "estimated consumption". On 15th November, 1995 the plaintiff wrote a reminder to its previous letters. The said letter questioned how the estimated water consumption of 742 cubic meters was arrived at, since the previous reading given as 19975. The plaintiff indicated that as at that time, the meter was still stuck at the number 072178.

25. In a letter dated 29th December, 1995, the plaintiff challenged the water consumption of 4077 cubic meters and the then meter reading of 24052. The plaintiff informed the defendant that the meter reading was still stuck at 072178. The plaintiff in the said letter noted that the account for water meter No. 776558 had been changed from 545/046/2010/0 to 545/788/2910/0.

26. On 9th August, 1996 the defendant responded to the plaintiff's letter dated 5th August, 1996, which the plaintiff did not produce in evidence. In the said letter, the defendant stated that it would request its sub-area Manager, West Mainland to attend to the matter urgently. He indicated that the water meter needed to be serviced or replaced so that the plaintiff's actual water consumption could be ascertained through meter readings. He indicated that the water meter needed to be serviced or replaced so that the plaintiff's actual water consumption could be ascertained through meter readings.

27. On 15th November, 1999, the defendant demanded payment of Kshs. 2,104,722.00 from the plaintiff. In a subsequent letter dated 21st August, 2000, the defendant demanded Kshs. 1,115,382.00 after it made adjustments to the former water bill.

28. On 4th October, 2000, the plaintiff wrote to the defendant protesting against the amounts being claimed in the said letters. Throughout the duration of the dispute, the plaintiff continued to pay the sum of Kshs. 1,147,00 per month from June 1995 to December, 1996 for water consumption for meter No. 7765358.

29. The defendant relied on a bundle of documents to support its case. It did not produce any documentation to show the correspondence it had with the plaintiff regarding the long drawn claim by the plaintiff that meter No. 7765358 was faulty. It also did not produce any documentation to show how it addressed the allegation made by the plaintiff that it was receiving high charges for consumption of water for meter No. 7765358, yet according to plaintiff, the meter reading had stuck at 072178 for some time. This court notes that the defendant had in the water bills it sent to the plaintiff given different meter readings when according to the plaintiff, the meter reading on site was 072178. The plaintiff therefore regarded the said readings as an estimate.

30. The defendant relied on a letter dated 9th January, 2001 addressed to the plaintiff in which it asserted that the billing was on metered consumption as tabulated until the meter was sealed on site in the year 1996.
31. The defendant further explained that the bill was adjusted from 2,104,72.00 to Kshs. 1,115,382.00 and as such the bill was correct and payable. The defendant produced bills to support its counter-claim as well as a demand letter dated 15th November, 1999 in which it claimed the sum of Kshs. 2,104,722.00. Another demand notice dated 21st August, 2000 for the sum of Kshs. 1,115,382.00 being the adjusted amount was produced. Notices dated 30th May, 2001 and 19th June, 2001 addressed to the plaintiff informing it of impending disconnection of water supply were produced as well.
32. In the defendant's further amended statement of defence and counter-claim filed on 27th April, 2017 the defendant avers that the account numbers for water meter No. 7765358 changed from 545-046-29100 to 545-788-29100 then to 71-788-29100 and finally to 71-729-29100.
33. When DW2 was cross-examined, he stated that the meter readings for meter No. 7765358 were the same for some time as the fire hydrant meter (plant meter) was not being used.
34. It is clear from the evidence of PW1 that water meter No. 7765358 supplied water to the plant and according to DW1, it was the meter for the fire hydrant. Meter No. 91088737 supplied water to the administration block.
35. The court believes the evidence of PW1 that water meter No. 7765358 was faulty and an analysis of the evidence adduced and documents tendered in court prove that the plaintiff wrote to the defendant on several occasions to have the water meter serviced or replaced due to malfunction. The evidence reveals that on two occasions meter readings were stuck at the same number but the defendant sent a bill bearing different meter readings which was at variance with what the plaintiff had observed on site. It is therefore this court's view that due to the foregoing and the malfunctioning of the water meter which was not rectified, the estimated billing for meter No. 7765358 was exorbitant.
36. PW1 adduced evidence that the plaintiff continued to pay for the water consumed and when the meter reading became erratic they paid Kshs. 1,147.00 being an estimate of the water consumed from the meter in question per month between the years 1994 and 1996.
37. In the year 1999, the defendant demanded payment of Kshs. 2,104,722 in a subsequent letter dated 21st September, 2000, the defendant demanded Kshs. 1,115,382. The defendant failed to call evidence to show the measures it put in place to service and/or replace water meter No. 7765358 when the plaintiff complained about it. For the said reason its counter-claim for the sum of Kshs. 1,115,383.00 must fail. I hold that the said claim is unjustifiable. The defendant should have looked for an amicable way to settle the dispute other than by disconnecting and sealing meter No. 7765358. The defendant can in the same breath have no legal right to disconnect water supply to meter No. 91088737, due to this court's finding that the disconnection of meter No. 7765358 was unjustified.
38. The Halsbury's Laws of England, 4th Edition, Volume 17, at paragraphs 13 and 14 describes legal burden in the following words:-
- “13. The legal burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and the contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.***
- 14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. They may therefore be separate burdens in a case with separate issues.”***
39. In **Ann Wambui Ndiritu vs Joseph Kiprono Ropkoi and Another** [2005] 1 EA 34, the Court of Appeal held thus on the legal burden of proof and evidential burden:-
- “As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the Legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 112 of the Act”.***
40. In this case the evidential burden set out in Section 107 of the Evidence Act shifted to the defendant to prove what it did to rectify the faulty water meter. It failed to do so. It is my finding therefore that the plaintiff is entitled to the prayers sought in the amended plaint.
41. The defendant failed to prove the allegations pleaded in the counter-claim and did not even show how the plaintiff tampered with meter No. 7765358. The counter-claim must therefore fail in its totality. I therefore find that there was no breach of contract on the part of the plaintiff for failing to pay the sum of Kshs. 1,115,382.00 which I find is not owing to the defendant.
42. It is the finding of this court therefore that the plaintiff has proved its case on a balance of probabilities but the defendant has failed to prove the counter-claim. I however decline to grant general damages to the plaintiff as justification for such an award was not brought out by the evidence adduced by PW1 on behalf of the plaintiff.
43. The plaintiff's claim as per the amended plaint filed on 22nd March, 2017 is hereby partly allowed. The resultant orders are that:-

(i) A declaration is hereby issued that the water charges claimed by the defendant are arbitrary and without legal and/or contractual basis and as such, they are not payable;

(ii) A declaration is hereby issued that the defendant is not entitled to disconnect the plaintiff's water supply line on meter number 91088737 in respect of which there is no dispute on account of the arbitrary charges levied upon the defendant's account in respect of the plaintiff's purported water consumption on its supply line on meter number 7765358 during the period between June, 1995 and December, 1996;

(iii) An injunction is hereby issued restraining the defendant herein and/or its agents and/or servants and/or employees howsoever from disconnecting the plaintiff's water supply line on its meter number 91088737 and/or unlawfully interfering with the plaintiff's water supply on its meter number 91088737, as long as water charges for the said meter are paid for; and

(iv) Costs of the suit and counter-claim are awarded to the plaintiff.

It is so ordered. The haalburry's Laws fof ERnggland, 4th Edition, volume 17, at paras 13 and 14 describe legal buirfden intthee following words:

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of December, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mathari holding brief for Mr. Matheka for the plaintiff

Ms Kaguri for the defendant

Mr. Oliver Musundi - Court Assistant