



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 122 OF 2008**

**ROSEMARY VASSAUX .....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING CO. LTD.....DEFENDANTS**

**JUDGMENT**

The Plaintiffs claim in this suit is for special damages in the sum of Ksh. 7,493,300/= being value of the house together with the goods destroyed by the fire.

The sum of Ksh. 39,000/= per month being the rent and security charges the plaintiff is paying for alternative accommodation from the month of April, 2007 to March, 2008 and Ksh. 38,000/= from April 2008 till payment in full.

Alarm services May – December, 2007 Ksh. 5,686 per month.

(1) January, 2008 till payment in full Ksh. 3,384/= per month. General damages for negligence.

It is common ground that the plaintiff is the registered owner of plot number Kwale/Diani/864 Complex whereby she has built a one storey residential house, a store, servants quarter, carport and swimming pool.

On 29th day of March, 2007 the house was gutted down by fire which was attributed to an electrical fault.

A contract had been entered between the plaintiff and the Defendant for the supply of electrical power to her premises.

It is the plaintiffs case that the Defendants negligently allowed an upsurge in power supply, from its supply line into the plaintiffs house hence igniting a fire which completely burnt the plaintiffs house with all its contents and abutments.

The particulars of negligence are that the Defendant negligently installed poor quality electric conduct cables, failed to install power cut-out fuses to prevent fire during power surges, allowing its electric power conductors to clash installing over-head power conductors over makuti roof, failing to prevent the fire from completely burning down the plaintiffs house, responding late to an emergency call

and generally not taking its duties and obligations seriously.

The Defendant in its amended defence denies having installed its supply gadgets from a pole next to the plaintiffs house and supplied the plaintiffs premises with electricity. It further denies having allowed an upsurge in power supply from its supply line into the plaintiffs house hence igniting a fire which completely burnt down the plaintiffs house together with all contents and abutments and if it so happened then it was due to the sole negligence of the plaintiff.

The particulars of sole and or contributory negligence are

- (a) Causing the fire by other means than electricity, that is the use of firewood.
- (b) Installing too many electrical appliances causing over loading and short circuit.
- (c) Leaving electrical cooking appliances on unattended
- (d) Failing to follow instructions while using electrical appliances
- (e) Failing to switch off electricity when required and necessary.

As per the Defendants submissions ultimately what is denied and disputed is the negligence attributed to it as being the cause of the fire that destroyed the plaintiff's premises as well as the particulars of special damages figures put for the value of the house and the goods that were therein.

The plaintiff had testified before Justice Ibrahim (as he then was) and stated of how she purchased one acre of land at Diani Complex and was issued with a title number Kwale/Diani/Complex 864. She constructed a house on the said land. She applied for electricity from the Defendant which was later installed.

She gave the details of the money used for the construction of the said house which totalled to 55,250 Swiss francs. Bank transfer documents were produced in Court as exhibits Number. 3.

She further testified that after occupying the house she noticed power cables move in the wind and touching each other and on 29th August, 2002 she wrote to the Defendant complaining on the issue. She later visited Defendants offices at Ukunda on five occasions to complain but nothing was done.

Thereafter on 29th March, 2007 her house was gutted by fire at about midnight and all the house hold goods were destroyed.

She was given accommodation by a neighbour that night but thereafter she leased a new house for Ksh. 31,000/= per month but owing to insecurity she moved out and rented another one for Ksh. 35,000/= per month. She produced as exhibit 7 a bundle of receipts. A lease document was produced as exhibit number 6.

Augustine Odhiambo (PW2) an insurance claims investigator did carry out investigations as to the cause of fire at the plaintiffs house and compiled a report. It was noted that the cable from the post to the house ought to have been underground but this one was done overhead.

His conclusion was that the fire was due to power surge along the service cable. The burnt KPLC fuse and clashes caused fire on the Makuti roof. He was of the view that the fire damaged the building beyond repair. The same Witness in his evidence concluded that the plaintiff was not negligent. That the fire started from outside as per the night guard's evidence who saw clashes and smoke.

Maina Chege (PW 3) a registered and practicing valuer carried out a valuation of the plaintiffs premises at Ukunda. The land was worth Ksh. 400,000/=. He assessed the total value of the suit premises at Ksh. 5,976,000/= for land and improvements.

On liability. Counsel for the plaintiff Mr. Opolu relies on the authority of **SCOTT –VS- LONDON AND ST. KATHERINE DOCKS CO. 1865 3H & C 596 at 601** where it was held,

***“There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the Defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant that the accident arose from Want of Care”.***

Counsel has also cited the case **LILY WHITE –VS- UNIVERSITY COLLEGE LONDON HOSPITALS NHS TRUST (2005) EWCA CIV 1466** where it was held,

***“Yet where an unexplained accident occurs from a thing under the control of the Defendant and medical or other expert evidence shows that such accidents would not happen if proper Care were used. There is strong evidence of negligence”.***

In the present case there is uncontroverted evidence that there did exist a supply contract for electricity to the plaintiffs house between the Defendant and the plaintiff.

A duty of care flows from that contract. There is evidence from the plaintiff herself that after occupation of her house and installation of electricity she did notice that power cables were moving in the wind and the cables were touching each other and further that she did notice that there was an old pole that was bent. She did write a complaint letter to the Defendant but nothing was done. She followed this with visitations at the Defendants Ukunda offices but to no avail.

Her Witness PW 2 did testify to the effect that upon visiting the plaintiffs premises he found the meter point mounting board missing. Supply line from the pole had been disconnected. He disconnected other cause of the fire like arson, poor installation in this house and concluded that the plaintiff was not negligent and that the fire was not caused from inside but from outside as per the evidence of the night guard and the fact that the fire was due to power surge along the service cable.

I find that the Defendant company failed in its duty of care even after the plaintiff made several warnings orally and in writing. Had it rectified the defects alleged this would have prevented the clashing of cables. It is also noted that the plaintiffs house was roofed with “**Makuti**” which are highly inflammable material. Further that there was no fire extinguishers in the house. I find plaintiffs contributory negligence at 20 % and that of the Defendant at 80%.

On the issue of damages. In the amended plaint the plaintiff seeks special damages in the sum of ksh. 7,493,300/= being the value of the house together with the goods destroyed therein.

A sum of Ksh. 39,000/= per month being rent and security charges for alternative accommodation from April 2007 to March, 2008 and Ksh. 38,000/= from April 2008 till full payment.

(a) Alarm services May – December 2007 Ksh. 5086 per month.

(b) January 2008 till payment in full Ksh. 3,384 per month.

Counsel for the plaintiff submits for Ksh. 11,000,000/= as the current value of the house.

It is trite law that special damages must be specifically pleaded and strictly proved.

The plaintiff seeks special damages of Ksh. 7,494,400/=. In her submission she prays for Ksh. 11,000,000/= as special damages being the current market value of her suit premises.

Her Witness PW 3 did value the suit premises for Ksh. 5,976,000/= for the land plus improvements. I find this figure to be the one strictly proved. The figure of Ksh. 11,000,000/= is speculative and was not

specifically pleaded.

In respect of prayer II. The Court is satisfied that the plaintiffs house was completely razed to the ground and therefore it was necessary to rent alternative accommodation. She did produce rent receipts as exhibits. I find the claim to be justified. It was specifically pleaded and proved.

Rent Ksh. 39,000 x 12 months=Ksh. 468,000/=

Rent Ksh. 38,000 x 12 x 5 =Ksh. 2,280,000/=

Under this prayer a total of Ksh. 2,748,000/= is granted.

Under prayer III falling under alarm services there is no evidence that before her house was gutted down by fire she was enjoying the said services and at any rate no receipts were produced to prove this expense. None will be granted.

As for general damages, they are awarded in the form of a lump sum giving an all assessment of the losses flowing from the tort. An aggrieved party in negligence is not entitled to make a profit out of his misfortune.

Having made a specific claim for the value of all the items lost in the fire, a claim for general damages is untenable.

The claim for general damages does not succeed and disallowed.

The upshot is that Judgment is entered in favour of the plaintiff and against the Defendant for special damages of Ksh. 5,976,000/= prayer one. Prayer two Ksh. 2,748,000/=.

Total Ksh. 8,724,000/= as special damages plus costs and interest in the suit. Liability 80% as against the Defendant and contributory negligence of 20% as against the plaintiff.

**Judgment delivered dated and signed this 1st day of April, 2014.**

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**M. MUYA**

**JUDGE**

**1ST APRIL, 2014**

**In the presence of:-**

**Mrs Kariuki holding brief for Mrs Ngugi for Defendants**

**Court clerk Mr. Musundi**

**M. MUYA**

**JUDGE**

**Mrs Kariuki: We pray for stay of execution for forty five (45) days and certified copies of the Judgment**

**Court: Stay of execution for forty five (45) days granted. Parties to be furnished with copies of the Judgment.**

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**M. MUYA**

**JUDGE**

**1ST APRIL, 2014**