



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CIVIL APPEAL NO. 49 OF 2011**

**BETWEEN**

**OCTOPUS (K) LIMITED ..... APPELLANT**

**AND**

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

***(Being an appeal from the Judgment and Decree of Hon. P. C. Biwott, PM at the Principal Magistrates Court at Winam in Civil Case No. 49 of 2011 dated)***

**JUDGMENT**

1. The appellant's case before the subordinate court was that sometime in September 2009, the respondent accused the appellant of tampering with the electric meter. The appellant contended that to obviate the disconnection of its power supply, it was forced to sign a letter dated 19<sup>th</sup> September 2009 ("the Liability Form") in which it admitted tampering with the meter and accepted liability for any undercharge that the respondent would compute during the period the meter was defective. It was only after signing the Liability Form that the respondent replaced the old meter with a new one and continued electricity supply to the appellant's premises. Thereafter the respondent demanded from the appellant about Kshs. 300,000/- being the electricity consumed during the period the meter was tampered with. The appellant sought the following reliefs:

*a. A mandatory injunction compelling the Defendant to reconnect and restore electric power to the plaintiff's suit premises.*

*b. A permanent injunction restraining the Defendant from unlawfully disconnecting or in any way interfering with electric power supply to plaintiff's premises.*

*c. An order declaring the liability forms unconscionable, unlawful and vitiated with duress and coercion hence not binding.*

2. The respondent resisted the appellant's claim by its amended defence and counterclaim. The respondent stated that the disconnection of power to the appellant's premises was lawful as the appellant's account was in arrears of Kshs. 296,089.16/- which it counterclaimed. The respondent contended that the appellant had fraudulently consumed electricity by tampering with the meter and he was therefore liable to pay the amount outstanding amount.

3. The evidence led by the parties followed the contours set out in their pleadings. The appellant's Managing Director, William Roman MacTough (PW 1) testified that after the respondent disconnected power, he went to the respondent's office where he was informed that it would be restored if he paid for a

new meter and signed a Liability Form accepting to pay an average bill based on the appellant's average consumption rather than on actual meter readings for the time the meter was faulty. PW 1 claimed that he was coerced to sign the Liability Form as the respondent had taken away the meter and the business was going to suffer substantial losses if a meter was not installed. PW 1 told the court that shortly thereafter the respondent started issuing threats to disconnect power if the appellant did not pay Kshs. 315,000/-. In April 2000, the respondent disconnected the appellant's power forcing it to file suit and seek interim relief.

4. The respondent's Revenue Protection co-ordinator, Stephen Otieno Awuori (DW 1), testified that on 13<sup>th</sup> November 1999, the respondent's inspectors discovered that the meter installed at the appellant's premises had been tampered with. The respondent installed a new meter and observed its reading for three months following which it issued the appellant with an average bill for the period from 1997 to 1999 amounting to Kshs. 315,000/-. DW 1 told the court that on receipt of the demand to pay, the appellant wrote back complaining that the new meter was moving faster than usual. It thus requested a meter check but before the meter check results were out the appellant filed suit. DW 1 admitted in cross-examination that the appellant had made payments for the bills between October 1997 and September 1999.

5. After hearing the matter, the trial court ordered the appellant to pay the respondent Kshs. 296,089.16/- being the outstanding amount claimed for fraudulent consumption of electricity. The trial magistrate also held that the appellant was harassed by the respondent's servants into signing the Liability Form and because it has a monopoly over power supply, he considered that it was signed under duress hence not binding on the parties. He therefore declared it null and void.

6. The appellant lodged this appeal contesting the judgment entered against as prayed in the counterclaim. In the memorandum of appeal dated 20<sup>th</sup> April 2011, it faulted the trial magistrate for finding that there existed a counterclaim against it despite there being no evidence to support the claim. It further stated that the trial magistrate based his findings on presumptions thereby arriving at a wrong conclusion. The appellant also faulted the trial magistrate for finding that it was not entitled to costs of the suit.

7. When the appeal came up for hearing, the respondent's counsel did not attend court despite having taken the date for hearing of the appeal.

8. Having evaluated the evidence from the trial court, as required of the first appellate court, I find that the evidence is clear that the basis for the appellant's liability on the counterclaim was based on the Liability Form signed by the appellant. Since the trial magistrate declared it null and void, he could not make an award the amount based on it. The two findings are mutually exclusive and constitute an error on the part of the trial magistrate. Since the respondent did not cross-appeal against the finding in favour of the appellant that the Liability Form was null and void, it follows that the appeal must be allowed.

9. As regards the issue of costs, the trial magistrate ordered that each party bear its own costs. Under **section 27** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, the award of costs is within the court's discretion subject to the principle that costs follow the event unless there are good reasons for a successful litigant to be deprived of them (**see *Osapil v Kaddu* [2000]EA 187 and *Karanja v Kabugi and Another* [1976-1985]EA 165**). Since both the appellant and respondent had won and lost in equal measure, the trial magistrate was right to order that each party bear their own costs.

10. I allow the appeal to the extent that the judgment against the appellant for the sum of Kshs. 296,089.16/- is set aside and substituted with an order dismissing the counterclaim with costs to the appellant.

11. I award costs of this appeal to the appellant assessed at Kshs. 25,000/-.

**DATED and DELIVERED at KISUMU this 10<sup>th</sup> day of April 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Odeny instructed by Bruce Odeny and Company Advocates for the appellant.

Kibichy and Company Advocates for the respondent.