



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 162 of 2007

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

JARED OUMA OWUOCHA RESPONDENT

(Being an appeal from the judgment and decree of Mr. Ezra O. Awino, the Principal Magistrate

in Migori PMCC No.343 of 2004 dated and delivered on 25th July 2007)

JUDGMENT

1. The respondent filed suit against the appellant in the court below seeking the following reliefs:-
 - a) *an order to issue directing the defendant to re-connect the plaintiff's supply of electricity on plot No.46B, at Awendo Market.*
 - b) *Kshs.18,000/= per month with effect from 1st September 2003 till reconnection.*
 - c) *costs.*
 - d) *interest on (a) (b) (c) and (d) above (sic).*
 - e) *Any other relief.*
2. The respondent averred that the Appellant breached the agreement made between the two of them to supply power to the respondent's commercial premises at Awendo, more particularly known as Plot No.46'B' Awendo market within the Republic of Kenya when on or about 14th August 2003, the appellant's employees, servants and/or agents disconnected electricity supply to the respondent's aforesaid premises on account of unpaid bills amounting to Kshs.8,879/10 which amount the respondent serviced promptly and also paid Kshs.384.00 reconnection fee. He averred that despite having paid the outstanding bills together with the demanded reconnection fee of Kshs.384.00, the appellant refused and/or ignored to reconnect the electricity supply and further or in the alternative notwithstanding the respondent's repeated demands the appellant continued to bill and to demand payment of Kshs.4926.00 from the respondent. The respondent averred that as a result of the actions of the appellant as aforesaid, he lost the benefit of the electricity agreement and suffered loss and damage.
3. The appellant entered appearance and filed statement of defence on 14th July 2005. The appellant made a general denial of all of the respondents allegations and in particular denied that the respondent had

suffered the alleged damage or loss or that he suffered any special damage as itemized under paragraph 9 (1) of the plaint. The appellant urged the court below to dismiss the respondent's suit with costs.

4. The suit was heard in the subordinate court and at the conclusion thereof, the trial court found for the respondent and entered judgment accordingly in the following terms:-

- 1) Shs. 450,000/= as loss of earnings;
- 2) Shs.10,000/= general damages;
- 3) the defendant to reconnect power and install meter and bill the plaintiff for the same forthwith;
- 4) interest from the date of this judgment with costs[s] to this suit (sic).

5. The appellant was aggrieved by the said decision of the trial magistrate and has appealed to this court against the said decision on the following 13 grounds:-

1. *The Learned Trial Magistrate erred in both law and infact when he awarded to the Respondent against the Appellant damages in the sum of Kshs.450,000/= as loss of income consequent upon breach of contract to supply electricity when the same had neither been pleaded nor proved at the trial.*

2. *The Learned Trial Magistrate erred in both law and infact when he failed to hold and appreciate that the Respondent, having pleaded and prayed for a sum of Kshs.18,000/= per month until reconnection of electricity to his premises, it was incumbent upon him the Respondent to prove the same, and having failed to do so by evidence, he had no option but to dismiss the suit.*

3. *The Learned Trial Magistrate erred in both law and infact when he plucked a figure of Kshs.10,000= per month from the air and used the same as a basis to award damages to the Respondent against the appellant and without basis and or evidence being led at the trial.*

4. *The Learned Trial Magistrate erred in both law and infact when he failed to appreciate the totality of the evidence led at the trial and to hold that electricity to the Respondent's premises had been disconnected consequent upon the Respondent's admitted failure to settle electricity bills due on his account.*

5. *The Learned Trial Magistrate erred in both law and infact when he failed to appreciate the fact that damages for loss of income are special damages which must not only be pleaded specifically but also strictly proved at the trial.*

6. *The Learned Trial Magistrate erred in both law and infact when he awarded a judgment on the basis of un pleaded issue and which was never at all, canvassed before him at the trial.*

7. *The Learned Trial Magistrate erred in both law and infact when he held but without finding that the Respondent was entitled to damages on a continuing basis up to the time of judgment, in proceeding to award the same at the rate of Kshs.10,000/= per month and a total of Kshs.450,000/= up to and including July 2007 when the plaint was never amended at or before the time of hearing to quantify and claim the same specifically and thereafter strictly prove the same.*

8. *The Learned Trial Magistrate erred in both law and infact when he awarded damages to the Respondent which had not been specifically pleaded.*

9. *The Learned Trial Magistrate erred in both law and infact when he awarded a sum of Kshs.10,000/= as damages for embarrassment allegedly caused to the Respondents and to his business and more so when the same had not been pleaded or proved at the trial.*

10. *The Learned Trial Magistrate erred in both law and infact when he ordered the Appellant to forthwith*

reconnect power to the Respondent's premises, supply and bill for a meter when the same had not been pleaded or made an issue at the trial.

11.The Learned Trial Magistrate erred in both law and infact when he ordered specific performance of a contract that evidently had been terminated.

12.The Learned Trial Magistrate erred in both law and infact when he [failed] to address his mind properly to the issues in dispute led at the trial vis a vis the prayers sought.

13.The Learned Trial Magistrate clearly erred when he failed to dismiss the Respondent's suit with costs.

6. The appellant prays that this appeal be allowed and that the respondent's suit in the court below be dismissed with costs to the appellant. The appellant also prays that the respondent be condemned to pay the costs of this appeal.

7. This appeal proceeded by way of written submissions as agreed by the parties. I have read the same together with the accompanying authorities. I have also carefully read the pleadings filed by the parties herein. I have also read the proceedings in the court below and the judgment of the trial magistrate, as I am required to do as part of a duty imposed upon a first appellate court.

8. The duty of a first appellate court has been well set out by our judicial forefathers and this is that on facts, the first appellate court is bound to analyze the evidence afresh, evaluate it and arrive at its own independent conclusion, but always remembering that the trial court had the advantage of seeing and hearing the witnesses, and therefore seeing their demeanor. The first appellate court must make allowance for this peculiar advantage which only the trial court enjoys. In the case of **Mwangi –vs- Wambugu [1984] KLR 453**, Kneller JA, (as he then was) restated the duty of the first appellate court in the following words appearing at p. 461:-

“This is a first (and only, appeal so this court is obliged to reconsider the evidence assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making due allowance for this: Selle & another –vs- Associated Motor Boat Company Ltd. & others [1968] EA 123, 126 (A-Z) and Williamsons Diamonds Ltd. –vs- Brown [1970] EA 1, 12 CA-T.”

9. In the instant appeal, and considering the totality of the grounds of appeal, the issue for determination is whether on the evidence that was before the trial court, the respondent proved his case against the appellant on a balance of probability and in particular whether he pleaded and specifically proved the special damages.

10. In its submissions dated 24th June 2011 and filed in court on the same day, the appellant merged all the 13 grounds of appeal and contended that at the time of the disconnection of the electricity supply, the respondent owed the appellant substantial amounts of money which had accumulated over time. The respondent testified that he operated a carpentry workshop at Awendo market and that for 3 months, he didnot receive any bills from the appellant and attributed his failure to pay the accumulated bills to the appellant's failure to supply bills during that time. The respondent produced the accumulated bill dated 22nd August 2003 as **P. Exhibit I**. From this bill, it appears that the last payment of Kshs.2000/= was made on 25th July 2003, so that the respondent's allegation that he had not received bills for 3 months was not quite correct.

11. However, after receipt of this **P. Exhibit 1**, the respondent made payments as follows:- Kshs.5000/= on 1st September 2003 as per **P. Exhibit 2** and a further Kshs.3900/= plus reconnection fee of Kshs.348.00/= as per **P. Exhibit 3**. The payments notwithstanding, the appellant did not reconnect the supply, but continued billing the respondent. The appellant contended that the reconnection was not done because the meter was missing.

12. My considered view on this issue is that from the moment the appellant received payment for the accumulated bill, and accepted the reconnection fee required of the respondent, the appellant was under a duty to reconnect the power supply. If that were not so, why would the appellant continue to bill the respondent? Further, if indeed it was true that the meter was missing, it was the duty of the appellant to formally bring this to the attention of the respondent with a view to having the meter fixed so that supply could be resumed. The appellant did not, in any event, adduce any documentary evidence to prove its allegation that the reconnection was not done because the meter was missing from the respondent's commercial premises. It is trite law that he who alleges must prove. Whereas the respondent proved his claims that he had paid the outstanding bill as well as the reconnection fee, thereby becoming entitled to a reconnection, the appellant's allegation that the supply was not reconnected because the meter was missing was not proved. **Section 107 of the Evidence Act, Cap 80 Laws of Kenya** casts this burden on the appellant in the following terms:-

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

13. The duty cast upon the appellant to prove that the reason for non reconnection was the missing meter was inescapable and the trial court could therefore not have found otherwise. I am therefore satisfied that

the trial court was right in making a finding that the appellant failed and/or ignored to reconnect power to the respondent's commercial premises despite the fact that its accumulated bill had been paid and a reconnection fee paid by the respondent.

14. The next issue for determination is whether the trial court was right in awarding the general and special damages. I shall first deal with the award of Kshs.10,000/= general damages. In making this award, the trial court said that:

“For the embarrassment caused to the plaintiff and his business,

I would assess damage at Kshs.10,000/=.”

15. Going back to the plaint however, I do not find anywhere where the respondent asked to be compensated for the embarrassment caused to him and to his business. A court of law can only grant that which a litigant has asked it to grant. In my humble view therefore the award of Kshs.10,000/= as general damages was neither pleaded nor proved and the same was thus unmerited.

16. Now I come to the more troublesome award of Kshs.450,000/= for loss of earnings. According to the appellant, this sum was not deserved since according to the 45 months factored into the judgment i.e from October 2003 to July 2007 was plucked from the air and misconceived because it was clear that the appellant lawfully terminated the contract on 15th March 2005 for nonpayment of replacement of metre fee. On his part the respondent avers that there is clear evidence on record that after the demand letter was written on behalf of the respondent demanding reconnection (the letter dated 8th October 2003 was produced as **P. Exhibit 4**), there was internal communication from one Stephen Mutiso to Evans Anangwe to the following effect:-

“The customer [the respondent] has today paid Kshs.5000/=. I will ask Mr. Okulo to bring the customers meter to your office tomorrow for you to consider him for credit.”

17. Two things emerge from the above communication: one is that as at 1st September 2003, the contract between the respondent and the appellant was still alive and kicking. Two, it is clear that the metre which was alleged to be missing from the respondent's premises was infact in the possession of the appellant, and the appellant was now in the process of returning the metre to facilitate reconnection. What happened

after that? The appellant did not reconnect the power. The court therefore does not accept the appellant's contention that the power was not reconnected because the respondent failed to pay the metre fee and secondly that the contract had been formally terminated on 15th March 2003. There was no evidence by the appellant to that effect.

18. The question that now arises is whether the respondent specifically pleaded and specifically proved the award made to him? In my humble view, the answer is yes. The respondent produced his record book/cash book as **P. Exhibit 7** and the single business permit issued by Awendo Town Council for the period February 2003 to December 2003 as **P. Exhibit 8** as proof of the earnings he lawfully used to make. In arriving at the figure of Kshs.10,000/= instead of Kshs.18,000/= per month, the trial magistrate noted that there were ups and downs in the “**jua kali**” business of furniture workshop.

19. The law is clear that for an appellate court to interfere with the findings of a trial magistrate on quantum of damages, it must be shown that the trial magistrate took into account facts or factors, which he should not have taken into account, or that he failed to take into account matters which he should have taken into account, or that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in making his findings. See generally **Mohammed Jabane –vs- Highstone Tongoi Olenja [1986] 1 KAR; The Administrator, H.H. Aga Khan Platinum Jubilee Hospital –vs- Busan Munyambu – Court of Appeal at Mombasa, [1985] KLR 127** and **Bundi Makube –vs- Joseph Onkoba Nyamuro [1983] KLR 403.**

20. In the instant case, I do not see any reason for this court to interfere with the findings of the trial court on the assessment of special damages in the sum of Kshs.450,000/=. The appeal therefore fails on this ground.

21. The upshot of what I have said above is that this appeal is dismissed on all the grounds except on ground 3 of the Memorandum of Appeal. Accordingly, the judgment and decree of the trial magistrate is sustained save that the award of Kshs.10,000/= general damages is set aside as the same was neither pleaded nor proved. The costs of this appeal shall be paid to the respondent to the extent of $\frac{12}{13}$ while the appellant shall have $\frac{1}{13}$ of the costs.

22. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

23. It is so ordered.

Dated and delivered at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyamurongi for Odhiambo (present) for the Appellant

M/s Abisai & Co. (absent) for the Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.