REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E134** OF 2023

VIPRO LIMITED……...……...……...…..……..……1ST APPELLANT

JOHN KAGONYE…….2ND RESPONDENT

-VERSUS-

BRIQTECH SOLUTIONS LIMITED…….....RESPONDENT

(Being an appeal from judgment and decree of the Senior Principal Magistrate's Court at Ruiru (Hon. J.A. Agonda PM) case number E101 of 2022 dated 5th June 2023)

JUDGMENT

The respondent was a tenant of the 1st appellant in go down number 9 on land reference number Ruiru/Kiu Block 2/3757 (hereinafter referred to as 'the premises'). On 20-02-2022, fire broke out near the premises which was put off by Ruiru fire fighters. According to the respondent, during the incident the appellants switched off electricity supply to the premises and failed to restore it for a period of over a month. The respondent claimed that this act caused it to incur business losses and in the plaint dated 24th February 2022, it prayed for the following orders against the appellants;

a. *A mandatory injunction be issued restraining the respondent/defendant whether by their servants, employees and/or agents from interfering with the plaintiff's quiet occupation of the suit premises in any manner whatsoever.*

b. *An order directing the OCPD/OCS Gitongora police station to implement/enforce order (a) above.*

c. *General damages for loss of business.*

d. *Interest on (c) above at the court rate from the date of filing this suit until payment in full.*

e. *Costs of this suit.*

f. *Such further or other relief as this Honourable Court may deem fit to grant.*

The appellants in their defence stated that the power was switched off as a necessity in order to avoid spread of the fire or further damage to the property. The appellants also denied that the respondent suffered any damages and added that the power was switched back immediately after the fire was put out.

After hearing one witness from the respondent and 3 from the appellant, the trial court by judgment dated 5th June 2023 found that the respondent had proved its case on a balance of probabilities and awarded it Kshs 7,000,000.00 for what it referred to as costs to reinstate the loss of business, costs of the suit and interest. It is this judgment that triggered this appeal where the following 9 grounds have been pleaded;

1. ***THAT*** *the learned Magistrate erred in law and in fact by holding that the respondent proved that it lost business worth Kshs. 7,000,000.00 and had tendered evidence to support its claims notwithstanding that:*
   a) *The respondent did not plead the sum of Kshs. 7,000,000.00 as loss of business income anywhere in its pleadings.*

b) *Loss of business income cannot be awarded as general damages since the loss of business claim is a special damage claim which must be specifically pleaded and proved.*

c) *The respondent failed to discharge its burden of proof as it only presented cancelled local purchase orders allegedly amounting to Kshs. 5,900,000.00 yet the said documents did not provide any analysis as to the specific amount the respondent actually lost as business income due to the failure to fulfil the said orders.*

d) *The local purchase order issued by Divena Investments Limited for 200 tons was substantially fulfilled by the respondent who only failed to supply 60 tons.*

e) *The cancellation letter from Eco Charge does not state the number of tons not delivered by the respondent.*

2. ***THAT*** *the learned Magistrate erred in law by awarding the respondent the sum of Kshs 7,000,000.00 for loss of business occasioned by cancellation of purchase orders by the respondent's customers yet the issue of cancellation of purchase orders by the respondent's customers was not pleaded by the respondent in its pleadings.*

3. ***THAT*** *the learned Magistrate erred in law and in fact by entering judgement against the appellants jointly and severally for the sum of Kshs. 7,000,000.00 as costs to reinstate the loss of business yet the respondent did not plead for an award of costs to reinstate the loss of business in the plaint.*

4. ***THAT*** *the learned Magistrate erred in law by holding that the respondent was not negligent whereas the evidence presented by the appellants clearly demonstrated that the subject fire was caused by the respondent's negligence.*

5. ***THAT*** *the learned Magistrate erred in law and fact by finding that the respondent proved its case on a balance of probabilities yet the letters for cancellation of the purchase orders produced by the respondent did not state the value of the goods not delivered by the respondent.*

6. ***THAT*** *the learned Magistrate erred in law and fact by awarding the respondent the sum of Kshs. 7,000,000.00 yet the respondent failed to prove by way of analysis the amount it lost as income had it fulfilled the orders in full.*

7. ***THAT*** *the learned Magistrate erred in law and fact by failing to address herself to all the pleadings filed in the matter and the evidence adduced by the parties.*

8. ***THAT*** *the learned Magistrate erred in law and in fact by placing undue weight to the pleadings and the evidence adduced by the respondent while totally ignoring the pleadings and the evidence adduced by the appellants thereby arriving at a wrong decision.*

9. ***THAT*** *the learned Magistrate erred in law and fact by arriving at a wrong decision considering all the circumstances of the case.*

This is a first appeal. A first appellate court is expected to conduct the appeal as if it were doing a re-hearing where it looks at the evidence of the parties afresh, and evaluates and analyses it and comes to its own independent conclusion but always bearing in mind that it did not take the evidence of the witnesses first hand and did not have the advantage of observing their demeanour and give due allowance for that.

The respondent's case

The respondent's only witness was its director one Martin Mwai Kamau, who told the court that the respondent was seeking damages from the appellant's for interfering with its business calculated up to the lapse of the term of the contract. He stated that on 23-05-2020, the respondent leased the premises from the appellant for a period of five years and four months. The respondent was in compliance with the the terms of the agreement and that on 20-02-2022 fire broke broke out about 50 to 100 metres from the premises.

The witness claimed that the respondent called Ruiru fire department who extinguished the fire in good time and that its employees were involved in fighting the fire even before the fire fighters arrived. He stated further that one Olive Kagonye an employee of the appellants arrived immediately and blamed the respondent for the fire break out and went ahead to disconnected their electricity power supply.

The witness added that he filed a report with Gitongora police station and recorded a statement and that there was no conclusive report from the fire department holding the respondent liable and the disconnection of the power supply was

malicious. He stated further that the appellant's action of disconnecting power caused unprecedented loss of business and income. The action led to withdraw and cancellation of orders by their customers due to the respondent's failure to meet its obligations to the clients. Its failure to meet the obligations was caused by the disconnection.

The witness produced a copy of the lease agreement dated 23-05-2020, copies of rent payment cheques, some photographs, copy of occurrence book entry extract and statement recorded at the police station, copies of LPOS addressed to the respondent and copies of letters withdrawing and cancelling the LPOs.

In cross-examination, the witness stated that he was claiming loss of Kshs 7,000,000.00 but admitted that he had not stated the amount in the plaint. He insisted that the LPOs were cancelled by their customers after the disruption of electricity power supply. He maintained that the power remained disconnected for over a month and admitted that the LPOs and letters from the customer companies cancelling businesses did not bear the signature of the companies sending them. He maintained that they were unable to supply due to power disconnection but admitted that he had not produced an audit report showing loss incurred. He denied that the respondent caused the fire.

Appellant's case

The first witness on the side of the appellants was the 2nd appellant who happens to be a director of the 1st appellant. He stated that the 1st appellant leased the premises to the respondent and added that on 20-02-2022, fire broke out about 50 metres from the premises upon which he called their electrician one Ochieng Awiti

George and advised him to visit the scene of the fire and take the necessary measures to prevent fire from spreading and causing damage.

The 2nd appellant added that George disconnected power supply to the premises and go down 8 to stop the fire from spreading and that he reconnected the power on 22-02-2022. He added that a report from Sterling Loss Assessors & Adjusters attributed the cause of the fire to the operations within the premises since they had dumped their sawdust and timber cuts at the site. He added that the 1st appellant lost wood and timber to the fire.

In cross-examination, the 2nd appellant stated that the fire broke out outside the go down leased to the respondent and admitted that he switched off the power and called an electrician. He stated further that he was not present when the fire broke out but was informed by KK Security and his agents. He added that the power was reconnected after a few days. He blamed the respondent for the fire break out as he was manufacturing charcoal and added that he hired a private investigator who did not involve the respondent in the investigations. He maintained that he was told by the electrician that power was reconnected on 22-02-2022.

The appellant called one Francis Maina Wabita a private investigator working for Sterling Loss Assessors and Adjusters who told the court that he was instructed to investigate the 1st appellant's premises and proceeded to produce his report as an exhibit. He stated further that on the material day, an employee exclusively hired by godown 9 disposed inflammable materials at the site and according to him, the owner of godown 9 was negligent.

When he was cross-examined, he stated that he was licenced to conduct the investigations although he had not attached his education documents to the report. He maintained that the occupant of godown 9 was disposing sawdust waste and timber which was not connected with power breaking out.

DW3 was Ochieng Awiti George who testified that on 20-02-2022, he was called by DW1 who informed him that there was fire in their godowns. He arrived at 12 pm and found fire burning outside godown 9 which was occupied by the respondent and he immediately disconnected electricity power supply serving godown 8 and 9 to stop the fire from spreading and causing further damage. He added that the fire captured 150 meters area around godown 9. He monitored the situation for 3 days and on 22-02-2022 in the morning, he reconnected power supply in presence of Moses Siriswa an employee of the respondent.

He was cross-examined by the counsel for the respondent where he stated that he worked with the 1st appellant as an electrician his duties being to carry out repairs when there were electrical problems. He stated that on the day the fire broke out, which was a Sunday, he was not working but he was instructed to disconnect the power to stop the fire from spreading. He maintained that he disconnected at 4 pm and reconnected on 22-02-2022 in the morning.

Analysis and determination

The appeal was argued by way of written submissions. I have read the submissions of the appellants dated 23-04-2025 and those of the respondent dated 23-06-2025. From my analysis of the submissions, evidence of the parties including the exhibit produced in the trial court, it is clear to me that the following facts are not disputed;

a. The respondent was a tenant of the 1st appellant at the time of the fire incident.
b. The fire broke out outside the premises although the distance from the godown is disputed.
c. The appellants disconnected power supply to the premises although the period it remained disconnected is in dispute.

In its judgement, the trial court framed three issues for determination thus; whether the appellants were in breach of contract, whether the respondent was entitled to orders sought and who should bear the costs of the suit. I find the analysis of the evidence by the trial court having gone the wrong direction. The trial court proceeded as if the appellants had terminated the tenancy or breached a fundamental term of the agreement which led to termination of the tenancy. In my view, that was the wrong approach although it may have resulted to the same conclusion that the appellants violated the respondent's right to quiet possession and created environment that did not allow the respondent to conduct its business.

As observed above, there is no dispute that there was fire outside the premises. The dispute is on the cause of the fire. The appellants argued that the fire was caused by the respondent and the disconnection was a necessity to stop the spreading of the fire. In support of its position that the respondent caused the fire, the appellant produced their own appointed investigator's report dated 9-09-2022. The report does not indicate when the instructions were given or when the investigator visited the scene.

The report indicates that the enquiries were taken from Dorcas Kandenge Onyonyi the caretaker of the premises who was off duty on the day of the incident, Winfred

Nduku Ngei a security guard who was on duty at the time of the incident and an unnamed police investigating officer. None of these people were called as witnesses neither did any tell the investigator how the fire started.

The police did not make any conclusion on the cause of the fire neither was there a report from the Ruiru fire fighters. The appellant's report states that CCTV footage was not provided for the scrutiny. Interestingly, in its conclusion, the same report stated that the CCTV footage from the main gate and gowdon 9 is evident that the cause of the fire was attributed to operations within godown 9. I find this report lacking in integrity and truth. The respondent's employees who were allegedly present at the time of the incident were not involved or asked questions.

The report was generated seven months after the incident. In my opinion, the same was based on assumption and cannot found a positive finding from the court. A court is not bound to accept finding of experts as their evidence is nothing more than an opinion and must be subjected to the test of authenticity and truth. It was held in ***Mamta Peeush Mahajan (Suing on behalf of the estate of the late Peeush Premlal Mahajan) v Yashwant Kumari Mahajan (Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan) (2017) KEHC 2062*** (KLR) that;

> *'It is trite law that a court is not bound by an expert's opinion: see* ***Shah*** **v** ***Shah [2003] 1 EA 290*** *and* ***Kimani*** **v** ***R [2000] 2 EA 417****. It is the court that ultimately assesses the cogency of the expert's evidence in the contextual and factual matrix of the case. The court may reject it if it is not based on sound grounds. As it were,expert evidence is currently also admissible on fairly simple rules of evidence under Section 48 of the*

Evidence Act (Cap 80). This affords the court broad discretionary powers to consider it along other evidence.'

Even if there was truth in the allegations that the fire was caused by the respondent, it would not mean that the appellants were justified in disconnecting electricity power supply for the period it did. The appellants had the duty to demonstrate to the court that their actions were justified in the circumstances. The fire was outside godown 9 and there was no evidence that the same had gotten to appoint of endangering the godown or the others. Of course, it is good and justifiable for a landlord to take precautionary and preventive measures where their property is endangered. But where such an action is taken, the landlord has a duty to restore the premises to useable status once the risk is no longer manifest or likely to arise. The fire was contained and put out in the afternoon of 20-02-2025. The appellant did not in my view show satisfactorily that there was need for the disconnection to continue for days. That said, I hold that the appellants' action was not only in breach of the respondent's right to quiet possession but also unjustified interference with the respondent's business.

The other issue is whether the respondent was entitled to damages and if so, how much. The trial court awarded the respondent a sum of Kshs 7,000,000.00 being what she termed as costs to reinstate the loss of business. The plaint is clear that the respondent did pleaded loss of business income without giving any specific figure. Its witness is also on record stating that the amount was not claimed in the plaint. Loss of business is a special damage claim which must not only be specifically pleaded but also strictly proved. In ***Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko (2006) KECA 130 (KLR),*** the Court of Appeal held that;

> *'The issue of loss of earning capacity was even raised during the submissions of counsel in the superior court. Loss of earning is, as correctly submitted by Mr. Inamdar, a special damage claim and must be pleaded specifically and strictly proved.'*

The respondent has argued that it had lost business and the award by the trial Magistrate is justified going by ywo LPOs from Divena Investment Ltd for Kshs 2,300,000.00 and Eco Charge for Kshs 3,600,000.00. These LPOs are alleged to have been cancelled by the clients due to lack of delivery of the products. There is a letter from Seehlam Investments dated 7-03-2022 canceling a LPO but the LPO was not part of the documents produced. The respondent claimed that it was unable to meet the client's target because of the disconnection of the electricity power supply.

The respondent did not give the court its history or record of production and sales before and after the disconnection of the power supply. There were no books of accounts or financial statements to show how the respondent used to earn. In my view, production of the LPOs and the letters cancelling the orders are not enough proof of quantifiable loss of business. There could have been loss of business but the extent must be proved by production of sufficient evidence.

The LPOs amounted to Kshs 5,900,000.00 and it beats logic that the court awarded Kshs 7,000,000.00 and even assuming that the LPOs value was Kshs 7,000,000.00, the trial court would still not be correct to award the gross sum. This was not profit from the business because in order to fulfil the orders in the LPOS, the respondent was expected in normal circumstances to meet significant costs, like raw materials, power, labour, transport and other attendant overheads.

Loss of business must reflect the net profit that the respondent would have earned from these orders and not the gross value as indicated in the LPOs. The court simply pulled a figure which was not supported by any evidence which contravened the principle of *restitutio in integrum* which is aimed at restoring the affected party to the same position they would have been had the actions by the appellants not occurred.

The argument by the respondent that the appellant had notice of the nature of the claim does not in my view hold water. Special damages are calculable pecuniary loses arising from breach of a right or injury to person or property. The respondent had in the prayers of its plaint asked for general and not special damages and a court of law cannot award what has not been pleaded. The Court of Appeal in rejecting a claim for loss of business in ***Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited (2016) KECA 56 (KLR)*** where proof was insufficient held that;

> *'No evidence whatsoever was led by the appellant on this aspect. This, as we already stated elsewhere, was an abstract figure which was thrown to the court with a mere statement that "this is the loss the appellant has suffered. Please award it to the appellant." In the case of* ***Ryce Motors Ltd & Another vs Muchoki*** ***(1995-98) 2 E. A 363 (CAK)*** *commenting on statements of accounts presented without more as in this case stated, this Court observed;*
>
> > ***"… The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages."***

There was no basis for the court to assess the damages as it did. The same was speculative and conjecture and in the premises, it is my holding that the loss of business was neither specifically pleaded nor proved. The award of Kshs 7,000,000.00 is inevitably set aside.

Having said the above, in particular that there was violation of the respondent's right and going by the equitable principle that there is no wrong without a remedy, I hold that the respondent was entitled to general damages for the interference with his business. I am guided by the holding of the Court of Appeal in the above cited case of ***Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko (2006) KECA 130 (KLR),*** that;

> *'We appreciate the expectation of Mr. Inamdar that accounts books, Income Tax returns or audited accounts would have put the claim beyond doubt if it was specifically pleaded as special damages or even as general damages. But there is dicta in decided cases that a victim does not lose his remedy in damages merely because its quantification is difficult.'*

The appellants claimed that the disconnection lasted for two days while the respondent maintained that it lasted for about three weeks but none of the parties had proof in support of their stand. It is on record is that the respondent came to court on 24-02-2022 at which date it was obvious that the supply had not been restored. That means that the appellant's allegations that the same was restored on 22-02-2024 is not true. What is clear is that by 15-03-2022, power had been restored as the proceedings show the respondent's advocate confirming the restoration without specifying the date it was done.

In the above circumstances and noting that the respondent did not proof the extent of the damage it may have suffered as a result of the interference, the damages this court can award are at large. In my view and discretion, a sum of Kshs 200,000.00 as compensatory damages would adequate to remedy the wrong.

In conclusion, I proceed to give the following orders;

a. Judgment and decree in Ruiru Senior Principal Magistrate's Court civil case number E101 of 2022 dated 5th June 2023 is hereby set aside.

b. Judgment is entered for the respondent (plaintiff in the lower court) against the appellants (defendants in the lower court) jointly and severally for Kshs 200,000.00 (two hundred thousand) in general damages with costs and interest on the principal sum from the date of the trial court's judgment until payment in full.

c. There shall be no orders as to costs of this appeal.

Dated, signed and delivered at Nairobi this **11th** day of **December** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of C.K. Chege for the appellant and Miss Kinuthia for the respondent.