**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 817 OF 1991**

**POLYCANS LTD ………………………………………… PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING CO LTD……….......….RESPONDENT**

# JUDGMENT

The plaintiff is a limited liability company carrying on the business of manufacturers of plastic containers at its factory situate on plots Nos 157/158, section XIX, Gideon Rimba Road, Mombasa Island. The factory is powered by electricity supplied by the defendant.

In paragraph 3 of the plaint, the plaintiff claims that on 14.3.1990 between 5.30 pm and 7.00 pm there was a sudden interruption in the power supply at the plaintiff's factory without any prior notice. When power resumed between 7.15 pm and 7.30 pm it came in two phases only instead of the usual three phases, resulting in very high voltage exceeding 500 volts. As a result of the high voltage 60 machine contractors of 112 volts were burned out. It took 4 days to replace the damaged contractors.

The plaintiff claims that it was an express or implied term of the contract, between the defendant as the supplier and the plaintiffs as the consumer of the electric power supply that the defendant would supply power to the plaintiff at its factory on the aforesaid plot without any fluctuations, power cuts or disruptions for safety of electric motors and machines at the factory. The plaintiff further contended that the resumption of power supply in two phases with very high voltage was evidence of negligence on the part of the defendant, its servants or agents. It therefore claims damages for the loss that resulted from the damage to the contractors as follows:-

(a) Replacement of damaged motors and machines..... Shs 387,108.85

(b) Loss of profits for 4 days ……………....................... Shs 437,400.00

Total……………………….……………………............…..........Shs 824,508.85

Although in its defence the defendant denied the alleged sudden interruption of supply and negligence on its part and averred that, if any damage was caused to the plaintiff's equipment, it arose from the plaintiff's failure to protect itself against single phasing for which it is supposed to have its own protection, when the suit came up for hearing the defendant conceded through the evidence of Joseph Kinyua Njagi (DW2), its commercial engineer, that there was power interruption at the factory of the plaintiff on the material day which came about when one of the conductors supplying the factory got cut as a result of which the plaintiff's power supply came through two conductors or phases instead of the

usual three. D2 also conceded that the result of an occurrence of the nature that happened at big factory like the plaintiff's would be high voltage.

The breakage of the conductor was attributed by DW2 to corrosion or heavy object coming into contact with the conductor or under link. DW however sought to deny liability on the part of the defendant by saying that the defendant takes measures to prevent corrosion by sending patrols in areas such as Mombasa where complaints of the nature we have before us are common. He however stressed that it was economically impossible to check the thousands of kilometers of electricity network operated by the defendant all over the country. For that reason it was said by David Ferguson Whittle, the other witness for the defendant and whose firm investigated the incident at the request of the defendant that there was no legal obligation on the defendant's part to install protective devices to consumers and that consumers themselves were supposed to provide their own protective devices particularly in the coastal area where power failure occurs (more frequently) due to corrosion and other reasons.

In view of the line of defence taken by the defendant at the trial I think the issues to be determined in this suit can be narrowed to three, namely-

> (a) What were the express and or implied conditions for supply of power by the defendant to the plaintiff; and
>
> (b) Was the power disruption and sudden resumption in two phases with very high voltage in itself sufficient evidence of negligence on the part of the defendant, its servants or agents; and
>
> (c) Were the defendant, its servants or agents negligent in their duty (ie if any) to the plaintiff as alleged?

It is common ground that the damage to the plaintiff's machines was caused by high voltage emanating from a broken conductor or jumper. That breakage resulted in the delivery of power to the plaintiff in two phases instead of the usual 3 phases. The effect according to the experts were unusually high voltage.

The cause of that breakage was either corrosion or weakness in the jumper according to the evidence of the two expert witnesses called by the plaintiff and the defendant namely Donald B Reid (PW1) and M Joseph Kinyua Njagi (DW2). Both witnesses were also in agreement that the breakage occurred over the main supply line which is in the exclusive control of the defendant. There was conflict in the evidence of the two expert witnesses as to what might have caused the high voltage but both were in agreement as to the origin and effect of the occurrence sustained high voltage over the plaintiff's equipment emanating from outside the factory, resulted in damage to the machines.

The defendant's witnesses (DW1 and DW2) testified that the damage caused by the over-voltage could have been prevented by the installation, by the plaintiff, of protective devices but that evidence was controverted by the plaintiff's witness Mr Reid (PW1) whose evidence on the matter was that the plaintiff's installation was in accordance with all current regulations relating to provision of electricity in factories and there was nothing internally wrong. All the protective devices in the factory such as circuit breakers and overload relays were in satisfactory working order, he said.

He further testified that cases of high voltage of the nature that occurred at the plaintiff's factory was not frequent and they should not normally happen if the lines are frequently inspected and maintained. Breakages, he said, occur through corrosion and fair wear and tear. Mr Reid's opinion was that it is not normally possible to provide protection against the type of over-voltage that hit the plaintiff's factory, except by installing very expensive equipment which is not required under current regulations. He added that, in his experience, no factory has any protective devices for contractor coils, which are the equipment that got burned at the plaintiff's factory.

From the above it will be more than clear that the evidence tendered for the plaintiff and that for the defendant is in direct conflict on the crucial question of whether or not the plaintiff is required to install protective devices, to prevent damage by high voltage. On the one hand we have the evidence of Mr Raid

who says that no such protective devices save those which were in place at the plaintiff's factory, are required while on the other we have the evidence of the two witnesses called on behalf of the defendant whose evidence was that the damage could have been prevented by the installation of the devices.

The other conflict in the evidence relates to the question whether or not the high voltage could have been prevented. Regarding this Mr Reid said that frequent inspection and maintenance would have resulted in the discovery of the weaknesses in the lines arising from either corrosion or wear and tear which might have resulted in taking of corrective measures while Mr Njagi said that owing to the distances involved that was not possible. Given that conflict, the equestion arised whom between Mr Reid, on the one hand, and Mr Whittle and Mr Njagi on the other, is to be believed.

Mr Reid is an experienced electrical engineer with over 30 years experience in electrical engineering. He has worked in the UK with an insurance company as an expert in electrical matters and also with the GEC and the Crown Agents. He was the Assistant Chief Electical Engineer with the then East African Harbours for ten years and thereafter was Senior Superintendent Engineer with the JKA for 3 years. He was since his time with the JKA been practising privately as a consultant engineer in Mombasa.

Mr Whittle who gave evidence as defence witness number 1 has no professional qualifications in engineering. He is however a member of the Chartered Insurance Institute and an Associate of the Chartered Institute of Loss Adjusters. He had no personal role in the investigations relating to the occurrence giving rise to these proceedings and apart from the production of the documents prepared by his company in which certain opinion as to the liability of the defendant in this matter were expressed, his evidence on the matter in dispute was largely immaterial.

The second defence witness, Joseph Kinyua Njagi, is an employee of the defendant. He qualified as an electrical engineer in 1981 and has since 1982 worked for the defendant. Thus, virtually all his working and professional experience has been with the defendant. Given that fact, Mr Njagi cannot be expected to be 100% objective in his view of things, particularly where, as in this case, the interest of his employer is involved. His long association with and loyalty to his employer is bound to colour his judgment and even tilt it in favour of the employer. Accordingly where his assessment of the situation is in conflict with that of Mr Reid, who, after seeing him in the witness box, impressed me as an impartial, disinterested and knowledgeable witness, I am inclined to favour the views of the latter.

For the above reasons, with regard to the crucial question whether or not the plaintiff was required by ordinary practice in the industry to install protective devices in his factory, to prevent damage by the type of occurrence that took place at his installation on 14.3.1990, I find the plaintiff was not obliged to install such devices. For the same reasons also, I accept Mr Reid's evidence that the event that caused the high voltage could have been detected and the breakage stopped if the defendant had carried out regular inspections and maintenance of the electricity lines. Indeed in my view, Mr Njagi who is the defendant's commercial engineer in effect conceded negligence on the part of the defendant when in his evidence he said:-

> "Because of the length (of electricity lines) involved we cannot be able to check each and every point but we do check the trouble spots ie where there are problems."

Since the lines are in the exclusive control of the defendant, only the defendant can check and inspect the lines. If it does not do it, it means that the lines are not inspected and the consumer is exposed to danger which could have been prevented if the defendant had done what it is reasonably required to do by virtue of being in exclusive control of the lines.

In the plaint the plaintiff claimed that the power disruption and sudden resumption in two phases with very high voltage was in itself sufficient evidence of negligence on the part of the defendant, its servants or agents. That was in essence a plea of *res ipsa loquitur*.

In the case of *Moore v Fox & Sons* [1956] I All ER 182, (cited by learned counsel for the plaintiff ) the plaintiff's husband was fatally wounded by an explosion when working at the defendant's installation. In

the trial of an action by the deceased widow, it was proved that the explosion was caused by an accumulation of unignited gas due to a failure in the proper functioning of a pilot jet which was used to ignite or co-ignite the burner. It was also proved that the explosion would not have occurred if the machine had been properly maintained and that there was no fault in the gas supply and that the mechanism was such as should not have required overhaul a or before the time of the accident. It was, however, the duty of the defendant's maintenance man to inspect the apparatus weekly and the duty of their foreman to supervise the plaintiff's husband and not to allow him to work the gas apparatus until the foreman was satisfied that he was competent to do so. Neither the foreman nor the maintenance man was called as a witness. It was not contended by the defendants that the plaintiff's husband had been responsible for the accident. It was held:-

> "the plaintiff was entitled to recover damages from the defendants because –
>
> (a) the maxim of *res ipsa loquitur* applied as the plant was under management of the defendants or their servants and the accident was such as in the ordinary course of things would not have happened if proper care had been taken, and (ii) the defendants had failed so to explain the accident as to discharge the onus which was on them to show either that the explosion was due to a specific cause not connoting their negligence or that they used all reasonable care in and about the management of the plant, it being insufficient for the defendants merely to show that the accident could have happened without negligence on their part, and
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> (b) the plaintiff, on the alternative footing that the maxim *res ipsa loquitur* did not apply, had established negligence on the part of the defendants."

Except in a very minor respect, the circumstances of the instant case are on all fours with the cited authority. That exception is that whereas the defendant in the *Moore* case did not contend that the plaintiff's husband had been responsible for the accident, the defendant in the instant case does claim that the plaintiff was somewhat responsible for the damage by failing to install protective devices. I have disposed of that issue by finding that it was not incumbent upon the plaintiff to install such devices. I think the *Moore* case is good authority for basing my finding that the defendant herein, on the facts established, liable to the plaintiff in damages both on the basis of its negligence and or on the principle of *res ipsa loquitur*.

The other English authority cited by Mr Pandya for the plaintiff was the case of *Henderson v H E Jenkins & Sons* [1969] 3 All ER 756. The facts in that case were that:

> "A five- year old lorry was driven down a steep hill by its driver. At one point the brakes failed and the lorry collided with two other vehicles, killed a man and caused other damage. It was subsequently discovered that the pipe carrying brake fluid was badly corroded and the brake failure must have been caused by a large hole in the corroded part of the pipe. The instantaneous development of this hole was very uncommon and would have allowed the driver no warning of the pending brake failure. The appellant sued the driver and his employers, the respondents. In evidence it was shown that neither the vehicle manufacturers nor the Ministry of Transport recommended the removal of the pipe for inspection, although only 60 per cent of it was visible *in situ* and the remainain 40 per cent was particularly prone, by reason of its position, to corrosion. Evidence also established that the degree and speed of corrosion was largely determined by the use to which the vehicle was put. The respondents led no evidence on this subject, however, relying on a plea of latent defect."

It was hed:-

> "the respondents had to prove that, in all the circumstances which they knew or ought to have known, they took all proper steps to avoid damage; they had failed to prove this accordingly the appellant was entitled to damages."

I was also referred to a recent decision of my learned brother Wambilyangah J in the case of *Ferdinanard Wambua Musyimi v Akamba Public Road Services Ltd*. (MSA HCCC No 468 of 1991) in which he restated the condition under which the doctrine of res ispa loquitur applies. These are, if I may repeat them, that :-

(i) the thing that inflicted damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has right to control;

(ii) the occurance of the accident is such that it would not have happened without negligence.

"if those two conditions are satisfied it follows on a balance of probability that the defendant or person for whom he is responsible, must have been negligent." (see *Clark & ludsell on Torts* V 14th Edition para 976 page 596).

I must now apply the above principles to the facts of this case. Briefly the position is that one phase of the defendant's electric supply lines away from its connector and made conduct with an adjacent phase conductor resulting in the delivery to the plaintiff's installation of high voltage current which destroyed the plaintiff's equipment. At the time of the occurrence weather conditions were good and there is no reason to believe that there were any extraneous factors involved. The reason attributed to the breakage was either weakness caused by corrosion or wear and tear of the affected part but neither of the leading witnesss for the plaintiff nor those for the defendant knew exactly what caused the conductor or jumper to break. Mr Njagi the leading witness for the defendant suggested that the high voltage could not have been caused in the manner the plaintiff's witnesses said it happened. But he did not himself offer any explanation for the occurrence. He did however concede that the breakage or whatever it was that caused the high voltage originated from parts of the electricity lines in the sole control of the defendant. He however claimed that the defendant usually sends men on patrol to conduct checks on areas from which complaints of corrosion occur but he did not say with respect to the particular line that broke when any inspection had been made. It was however his contention that it was economically impossible to check all the lines for the effects of corrosion. Since he acknowledged that the Mombasa area was prone to corrosion through salt it was incumbent for the defendant to show that it took special care to ensure that it did not put consumers to risk through breakages and over voltage resulting from corrosion. That no evidence was led to show that any inspections had been carried shows in my view that in fact nothing was done by the defendant to ensure that the lines were risk free. That in my view establishes, on a balance of probability, that the defendant was negligent, for it failed in its duty to consumers, amongst whom the plaintiff is one, to ensure that it did not deliver to it dangerously high voltage currents which would destroy its equipment. In my view therefore the defendant is liable to the plaintiff in damages.

The special damages pleaded in the plaint amounting to Shs 824,528/85 was not challenged by the defendant. There was ample evidence to show that the loss was suffered. I would therefore enter judgment in favour of the plaintiff for that amount.

The plaintiff also claims shs 208,875/55 being damages for loss of interest on the sum of Shs 824,528/85 from the time it notified the defendant of its claim which was 19th March, 1990 till 19th October, 1991 the time this suit was filed. On the authority of *Savannah Travel & Tours Ltd v Highway Ltd*, [1978] KLR 262 I think the claim is sustainable. The interest payable should however be at court rates which at the material time was 12% per annum. Accordingly the total sum payable in respect of interest is:-

Shs 824,528/85 x 19 x 12

12 100 = Shs 156,660.40

There will therefore be judgment for the plaintiff against the defendant a follows:-

(a) the sum of Shs 824,528.85

stated above (b) the sum of Shs 156,660.40

being interest as indicated above

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TOTAL Shs 981,189.25

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(c) Interest on the total sum above at court rates from the date of filing suit till payment in full.

(d) Costs of the suit.

Dated and Delivered at Mombasa this 4th day of May, 1993

**T. MBALUTO**

**……………..**

**JUDGE**