Kenya Power & Lighting Company Limited v Ganjoni Towers Limited (Civil Appeal E162 of 2024) [2024] KECA 1803 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1803 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E162 OF 2024

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

DECEMBER 20, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED ..... APPELLANT

AND

GANJONI TOWERS LIMITED ..... RESPONDENT

(Being appeals from the Judgment and Decree of the High Court of Kenya at Mombasa (Olga Sewe, J.) delivered on 4th August 2023 In H.C.C.C No. 35 of 2018)

JUDGMENT

1. Kenya Power and Lighting Company Limited, the appellant in Civil Appeal No. E162 of 2024 and respondent in Civil Appeal No. E164 of 2024 and Ganjoni Towers Limited, the appellant in Civil Appeal No. E164 of 2024 and respondent in Civil Appeal No. E162 of 2024, lodged their respective appeals to this Court from the judgment and decree of the High Court of Kenya at Mombasa (Olga Sewe, J.) delivered on 4th August 2024 in Mombasa HCCC No. 35 of 2018 (the impugned judgment). Purely for good order and convenience, we will henceforth refer to Kenya Power and Lighting Company Limited as "KPLC" and Ganjoni Towers Limited as "Ganjoni Towers".

2. In the impugned judgment, the learned Judge determined and allowed Ganjoni Towers' claims against KPLC and made various awards in favour of Ganjoni Towers. In its plaint dated 22nd May 2018, Ganjoni Towers prayed for:

    a. special damages in the total sum of Kshs. 44,544,986 on account of alleged destruction of -

        i. its Plot No. 295/XX/MI - Kshs. 40,679,286;

        ii. Plot No. 294/XX/MI - Kshs. 2,662,200;

        iii. Plot No. 56/XXI/MI - Kshs. 34,800; and

iv. Plot No. 423/XX/MI - Kshs. 1,168,700;

b. general damages for negligence;

c. a declaration that the plaintiff was not responsible for the fire on Mombasa/Block XXI/295;

d. an order directing the plaintiff to indemnify the proprietors of Plot No. 294/XX/MI, Plot No. 56/XXI/MI and Plot No. 423/XX/MI in the total sum of Kshs. 3,865,700 as prayed in (a) (ii) to (iv) above;

e. interest on Kshs. 40,679,286 in respect of its Plot No. 295/XX/MI as prayed in (a) (i) above till payment in full; and

f. costs of the suit and interest thereon.

3. Ganjoni Towers' case was that the fire resulting in destruction of its premises and of the three adjacent plots aforesaid was attributable to negligence on the part of KPLC. The particulars of negligence were that KPLC failed to: maintain and service the regulator device on the main intake switch; put precautionary measures in place to control and regulate overload and unstable currents; dispatch an emergency response team to disconnect power supply despite notice of the fire; take precautions to ensure the safety of adjacent buildings; replace and maintain power cables; and to replace and maintain a proper fuse.

4. In its statement of defence dated 7th August 2018 and amended on 14th August 2018, KPLC denied the claim and stated, inter alia: that the cause of the fire was not an electrical fault due to an overload or an unstable current, or the alleged failure of an electric regulator on the main intake switch; that they were not to blame for the fire; that the damage allegedly occasioned to the property was not as a result of their negligence; that the fire broke out within the customer's (Ganjoni Towers) jurisdiction, and that it was caused by their reckless, dangerous, willful and intentional acts and omissions; and that the alleged fire spread rapidly because Ganjoni Towers knowingly and willfully stored highly flammable materials in the premises.

5. According to KPLC, the particulars of negligence attributable to Ganjoni Towers are: "knowingly and intentionally overloading the temporary single phase power supply; failing to ensure that the cables and the wiring within the premises were in good and safe condition; knowingly engaging the services of inexperienced wiring electricians and unqualified electricians; knowingly storing flammable materials within the premises; knowingly failing to report the alleged fire to the defendant's emergency unit as required; knowingly and intentionally using high voltage machinery within the premises and overloading the single phase power supply; failing to report the start of the alleged fire to the Mombasa County Fire Brigade within the shortest possible time; failing to mitigate the spread of the alleged fire; and intentionally, willingly and knowingly causing the alleged fire." In view of the foregoing, KPLC prayed that the suit be struck out or dismissed with costs.

6. In its judgment dated 4th August 2024, the High Court (Olga Sewe, J.) awarded Ganjoni Towers:

a. general damages for negligence in the sum of Kshs.100,000/=;

b. special damages in the sum of Kshs. 30,568,350/=;

c. interest on [a] and [b] above at court rates from the date of judgment until payment in full; and

d. costs of the suit.

7. Aggrieved by the learned Judge's decision, KPLC moved to this Court on appeal in Civil Appeal No. 162 of 2024 on the grounds that the learned Judge erred: in misapprehending the facts and by misdirecting herself on the question as to the cause of the fire incident of 3rd April 2017; in failing to hold that the Plaintiff/Respondent, who alleged to be in possession of documentary records/receipts on expended amounts but failed to produce them in evidence as exhibits, did not specifically prove the special damages pleaded; in failing to draw adverse conclusions on the deliberate failure on the part of the Plaintiff/ Respondent to produce available documentary evidence on the actual amounts expended in support of its claim for special damages as pleaded; in basing her decision to award the sum of Kshs. 30,568,350/- on experts' estimates, notwithstanding the Claimant/Plaintiff's admission that there existed documentary evidence on the actual amounts expended, but which were not tendered/ produced as evidence; in awarding general damages of Kshs. 100,000 to the Plaintiff/Respondent; for failing to appreciate the weight of the uncontradicted defence/Appellant's evidence on record and the inconsistent Respondent's/Plaintiff's evidence; and in failing to dismiss the Plaintiff's case on the basis of the witnesses' contradictory evidence and admissions made in cross examination. They prayed that the appeal be allowed by setting aside the impugned judgment and decree and substitute therefor an order dismissing the case in the High Court with costs to KPLC; and that the costs of its appeal be awarded to KPLC.

8. On its part, and in place of a cross-appeal, Ganjoni Towers lodged a separate appeal, to wit, Civil Appeal No. 164 of 2024 on the grounds that the learned Judge erred in law and fact: in failing to consider that the appellant had prayed for interest on special damages to be awarded from the date of filing suit; in failing to consider that the appellant had expended the amount of special damages prayed for at the time of filing suit; in failing to consider the express testimony of the appellant's witness praying for interest from the date of filing suit; and in failing to exercise her discretion judiciously, thus arriving at the wrong decision. They prayed that their appeal be allowed; that part of the impugned decision which decided that the interest awarded on special damages do run from the date of delivery of judgment be set aside; that, in its place, there be substituted an order that interest on special damages do run from the date of filing suit, to wit, on 22nd May 2018; and that they be awarded costs of their appeal.

9. In support of the appeal by KPLC and in opposition to the appeal by Ganjoni Towers, learned counsel for KPLC M/s. Mogaka Omwenga & Mabeya filed written submissions, a list and summary of cases, all dated 27th March 2024 followed by a further bundle of authorities and summaries dated 13th September 2024 citing a total of nine (9) judicial authorities, which we have taken into consideration. In conclusion, counsel urged us to allow KPLC's appeal No. E162 of 2024 with costs and dismiss Ganjoni Towers' Appeal No. E164 of 2024 with costs.

10. On their part, learned counsel for Ganjoni Towers M/s. J. M. Makau & Company, filed their written submissions, a list of authorities and case digest, all dated 25th April 2024 in support of their clients' appeal and in reply to the submissions made by counsel for KPLC. Learned counsel cited twelve (12) judicial authorities, which we have taken to mind. They urged us to allow Ganjoni Towers' appeal No. E164 with costs as prayed and dismiss KPLC's appeal No. E162 with costs.

11. The two appeals were consolidated and, as first appeals, this Court's mandate applies in equal measure to both as enunciated in Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 thus:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that, this Court must 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 witness and should make

due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

12. This mandate was reiterated by this Court in the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 thus:

> " 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."

13. In discharge of our mandate, we take to mind the timeless caution by the predecessor to this Court in the celebrated case of Peters v Sunday Post Ltd [1958] EA 424 where the Court observed that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

14. In our considered view, the issues that fall for determination in this appeal are:

    (i) whether KPLC was liable in negligence to Ganjoni Towers as claimed in the suit or at all;

    (ii) if the answer in (i) is in the affirmative, whether Ganjoni Towers proved its claim for special damages to the required standard;

    (iii) whether the sums awarded to Ganjoni Towers in general damages holds and, if so, in what amount;

    (iv) whether the sums awarded in the impugned judgment should attract interest from the date of filing suit or from the date of judgment; and (v) what orders ought we to make in determination of this appeal, including orders on costs.

15. On the 1st issue as to whether KPLC was liable to Ganjoni Towers in negligence as alleged or at all, counsel for Ganjoni Towers submitted, inter alia, that:

> " 9. The Respondent produced overwhelming oral and documentary evidence which pointed the cause of the fire was electric and not any other cause. The appellant was totally unable to pinpoint the actual cause of the fire and shied away from stating that it was electric. It was the evidence of ... PW1, PW2 and PW5 ... that all the firefighters had to wait for a considerable time for the appellant to disconnect electricity supply to the building before [the] firefighting exercise could commence. This piece of evidence was corroborated by the appellant's witness, ... DW2 who sent a team from the appellant's office in Mbaraki to disconnect power supply to the Respondent's building and the neighbourhood.

... .

19. The appellant was totally unable to state the cause of the fire and resorted to conjecture, suggesting that there was illegal tapping of power and or that some people were seen smoking in the basement and could have thrown lit cigarette buts on a pile of timber products. None of these allegations were backed by any tangible evidence."

16. To buttress their submissions, counsel cited the cases of Parvin Singh Dhalay v Republic [1997] eKLR for the proposition that

> " when an expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, there cannot be any basis upon which such opinion could ever be rejected"; and M'Iruanji Muchai v Broadways Bakery & Another [1996] eKLR where it was held that "a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

17. In reply, learned counsel for KPLC contended that:

> " 13. .... the respondent's witnesses were unable to agree on whether the fire started from the loads and on which floor; that is [the] basement or ground floor and/ or whether it was from the main switch at the ground floor. The witnesses' contradictions are sufficient to demonstrate that the burden of proof was never discharged and negligence on the part of the appellant was never established....
>
> 14. .... Just because the appellant's herein are the sole suppliers of electricity in the country, that fact alone cannot and should not be used to connote negligence."

18. Counsel relied on the afore-cited case of M'Iruanji Muchai v Broadways Bakery & Another, (supra), submitting that the evidence on record was so contradictory that no logical conclusion as to the cause of the fire could be established. According to counsel, no single particular of negligence was proved against KPLC.

19. On the decisive issue of liability, the learned Judge found KPLC fully liable in negligence and observed that:

> " 44. The Defendant owns and operates the electricity transmission and distribution system in Kenya. It is therefore incumbent upon it to ensure that the said transmission and distribution system is maintained in good condition....
>
> 46. Having found that the defendant was responsible for the over-voltage transmission of power that caused the fire, it is irrefutable that a nexus between the action complained of and the plaintiff's loss has been established; and that the defendant is under a statutory obligation to compensate the Plaintiff."

20. The evidence on record suggests that the parties were substantially in agreement on the cause of the fire that led to the damage complained of. PW2, Elvis Onyango of M/s. Yakub & Associates, an Electrical and Electronic Engineer, who supervised the works at Ganjoni Towers, testified that:

> " From the photographs and the foregoing observations, the cause of the fire was an electrical fault due to overload and unstable current passing through the 16mm2 cable. The integrity of this cable is questionable and appropriate tests should be carried out to confirm its quality for service. K.P.L.C supply mains via this cable should be terminated and new fuses for the meter board be installed."

21. On his part, PW3, J. N. Muraya of Utmost Engineering Consultants, was of the view that:

> " ... due to the effect of heat, smoke, extinguishing water, the concrete and steel elements would undergo carbonation as well as steel corrosion if left unattended. Intervention measures to avoid further deterioration need to be taken which should include re-alkalination by application of various available chemicals including cement slurry to forestall in particular, any effect of carbonation."

22. In his report dated 7th April 2017, PW5 – Harrison Rai Kengo, Former Deputy Chief Fire Officer, Mombasa, concluded that the fire was caused by "failure of an electrical regulator device on the main in- take switch caused by excess power supply from power surge." According to PW5, "class C fire is fire caused from electrical faults .... I could also see that the fire had green flames. The ordinary fire would have red flames. The smell is also different from the other kinds of fire. All the signs of class C fire were visible .... It is true that at the site of Ganjoni Towers there were petroleum products.... They were also empty bags of cement and timber that caught fire and contributed to the overall damage."

23. From the testimonies of PW2, PW3 and PW5, who testified in support of Ganjoni Towers' claims, the witnesses were not in concurrence on what the exact cause of the fire was attributable to. The only points of convergence were that the fire was electrical in nature. According to PW2, the electrical fire was attributable to "... an electrical fault due to overload and unstable current passing through the 16mm2 cable"; that the integrity of that cable was questionable; and that appropriate tests should be carried out to confirm its quality for service. He recommended termination of electrical supply via that cable and installation of new fuses in the meter board.

24. On his part, PW5 was of the opinion that the fire was caused by "failure of an electrical regulator device on the main in-take switch caused by excess power supply from power surge". He observed that

> " ... at the site of Ganjoni Towers there were petroleum products ... empty bags of cement and timber that caught fire and contributed to the overall damage".

25. According to PW3, appropriate measures of intervention were required to arrest carbonation, corrosion and deterioration of the concrete and steel elements due to the effect of heat, smoke and extinguishing water. It is noteworthy that the witness did not express any opinion on the actual cause of the electrical fire.

26. In his report dated 29th August 2017, DW1 – Kigo Kariuki, a Risk Consultant with Safety Surveyor Limited, observed that "... the supply to the building was intact as the meters and cut outs were found intact" ... and that "the cause of the fire still remains unknown". According to him, "... the fire started from the middle of the basement floor and spread ....", but that he was unable to establish the cause. The same view was expressed by DW2 – Ezra Chweya Oyunge, KPLC's Electrical Engineer who, in

his report dated 10th April 2017, stated that "the cause of the fire still remains unknown". Be that as it may, DW2 found that "apart from the indicated interference of the supply cable to the single phase the supply to the building was intact as the meters and cut outs were found to be intact".

27. What DW2 next states in his report is informative. Referring to photographic evidence, he states that "the top photograph is of the single-phase meter .... There was an illegal tapping at this point. There are two small wires which are connected and cut. The cutting was fresh.... It shows it was an illegal tapping of both live and neutral lines". To our mind, the "illegal tapping" from a "single-phase" meter would explain what PW2 viewed as the "electrical fault due to overload and unstable current" to which the electrical fire was evidently attributable.

28. The question that arises from this conclusive finding is whether it was KPLC or Ganjoni Towers who were responsible for the "illegal tapping" and "overload and unstable current" in light of DW2's finding that "... the supply to the building was intact as the meters and cut outs were found to be intact," which, in our considered view, ruled out the possibility of a power surge for which KPLC would ordinarily have been responsible. However, this was not the case. As contended by KPLC, the fire broke out within the Ganjoni Towers domain (on the side of the consumer), and that "... it was caused by their reckless, dangerous, willful and intentional acts and omissions ..."; and that the alleged fire spread rapidly because Ganjoni Towers knowingly and willfully stored highly flammable materials in the premises.

29. In view of the foregoing, and on a balance of probabilities, we find nothing to suggest that KPLC was negligent as claimed or that the electrical fire in issue was attributable to them as claimed. To the contrary, Ganjoni acted in breach of statute law and, accordingly, was the author of its own misfortune. It failed to take reasonable care for their own safety, which caused or contributed to the damage complained of, and which was reasonably foreseeable. As was observed by the Court of Appeal of England and Wales in Lily White v University College London Hospitals NHS Trust (2005) EWCA CIV 1466, "such accidents would not happen if proper care were used". Put differently, they assumed the risk of damage by the illegal tapping aforesaid. The High Court in AAA Growers Ltd v Ann Wambui (Suing as the Administratrix in the Estate of Thomas Wahome Wambui) & another [2016] eKLR explained the doctrine of volenti non fit injuria when it correctly held as follows:

> " It has, however, been held that the question is not whether the injured party consented to run the risk of being hurt, but whether he consented to run that risk at his own expense so that he should bear the loss in the event of an injury; the consent that is relevant is not consent to the risk of injury but the consent to the lack of reasonable care that may produce that risk."

30. To our mind, the burden of taking precautions to avoid the eventuality of a fire resulting from illegal tapping and power overload in contravention of section 64 of the *Energy Act*, 2006 (Repealed) lay squarely on Ganjoni Towers. Moreover, they knew or ought to have known that such damage was likely to occur if reasonable care was not taken, not to mention the likely seriousness of the damage. We form this view mindful of the fact that, gaging from the profile of its witnesses, Ganjoni Towers was ably resourced with architects and electrical engineers whose professional knowhow was at their disposal for timely engagement to avert such a devastating inferno by ensuring strict compliance with section 64 of the 2006 Act, which reads in part:

> 64. Unauthorised, fraudulent or improper supply or use of electrical energy
>
> (1) A person who—
>
> ... ...

c. lays, erects or installs, or permits to be laid, erected or installed, any conductor or apparatus and connects it, or permits it to be connected, with any electric supply line through which electrical energy is supplied by a licensee, without the consent of the licensee; or

d. disconnects, or permits to be disconnected, any conductor or apparatus from any electric supply line belonging to a licensee, without the consent of the licensee; or

e. makes or permits to be made any alteration in his permanent installation without the previous approval of the licensee; or

f. in any case where the quantity of the supply of electrical energy is not ascertained by meter, uses any apparatus or device other than what he has contracted to pay for or uses such apparatus or device at any other time than the time specified and for which he has contracted to pay; or

g. uses the electrical energy supplied to him for other purposes other than the purposes for which it is supplied for; or

h. supplies any other person with any part of the electrical energy supplied to him by the licensee or the permit holder, without the consent of the licensee or the permit holder, commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings, or to a maximum term of imprisonment of one year, or to both.

... .

(3) The existence of artificial or unlawful means for making—

a. connection or disconnection as is referred to in paragraphs (c), (d) and (f) of subsection (1); or

b. making such alteration as is referred to in paragraph (e) of subsection (1); or (c) facilitating such use or supply as referred to in paragraphs (g) and (h) of subsection (1), shall, where the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, be prima facie evidence that such connection or disconnection, alteration, improper use or supply, as the case may be, has been fraudulently, knowingly and willfully caused or permitted by the consumer.

31. The only other question that requires scrutiny is whether KPLC was entirely blameless as asserted in its defence, or whether there was anything that could have been done to prevent the incident. With regard to their response to the fire, PW1 testified that they arrived one hour later while PW5 stated that KPLC arrived twenty (20) minutes later and disconnected power supply to contain the fire, which was raging on account of the highly flammable materials stowed in the basement of the premises.

32. On the other hand, DW2, a KPLC's Electrical Engineer, stated:

> " At about past mid-day, I received [a] 999 call on my number informing me of an incident at Ganjoni Towers .... I dispatched [the] emergency team to the scene. Before that I contacted our Rabai team to disconnect the power. This was done within less than 5 minutes."

33. We are not told how far the KPLC emergency team had to travel to reach the premises or the location at which the electrical power supply was to be disconnected. PW1 states that they took more than an hour while PW5's contradictory evidence suggests that the emergency team arrived about 20 minutes later. DW2' evidence that they were able to disconnect power supply within 5 minutes goes further to suggest that the response was within a reasonable time, and that KPLC cannot be said to have acted negligently in this regard. But what else could they have done?

34. While the record as put to us does not disclose how long the "illegal tapping" that resulted in "overload" was in place before the fire broke out, we fail to see how such tapping from a single-phase meter on such a building could have gone undetected by KPLC, whose officers took meter readings from time to time. We form this view conscious of the fact that such readings were not necessarily taken by electrical engineers who could have easily detected the illegal tapping. In any event, KPLC's duty of care ended with the installation of the meter at the tail-end of its power supply line, and beyond which the consumer took full responsibility as contemplated under the Act. The very fact that KPLC supplies electricity does not, of itself, make them liable for every electrical fire that breaks out without proof of negligence on their part (see Jeremiah Maina Kagema v Kenya Power & Lighting Co. Ltd [2001] eKLR, citing with approval the case of Sellars v Best [1954] 2 All ER 389).

35. In our considered view, Ganjoni Towers did not prove a causal link between KPLC's alleged negligence and their injury. As a general rule, "... the Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable" (see Statpack Industries v James Mbithi Munyao [2005] eKLR). As was held by The House of Lords in Haley v London Electricity Board (1965) AC 778, "[n]egligence requires that fault be proved against the defendant. Proof cannot be implied by the fact that an accident occurred."

36. However, the circumstances of this case and the statutory duties of KPLC are suggestive of a measure of complacency on the part of KPLC for which it was, to some degree, blameworthy on account of failure on the part of its officers to detect the "illegal tapping" when taking meter readings. Consequently, we hereby assess and find that KPLC was 20% negligent, set aside the impugned judgment in this regard and substitute therefor a finding on liability against KPLC in negligence at 20%.

37. As to whether KPLC was liable to Ganjoni Towers in respect of the adjoining properties belonging to third parties, we think not. Indeed, we find nothing to fault the learned Judge for dismissing Ganjoni Towers' claim on their behalf. As correctly observed by the learned Judge:

> " 55. ... the plaintiff pitched a claim on behalf of the proprietors of the adjacent plots, namely:(a) Destruction on Plot No. 294/XX/MI - 2,662,200.00 (b) Destruction on Plot No. 56/XXI/MI - 34,800.00 (c) Destruction on Plot No. 423/XX/MI - 1,168,700.00...
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> 56. The claim was premised on the fact that the plaintiff had received a demand letter from the owner of Plot No. 294/XX/MI for the sum of Kshs. 20,706,000/= and that the owners of the other plots had threatened to sue it for their loss...
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> 57. However, the fact remains that the plaintiff is not the registered owner of those properties; and in the absence of authority to sue on behalf of the registered owners, as is the case, it follows that the suit in that regard is incompetent for lack of locus standi."

38. Turning to the 2nd issue as to whether Ganjoni Towers proved its claim in special damages, learned counsel for Ganjoni Towers contends that the sums claimed were justified.

39. On their part, counsel for KPLC submitted that the amounts claimed in special damages were unmerited as they were not strictly proved.

40. The basis on which the trial court awarded Ganjoni Towers special damages in the sum of Kshs. 30,568,350/= was, first, its finding on liability in negligence against KPLC; and, secondly, on its finding that the amount awarded was founded on estimates, and that it represented "... an accurate picture of the plaintiff's loss." In this regard, the learned Judge had this to say:

> " 48. The plaintiff asked for special damages in the total sum of Kshs. 44,544,986/=, contending that it had to undertake repairs for the damage to the suit property as well as to three neighbouring properties. In respect of the plaintiff's property, it claimed for special damages for the sum of Kshs. 40,609,286/=. The claim was hinged on the estimates provided by the structural engineer (PW3) and quantity surveyor's report as per the evidence of (PW4) and (PW6); and in particular the Site Report by Gichuhi & Associates dated 20th April 2017 (at page 49 to 53 of the plaintiff's Bundle of Documents). Thus, the plaintiff produced no receipts or vouchers to prove actual expenditure incurred on repairs.
>
> 49. Although this approach was faulted by counsel for the defendant, it is instructive that the defendant's own witness, namely DW1, expressly conceded that he visited and inspected the building and carried out his own valuation. In his report dated 25th July 2017, it adjusted the loss to Kshs. 35,068,850/=; such that the only difference between DW1"s estimation and the plaintiff's is the VAT component of Kshs. 5, 610,936/=. It is therefore my considered finding that, other than VAT and the 3 months' delay period accounting for Kshs. 4,500,000/= of the special damages claimed by the plaintiff for the suit property, the rest of the items, even though presented as estimates, represent an accurate picture of the plaintiff's loss."

41. Our re-examination of the evidence on record raised pertinent questions that beg answers as to whether the special damages pleaded by Ganjoni Towers and awarded by the trial court in the sum of Kshs. 30,568,350/= was strictly proved on the required standard. We take note of the learned Judge's finding that "... the plaintiff produced no receipts or vouchers to prove actual expenditure incurred on repairs".

42. We hasten to observe that the evidence in that regard speaks for itself. For instance, when testifying as PW1 on cross-examination at the hearing on 26th October 2021, four-and-a-half years after the fire, Sammy Kamuio Mukuri, a Director of Ganjoni Towers, stated as follows:

> " The construction materials were obtained from Kilifi, Kwale, Nairobi and China. We have the documents and can avail the same if need be. We had to undertake repairs after the fire. We bought some materials in Mombasa, Nairobi and elsewhere .... The receipts and invoices are available and can be produced, if given time
>
> .... Other than the reports by the architect and the quantity surveyor we have not produced any document or receipt to prove expenditures on the repairs after the fire incident .... It is

true that every purchase made by the Company is documented. The building has now been completed and sold to clients ...."

43. Despite express admission by Kamuio that "... every purchase made by the Company is documented"; that they had the documents and "... can avail the same if need be"; that "the receipts and invoices are available and can be produced, if given time ...," the trial court awarded Ganjoni Towers special damages in the face of the admission. Kamuio's statement in conclusion of his testimony lends clarity to the state of the affairs with regard to the requirement to strictly prove special damages specifically pleaded in such a claim as Ganjoni Towers'. As stated by Kamuio, "other than the reports by the architect and the quantity surveyor [they had] not produced any document or receipt to prove expenditures on the repairs after the fire incident ...."

44. While the parties may not have been in contention on the respective reports of their architects and quantity surveyors on the proposed works and estimated costs of repair, such reports amounted to no more than professional, albeit speculative estimates of such repairs. To our mind, such reports cannot be construed as strict proof of such costs, the proof of which lay in Ganjoni Towers' power to produce in evidence, but which they neglected to do to the detriment of their claim for special damages.

45. Drawing a clear distinction between general and special damages, whose rules as to pleading and proof vary, this Court had this to say in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177:

> " The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded." [Emphasis ours]

46. Pronouncing itself on the general rule that has stood the test of time with regard to pleadings and the standard of proof of special damages, this Court in Hahn v Singh [1985] KLR 716 and 721 where the Learned Judges of Appeal - Kneller, Nyarangi, JJA & Chesoni Ag. JA. held thus at P. 717:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves." [Emphasis added]

47. In the same vein, the High Court of Kenya at Chuka in Ombeti & another v Muthuure [2024] KEHC 3377 (KLR) correctly observed:

> " 23. On the award of special damages, it is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court ....
>
> 24. In this regard, Courts have naturally insisted that a party must present actual receipts of payments made to substantiate loss or economic injury." [Emphasis ours]

48. The record as put to us is clear that Ganjoni Towers did not present in evidence any documents or receipts in proof of the actual expenses (if any) incurred in repair and restoration of the property in respect of which special damages were claimed and awarded. In the absence of "strict" proof thereof, we hold, with all due respect, that the learned Judge was at fault in awarding Ganjoni Towers the sum of Kshs. 30,568,350/= on account of special damages.

49. Turning to the 3rd issue as to whether the sum of Kshs. 100,000 awarded to Ganjoni Towers on account of general damages was merited, we hasten to observe that it was and that, subject to our finding on the apportionment of liability between KPLC and Ganjoni Towers, we find nothing to disturb the learned Judge' discretionary award which, to our mind, was neither inordinately high or low to represent an erroneous estimate.

50. We reach this conclusion on the authority of Butt v Khan (1977) 1 KAR where this Court addressed itself to the discretionary nature of awards of general damages and the Court's approach in determination of appeals from such awards, thereby holding as follows:

> " An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...."

51. In the same vein, this Court in Mbogo & Another v Shah [1968] EA 93, this Court (Sir Newbold, P.) stated at p.96 thus:

> " For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

52. In Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730, Kneller J.A. stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango V Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles."

53. Having considered the impugned judgment, the rival submissions and the cited authorities, we find no fault in the learned Judge's decision to award Ganjoni Towers a sum of Kshs. 100,000 in general damages, save that it be reduced to Kshs. 20,000 on account of our finding that Ganjoni Towers was 80% liable for the cause of fire leading to the damage complained of, and that liability in negligence may be apportioned at 20% against KPLC.

54. Turning to the contentious 4th issue raised by Ganjoni Towers in Civil Appeal No. 164 of 2024 as to whether interest on the sums awarded should accrue from the date of filing suit or from the date of

judgment, we hasten to observe that it all depends on the specific prayer in its pleadings by which it is invariably bound. In this regard, clause (e) of Ganjoni Towers' prayers in its plaint dated 22nd May 2018 reads: "interest on (b) above till payment in full". It is indubitable that this prayer does not specify any date from which Ganjoni Towers wished to be awarded interest. In the absence of express pleading in that regard, the effect was to leave it to the trial court's discretion, which we find no reason to disturb.

55. Section 2 of the *Civil Procedure Act*, 2010 defines "pleading" thus:

> " pleading" includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant;"

56. On the essence of pleadings, the Supreme Court of Kenya in Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR found and held as follows:

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings "

57. In the same vein, this Court in Independent Electoral and Boundaries Commission & Ano. v Stephen Mutinda Mule & 3 others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:

> " It is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded....
>
> ...in fact, that the parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

58. This Court underscored the principle that parties are bound by their pleadings in David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR and expressed itself thus:

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the at the trial as each knows the other's case is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expediate the litigation through diminution of delay and expense.

> The court, on its part, is itself bound by the pleadings of the parties. the duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

59. This proposition was also expressed by the former Court of Appeal for Eastern Africa in Gandy v Caspar Air Charters Ltd [1956] 23 EACA, 139 in the following words:

> " [T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given"

60. We pause for a moment to point out that our elucidation of this principle notwithstanding the outcome of the two appeals is nonetheless called for to lend clarity to our findings and set the law straight on the pleading and prayer by Ganjoni Towers with regard to interest and the date from which it applies on the sums awarded.

61. Taking to mind the fact that Ganjoni Towers did not specify in its prayer for interest the date from which such interest should accrue, we find no fault in the learned Judge's decision to award interest from the date of judgment. In the circumstances, Civil Appeal No. E164 of 2024 fails and is hereby dismissed in its entirety.

62. Having carefully considered the record in the two consolidated appeals, the respective grounds on which they were anchored, the rival submissions of learned counsel, the cited authorities and the law, we find that KPLC's Civil Appeal No. E162 of 2024 substantially succeeds, albeit in part, while Ganjoni Towers' Civil Appeal No. E164 of 2024 fails in its entirety. Consequently, we hereby order and direct that:

    a. With respect to liability for negligence, the quantum of general and special damages as well as costs of the suit, the Judgment and Decree of the High Court of Kenya at Mombasa (Olga Sewe, J.) delivered on 4th August 2023 be and is hereby set aside and substituted therefor with the following:

        i. a declaration that Kenya Power & Lighting Company Limited was liable to Ganjoni Towers Limited in negligence to the extent of 20%, while Ganjoni Towers Limited was liable in contributory negligence at 80%.

        ii. an order dismissing Ganjoni Towers' claim for special damages in its entirety;

        iii. an award of the net sum of Kshs. 20,000/= to Ganjoni Towers Limited on account of general damages, taking account of our finding on the degree of liability attributable to Ganjoni Towers in negligence at 80%; and

        iv. an order that Ganjoni Towers Limited do bear 80% of the costs of the suit in the trial court;

b. with regard to the date on which interest accrues on the sums hereby allowed, to wit the date of the impugned judgment, namely on 4th August 2023, the Judgment of Olga Sewe, J. be and is hereby upheld;

c. Ganjoni Towers Limited do bear the costs of Civil Appeal No. E164 of 2024 and 80% of the costs in Civil Appeal No. E162 of 2024.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR