



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 12 OF 2011

KENYA POWER LIGHTING CO. LTD.....APPELLANT

VERSUS

SOLOMON NGARE GATOTO.....RESPONDENT

(An appeal from the judgment of Hon. C.W. Ndegwa, Senior Resident Magistrate delivered on 29th December, 2010 in Taveta SRMCC No. 23 of 2008)

JUDGMENT

1. The appellant on 10th February, 2011 filed a memorandum of appeal raising the following grounds of appeal:-

- (i) That the Learned Magistrate erred in law and fact in failing to consider the evidence adduced by the respondent and that of the respondent's witness hence arriving at the wrong decision;
- (ii) That the Learned Magistrate erred in law and in fact in finding that the Statute applicable was the Electricity Act 1997 (sic) (which was repealed) and not the Energy Act, 2006 which came into force on 7th July 2007;
- (iii) That the Learned Magistrate erred in law and in fact in granting Special Damages of Kshs. 186,662.00 to the respondent whereas the amount had not been strictly proved;
- (iv) That the Learned Magistrate erred in law and fact in finding that the respondent had proved his case on a balance of probability as against the appellant;
- (v) That the Learned Magistrate erred in law and in fact in finding that the respondent had suffered loss and damages as a result of disconnection of power supply in violation of the law; and
- (vi) That the Learned Magistrate erred in law and in fact in entering judgment in favour of the respondent and awarding a sum of Kshs.204,336.00 plus costs of the suit.

The appellant prays for:-

- (a) The appeal to be allowed;
- (b) The judgment and decree of the Senior Resident Magistrate's Court delivered on 29th

December, 2010 to be set aside and be substituted with an order dismissing the respondent's suit;

(c) Costs of the appeal to be awarded to the appellant; and

(d) Such other relief as the court may deem fit to grant.

2. Counsel for the parties herein filed their written submissions which they highlighted. Ms. Obura, Learned Counsel for the appellant contended that the Learned Magistrate erred in fact and in law in finding that the Electricity Act (sic) 1997 was applicable yet it had been repealed as the Energy Act came into force on 7th July, 2007. She cited the provisions of section 123 (2) of the Energy Act, 2006 which provide:-

“Notwithstanding the provisions of subsection (1), anything done under the provisions of the Electric Power Act, 1997 or the Minister under the provisions of the Electric Power Act, 1997 and the Petroleum Act before the commencement of this Act shall be deemed to have been done under the provisions of this Act. (Energy Act).”

3. Counsel stated that the Judgment was delivered on 29th October, 2010 and by then, the Energy Act, 2006 was in force. She further submitted that the Magistrate applied the provisions of the wrong statute and arrived at the wrong decision. It was submitted that the Hon. Magistrate held that disconnection of power in the respondent's premises had violated section 63(1) of the Electric Power Act, 1997 which requires 14 days notice to be given and awarded Kshs. 17,674.03. In Ms. Obura's view, this violated the provisions of section 87(1) of the Electric Power Act of 1997 as section 69(1) of the Energy Act was applicable. In asserting her position that the Energy Act, 2006 was not to apply retrospectively, Counsel cited the case of **Patel vs Republic** (1968) EA at p.99 where the court held that whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by legislation.

4. Ms. Obura's position was that special damages though specifically pleaded were not strictly proved. In so stating, she argued that the respondent suffered some loss of tomatoes but was compensated for total loss instead of partial loss. She cited the case of **Hahn vs Singh** [1985] KLR and **Abudi Ali Mahadhi vs Ramadhani Saidi vs Freight Forwarders Limited** [1999] eKLR.

5. Counsel for the appellant contended that the disconnection of power at the respondent's premises was merited as there was an amount of Kshs.17,774.03 which was outstanding arrears for lost units of Energy consumed at the respondent's premises for 6 (six) months when his meter had a malfunction. The respondent acknowledged the said amount in his letter dated 16th May, 2008, and he voluntarily paid the said amount. She asserted that the amount was not illegal pursuant to section 59 of the Energy Act. She prayed for the appeal to be allowed.

6. Mr Busieka, Learned Counsel for the respondent submitted that the general principle of law is that laws apply progressively, not retrospectively. The Energy Act came into force on 7th July, 2007 which was after the event. He made reference to the case of **Patel vs Republic** (supra) which states that if legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested. Counsel submitted that the respondent had a right to electricity and a faulty meter cannot be associated with him. He added that if the court finds that the Energy Act, 2006 applied retrospectively, the issue of a faulty meter should not be visited upon the respondent. He however emphasized that the Energy Act, 2006 cannot apply retrospectively.

7. Counsel further submitted that the respondent stayed without electricity for 5 days hence the appellant ought to have contemplated the loss the respondent would suffer. He stated that the special damages awarded at Kshs.186,662/- was compensatory and Kshs. 17,774.03 was a refund for the amount illegally paid by the respondent. Costs and interest were also awarded.

8. Mr. Busieka contended that the appeal was filed out of time without leave of the court contrary to section 79G of the Civil Procedure Act. He argued that the memorandum of appeal was filed on 10th February, 2011 after delivery of the judgment on 29th December, 2010, thus the appeal was filed 11 days

late. He prayed for the appeal to be dismissed with costs to the respondent.

9. In response to the foregoing, Ms Obura informed the court that Order 50 rule 4 of the Civil Procedure Rules provides for the period when time does not run. This is the period between 21st December every year and 13th January in the year next following both days inclusive, shall be omitted from any computation of time whether under the Civil Procedure Act, the Civil Procedure Rules and any other statute. She submitted that time started running on 14th January, 2011 and as of 10th February, 2011, 28 days had elapsed.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the Energy Act, 2006 or the Electric Power Act, 1997 was applicable in this case; and
- (ii) If special damages were proved.

10. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and arrive at its own independent decision bearing in mind that it neither saw nor heard the witnesses who testified. In the case of **Kenya Ports Authority vs Kustron (Kenya) Limited** [2009] 2 EA 212, the Court of Appeal held *inter alia*, that :-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

11. The plaintiff/respondent, Solomon Ngare Gatoto, adduced evidence before the lower court that his power (electricity) was disconnected on 15th May, 2008 yet he had paid his bill of Kshs. 2,500/= on the 12th May, 2008 as per the receipt produced as pl. exhibit 1. He testified that no other bill had reached him save for that one he had paid. He produced the bill dated 11th April, 2008 as plf. exhibit 2. On making inquiries, he was told that he had arrears of Kshs. 20,000/=. Upon visiting Voi (appellant's office), he was informed that they had included the sum of Kshs. 17,674/= into his bill by mistake. He was told to pay Ksh.3,000/= which he did. He was issued with a receipt which he produced as plf. exhibit 3. They promised to reconnect the power immediately but did not do so until the 20th May, 2008. He was unable to irrigate his tomatoes for lack of power as a result of which 2 acres got damaged. An Agricultural Officer assessed the loss and prepared a report marked as PMFI-4. PW1 testified that he later paid the illegal bill of Kshs.17,647.03. He denied that they replaced the electricity meter. He prayed for compensation for expenses incurred and the losses he made. He also prayed for costs of the suit.

12. On cross-examination, the respondent informed the court that he did not have the bill for Kshs.17,674.03 or recall the person who attended to him in Voi, who advised him to pay and write a letter acknowledging that he will settle the bill. He confirmed writing the letter dated 16th May, 2008 marked as DMFI-1 where he acknowledged owing Kshs. 17,754.03. He denied having received a letter indicating that the meter was faulty and that the letter dated 26th March, 2009, marked as DMFI-2 was ever brought to his attention. On further cross-examination, PW1 stated that in the year 2007, there was a problem with electricity cables which were replaced alongside the meter for his house. He used to pay Kshs.5,000/= to 6.000/= before replacement of the meter. He indicated that he paid Kshs. 2,500/= as he waited for the bill. He agreed that he had not produced receipts to support his travelling expenses in his claim. He indicated that he agreed to pay Kshs. 17,647/= so as to have power reconnected.

13. PW2, the Divisional Agri-business Officer, Bomeni Division, by the name of Ndalai Saidi Mrinji went to do crop assessment in the farm of Ngare Gatoto, PW1. He had 2 acres of tomatoes which had started drying up due to lack of water. There were 13,333 plants of tomatoes. Each tomato was worth

Ksh. 14/=. The total value was Kshs.186,662. He prepared a report to that effect which he produced as plf. exhibit 4.

14. On cross-examination, PW2 stated that the respondent incurred loss but not total loss and if the plants were given water, the remaining flowers would have given fruit. It was possible that the plaintiff could have harvested some tomatoes.

15. On re-examination, PW2 stated that since there was no water, the entire crop was doomed to fail. The figure was a farm assessment of the damage suffered.

16. The defendant/appellant called 2 witnesses. DW1, Jackson Kilolwa testified that he was instructed by his boss, Mr. Ngure on 15th May, 2008 to disconnect the respondent's power supply as the account was in arrears.

17. DW2, Joseph Okoth, the appellant's business head at Voi branch testified that he was aware that the respondent's power was disconnected on 15th May, 2008 after he instructed the supervisor Jones Ngure to disconnect it. He explained that in the year 2006 there were inconsistent readings and subsequently a meter was reported burnt by the Taveta office. The meter was changed on 18th August, 2006 as per defence exhibit 3, form IF 130. They established that the previous meter was not recording properly from October, 2005 to the time it was changed. They wrote to the respondent by way of memo form of their intention to recover the lost units, as per defence exh. 2. They re-billed for 6 months as provided in the Electric Act (sic). It came to a total sum of Ksh.17,674.63. He referred to the respondent's statement which shows how the figure was arrived at as per defence exh. 4.

18. On 16th May, 2008 the respondent went to DW2's office to complain, about disconnection of his (electricity) supply. They discussed the bill and he agreed to pay in instalments. He made a down payment of Ksh. 3,000/= and wrote a letter to the Customer Service Engineer dated 16th May, 2008 acknowledging the bill and he undertook to pay the same in instalments, which he did, as per defence exh. 4. DW2 explained that a faulty meter is neither the fault of the company or a customer and that is why they calculate lost units based on average consumption of six months.

19. I have considered the argument by Mr. Busieka that the appeal herein was filed out of the time stipulated in law. It was not. Ms Obura correctly cited the provisions of Order 50 Rule 4 of the Civil Procedure Rules on when time is deemed to run for purposes of computation of time for amending, delivering or filing of any pleading or the doing of any other act, provided that the rule shall not apply to any application in respect of a temporary injunction. The appeal herein was filed 2 days shy of the 30 days within which an appeal can be filed.

20. In arguing that the provisions of the Energy Act, 2006 were applicable, Ms. Obura cited the provisions of section 123 (2) of the Energy Act, 2006 that stipulate as follows:-

“notwithstanding the provisions of sub-section 1 –

(a) anything done under the provisions of the Electric power Act, 1997 or the Minister under the provisions of the Electric Power Act, 1997 and the petroleum Act before the commencement of this Act shall be deemed to have been done under the provisions Act.

21. In my considered view, the above provisions must be read together with the provisions of section 19 of the Interpretation and General Provisions Act. The said section provides :-

“where any written law, or part of a written law, came or comes into operation on a particular day it shall be deemed to have come or shall come into operation immediately on the expiration of the day next preceding such day.”

22. The issue that gave rise to the disconnection of the power to the respondent's premises arose in the

year 2006 when his meter got burnt. The meter was replaced on 18th August 2006 after they established that the previous meter was not recording properly as from October, 2005. They re-billed the respondent for 6 months to recover lost units. The Energy Act, 2006 came into force on 7th July, 2007. Section 2 of the Interpretation and General Provisions Act applies to the construction or interpretation of all written law save for the Constitution. It therefore follows that actions that happened before the Energy Act, 2006 came into force cannot be governed by the said Act as argued by Ms Obura. This therefore means that the applicable statute to this case was the Electric Power Act, 1997. In his evidence, DW2 did testify that in calculating the amount that was the respondent was to pay as a result of lost units, he applied the period of 6 months as per the provisions of the Electric Power Act.

23. If indeed the Energy Act, 2006 was to apply to the circumstances of this case, then section 59(1) of the Energy Act would come into play. The said section states as follows:-

"Where a meter used to register the quantity of electrical energy supplied by a licensee to any consumer is found to be defective through no fault of the licensee or the consumer, the licensee may, in consultation with the consumer, determine the reasonable quantity of electrical energy supplied and recalculate the charges due to or from the consumer as appropriate for up to a maximum period of six months from the date the meter is established to be defective:

***Provided that if the consumer had reported any suspected defect in the meter and the licensee did not immediately examine the meter, the licensee shall not be entitled to recover from the consumer any charges for more than three months from the date the meter was established to be defective."* (emphasis added).**

24. The evidence on record does not show if the respondent was ever consulted with a view of determining the charges that were due to the appellant arising from the defect in the meter. He was told to settle the bill of Ksh. 17,674.03 without any reference to him. This Court has however held that the Electric Power Act, 1997 was the law applicable in this case. As such, when it came to disconnection of electricity supply to the respondent's premises, the provisions of section 63 (1) of the said Act were applicable. The said provisions state as follows:-

"If any public or local authority, company, person or body of persons neglects to pay any charge for electrical energy or any other sum due from him or them to the licensee in respect of the supply of electrical energy, the licensee may, after giving not less than fourteen days' notice in writing to such authority, company, person or body of persons, and without prejudice to his right to recover such charge or sum, cut off such supply, and for that purpose, may cut or disconnect any electric supply line or other works through which electrical energy may be supplied, and may, until such charge or other sum, together with any expenses incurred by the licensee in cutting off such supply of electrical energy as aforesaid and any lawful charges for or incidental to reconnection, are fully paid, but no longer, discontinue the supply of electrical energy to such authority, company, person or body of persons:

Provided that, where any company, person or body of persons has given to the licensee a deposit as security for payment for the supply of electrical energy, the licensee may at any time while any such charge or other sum remains unpaid after notice as aforesaid:

(i) apply such deposit in or towards payment thereof; or

(ii) discontinue the supply of electrical energy to such company, person or body of persons; or

***(iii) apply such deposit towards payment thereof and if any part of such charge or other sum remains unpaid thereafter discontinue the supply of electrical energy to such company, person or body of persons, until such charge of (sic) other sum together with any expenses incurred in disconnecting such supply and any lawful charges for or incidental to the reconnection thereof have been paid."* (emphasis added).**

25. The respondent testified that he was never notified of the bill and only visited the appellant's offices in Voi after his electricity supply was disconnected on 15th May, 2008 after he had paid a bill of Kshs. 2,500/- to the appellant on 12th May, 2008. That is when he was informed that he had an outstanding bill. This therefore means that the actions of the appellant were contrary to the provisions of section 63(1) of the Electric Power Act, 1997 that required the appellant to give the respondent notice of not less than 14 days in writing before disconnection of electricity supply.

26. Defence exhibit 2 was a notice to the respondent informing him of the appellant's intention to recover lost units. It was dated 26th March, 2008. It gave the respondent 14 days to respond to the said notice. On cross-examination, the respondent stated that the said notice was not brought to his attention.

27. The respondent's electricity was disconnected on 15th May, 2008. On 16th of May, 2008 he acknowledged the outstanding bill which he undertook to pay in three monthly instalments. Power was reconnected on 20th May, 2008. His tomatoes became damaged as a result of lack of water as he required electricity to pump water to irrigate the said tomatoes.

28. Having re-evaluated the evidence herein it is clear that respondent never received notice from the appellant before electricity was disconnected in his premises. He paid Ksh. 3,000 on 16th May, 2008 but that notwithstanding, electricity supply was not reconnected until the 20th May, 2008. He in the process suffered a loss of Ksh. 186,662.00. On re-examination, PW2 stated that the crops suffered a water shortage and the entire crop was doomed to fail. The submissions by Ms. Obura that the respondent suffered partial loss was thus dispelled by PW2 on re-examination.

29. Although the respondent agreed to pay the sum of Kshs. 17,674.03 in the circumstance of this case, I am in agreement, with Mr. Busieka, for the respondent that the said amount should not have been so paid since the appellant did not follow due process in claiming the same from the respondent. On the claim of Ksh 186,662.00, the said amount was strictly proved by the production of the report dated 20th May, 2008 marked as plf. exh. 4. which showed the actual loss suffered by the respondent due to disconnection of electricity supply. I therefore uphold the Judgment entered by the lower court for the sum of Ksh 204,336.00, plus costs and interest from the date of filing of the suit.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 6th day of June, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Layoo holding brief for Ms Obura for the appellant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant