IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 329 OF 2014

BETWEEN

FRIDAH KAGENI JULIUS ……..…….…….. APPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED……. RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (R.E. Aburili, J.) given on 24th September, 2014

in

HCCA. No. 118 of 2010)

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JUDGMENT OF THE COURT

BACKGROUND

1. This is a second appeal from the judgment of A.K. Ndung'u, Senior Principal Magistrate (as he then was), in C.M.C.C. No. 3546 of 2004. The trial court awarded the appellant a sum of Kshs.2,000,000/= as special damages for loss of income on account of the appellant's failure to re-connect electric power supply to the appellant's rental premises situate at Kahawa North. As a result of the failure, the appellant's tenants moved out of her rental premises.

2. The respondent appealed against that decision and the High Court (Aburili, J.) set aside the trial court's judgment. Being aggrieved by that decision, the appellant preferred an appeal to this Court.

THE APPELLANT'S CLAIM BEFORE THE TRIAL COURT

3. In her plaint dated 17th March, 2004, the appellant stated that in September 2002 the respondent accepted to supply electric power to her premises at **Kahawa North, Plot No. F6,** at a consideration of Kshs.227,679/= which she paid.

4. By a letter dated 11th September, 2003 the respondent purported to terminate the power supply contract and made a demand of Kshs.256,889.11 being alleged outstanding bill. However, the amount due was

only Kshs.30,411/= which the appellant paid. That notwithstanding, the respondent failed to reconnect power supply. As a result, the appellant claimed, all her tenants vacated the premises and as at March 2004 when the suit was filed, the appellant had suffered loss of rental income amounting to **Kshs.1,366,000/=** which she claimed from the respondent, including future loss of rent upto the date of reconnection of the power supply.

THE RESPONDENT'S DEFENCE

5. The respondent admitted existence of the power supply contract between the appellant and herself but contended that the appellant had failed, refused and/or neglected to perform her part of the contract by failing to pay her bills in full.

6. The respondent denied the appellant's claim for special damages and put the appellant to strict proof thereof.

THE APPELLANT'S TESTIMONY

7. The appellant, who was living in Ongata Rongai, testified that she owns **plot No. F6 at Githurai – Kimbo, Phase 1,** (the suit premises). Between 1999 and 2002 she put up 46 rental rooms on the said plot. She applied to the respondent for supply of electric power in 2001 and on 24th September, 2002 she was given a quotation of Kshs.227,679/= which she promptly paid, having paid Kshs.227,066/= earlier. The respondent supplied the premises with electric power between December 2004 and January 2005.

8. Subsequently, the appellant received a demand letter for Kshs.259,389/= on account of consumption of electric power at her house in Ongata Rongai, which she disputed. Earlier on, in August 2003, the appellant's father, Julius Murungi, had written to the respondent complaining about the delay in supplying power.

9. On 10th September, 2003 the appellant's advocates had also written a demand letter to the respondent stating that the appellant applied for supply of electric power to the suit premises on 16th March, 2001 but since then the respondent had failed to perform its part of the contract, although the appellant had paid for the supply. The appellant's advocate indicated that all her tenants had vacated the property for lack of power.

10. The appellant further testified that:

> ***"Power was restored in December 2004. I had rented premises in Githurai. Rent was Kshs.2000/= per month. There were 46 rooms. The rooms were occupied. Initially 45 rooms were occupied. When power was disconnected tenants started moving out. Initially there were 43 tenants as at October 2002, November 38, December 21 and by January 2003 there was none upto January, 2005. I got fully occupied in March 2005. I claim loss as a result of this disconnection. I never owed money at the time of disconnection. They never gave me notice of disconnection or even reconnection."***

11. The appellant called her father, Julius Murungi, (PW2) as a witness. PW2 testified that the plot on which the appellant's rental rooms had been erected was registered in his name but he had gifted it to his daughter, the appellant. He further testified that the respondent disconnected power supply on 26th August, 2003, having sent him a demand letter dated 25th August, 2003 for Kshs.266,889.11. However, after a complaint was lodged and investigations conducted, the appellant was required to pay Kshs.30,441/=, which was promptly paid.

12. The respondent chose not to call any witness at all. However, both parties filed their submissions. As already stated, the trial Court found in favour of the appellant and awarded her Kshs.2,000,000/= plus costs and interest, notwithstanding the fact that the appellant had proved a sum of Kshs.2,160,000/=. The trial Court pointed out that the appellant had submitted herself to the pecuniary limit of the court's

jurisdiction, which then was Kshs.2,000,000/=.

THE RESPONDENT'S APPEAL TO THE HIGH COURT

13. In its memorandum of appeal, the respondent contended that the learned magistrate erred in law and fact in finding: that the respondent had breached the power supply contract; that the power supply disconnection was wrongful; that the appellant owned or was beneficially entitled to the rental premises; that the appellant had proved her claim for special damages; in failing to hold that the appellant had failed to mitigate her loss (if any) by rebating any sum found payable to the appellant as reasonable and appropriate; and in entertaining a claim for loss of future income when the same had not been particularized, itemized and reasonable basis laid for the same.

14. The appeal was canvassed by way of written submissions. The learned judge raised five (5) issues for determination as follows:

> *"**(a) Whether there was a contract for supply of electricity between the Appellant and Respondent on premises quoted as Kahawa North Plot F6 as per the application approval and assessment letter dated 24/9/2002.***
>
> ***(b) Whether there was any breach of such contract of supply to plot F6 Kahawa North if at all it existed as admitted by the Appellant in their defence through power disconnection.***
>
> ***(c) Whether the Respondent had any tenants who vacated the suit premises due to power disconnection and whether the Respondent suffered any loss of rental income and/or future income.***
>
> ***(d) Whether the Respondent was entitled to general damages for breach of contract.***
>
> ***(e) Should the Respondent have mitigated her loss if any?"***

15. With regard to the first issue, the learned judge held that the appellant did not prove existence of the power supply contract because she did not produce the signed contract; she did not adduce evidence of payment of the balance of the assessed sum of Kshs.613/= after payment of Kshs.227,066/=; and she did not also demonstrate that she paid Kshs.22,500/= required as deposit for the contract.

16. Further, the appellant did not produce evidence of payment for the 5 metres that she said were supplied for each floor, instead, what was adduced in evidence were bills for 5 accounts on plot no. F6 Githurai Kimbo in the name of Fredrick Nyabuti Mogaka and 12 others and not F6 Kahawa North as per the quotation letter.

17. The Court added that although the existence of power supply contract between the appellant and the respondent had been admitted in the statement of defence, and therefore there was no need to produce it, that admission was in respect of the plot quoted in the plaint, that is, Kahawa North Plot F6. The evidence adduced was in respect of premises on Plot F6 Githurai Kimbo and the nexus between the two plots, if any, had not been shown.

18. The Court concluded that there could be no breach of non-existent contract between the parties.

19. Regarding the third issue, that is, whether the appellant had any tenants who vacated the suit premises due to power disconnection and whether the appellant suffered any loss of rental income and/or future income, the first appellate court held that the appellant failed to call her caretaker to corroborate her evidence on the existence of tenants; when and why they vacated the suit premises. Consequently, the learned judge held that the trial magistrate erred in law and fact in holding that the appellant had proved loss of rental income and future income.

20. The learned judge cited the demand letter that was done by the appellant's advocates to the

respondent on 10th September, 2003 stating, *inter alia*, that since March 2001 when the appellant paid the sum of Kshs.227,679/= the respondent had **"totally failed to connect the power and all her tenants have vacated the premises by reason thereof…"**

21. It was thus clear, the learned judge held, that the claim related to non-connection and not disconnection of power supply to the suit premises.

22. On the issue of general damages for breach of contract, the first appellate court held that it is trite law that general damages cannot be awarded for breach of contract.

23. Lastly, as to whether the appellant should have mitigated her loss, the first appellate court held that she ought to have done so, having demonstrated that she was a person of means.

SECOND APPEAL TO THIS COURT

24. Being aggrieved by the High Court's findings, the appellant preferred a second appeal to this Court. She argued that the learned judge erred in law by finding that there was no contract when the contract had been admitted; by applying a standard of proof that was beyond a balance of probabilities; by dealing with unpleaded issues; by finding that there were no tenants who vacated the suit premises after electricity supply was disconnected; by holding that there was no loss of rental income, loss or damage; by holding that the appellant could have mitigated damages without a pleading thereon or in law; by misapplying the applicable law; and for failing to take into account that the appellant's evidence had not been controverted.

25. The appellant urged this Court to set aside the High Court's judgment and substitute it with an order allowing the appeal and reinstating the trial court's judgment.

26. When the appeal came up for hearing, both Mr. Asiyo and Miss Kariuki, learned counsel for the appellant and the respondent respectively, relied entirely on their written submissions.

27. The appellant's counsel submitted on all the grounds of appeal in an omnibus manner. Regarding the issue as to whether there existed a contract of supply of electricity to the suit premises, the appellant submitted that paragraph 3 of the plaint stated that she had a contract with the respondent for supply of electricity to her premises "**situate within Kahawa North being Plot No. F6".** The respondent admitted that in its defence at paragraph 3. It stated:

> ***"Save that there exists a contract of power supply between the plaintiff and the Defendant, the Defendant deny (sic) the contents of paragraph (sic) 3, 4 and 5 of the plaint….."***

28. It was therefore not open for the Judge to find that there existed no contract between the parties, the appellant submitted, adding that none of the parties raised an issue about the location of plot F6.

29. Regarding the judge's finding that the appellant had not fully complied with the terms set out by the respondent in its letter dated 24th September, 2002, the appellant submitted that a deposit of Kshs.2,500/= had been made for each metre and that is shown in the bills on pages 36 to 55 of the record of appeal. The balance of Kshs.613/= must also have been paid, since the respondent does not supply electricity before payment of installation charges and deposits for metres are made; the appellant contended.

30. In response to the issue of existence of the contract, the respondent submitted that its admission was in respect of the appellant's premises situate within Kahawa North plot No. F6, but at the hearing the appellant's evidence related to her premises in Githurai Kimbo Plot No. F6, which is not the same as Kahawa North Plot No. F6.

31. The respondent further submitted that there was no evidence of payment of the balance of Kshs613/= and Kshs.2,500/= as deposit. The electricity bills that were generated by the respondent and which were

relied upon by the appellant were in the name "Fredrick Nyabuti Mogaka & 12 others."

32. In determining the issue of existence or non-existence of the alleged contract, we note that in the plaint the appellant stated that the respondent agreed to supply electric power to her premises situate "within Kahawa North being Plot No. F6." The respondent in its statement of defence admitted existence of the contract. It is trite law that a fact that is admitted is not a fact in issue and does not therefore require proof.

33. In its letter dated 24th September, 2002, the respondent asked the appellant to state the name the account would be operated under and she gave the name of her husband, Fredrick Nyabuti Mogaka. That account was opened and the bills that were generated by the respondent were in the name Fredrick Nyabuti Mogaka and 12 others and the supply location was shown as F6 Githurai Kimbo. Given that there had been express admission of existence of the electric power supply contract between the parties, we do not think that it was necessary for the appellant to prove that Githurai Kimbo was within Kahawa North.

34. As regards payments for the supply contract, the respondent's letter of 24th September, 2002 indicated that the appellant had paid Kshs.227,066/= and she was required to remit a balance of Kshs.613/= and pay an account deposit of Kshs.2500/=. In her evidence during cross examination, the appellant stated that she paid all the required amount for the supply contract. No contrary evidence was adduced by the respondent. And as for the deposit of Kshs.2500/=, PW2 stated:

> ***"I paid the deposit to Kenya Power & Lighting Company for connection. I was given a receipt. I identify the same. I identify the original contract. I produce the same (receipt Exhibit b). Power was originally supplied and after a time it was disconnected."***

35. As earlier stated, in all the bills that were produced by the appellant it was clear that the deposit of Kshs.2,500/= for each account had been paid.

36. In our view therefore, we are satisfied that there was a contract for supply of electric power between the appellant and the respondent to the suit premises. The learned judge erred in law in making a contrary finding.

37. The next issue is whether there was breach of that contract. In paragraph 4 of the plaint, the appellant stated that by a letter dated 11th September, 2003 the respondent terminated the power supply contract allegedly because there was an outstanding power bill of Kshs.256,889.11, whereas the actual bill was only Kshs.30,411/= which she paid. During the hearing, the appellant testified that together with her father they went to Stima Plaza (the respondent's head office) to make enquiries about the disputed bill.

38. In her cross examination by the respondent's advocates, the appellant stated that the bill of Kshs.30,411/= was paid on 4th April, 2003; that investigations revealed that the disconnection was erroneous and power supply was reconnected in December 2004. However, in February 2008 the respondent debited the appellant's account No. 2347602-01 in respect of her residence at plot No. 26038 Ongata Rongai with the exact sum that had wrongfully been demanded in respect of their suit premises at Githurai Kimbo. The appellant tendered in evidence Electricity Bill dated 16/02/2008 for her house at Rongai showing a debit of Kshs.256,889.11 done on 24/01/2008 bearing the words **"DEBIT AFTER REBILLING".** It was not clear why that was done, nearly four (4) years after the appellant filed the suit and power supply reconnected.

39. The trial court held that the respondent disconnected power supply "for non-payment of sums which they acknowledged later was erroneously demanded." It has to be recalled that the respondent chose not to offer any evidence to justify the disconnection.

We do not therefore agree with the findings by the learned judge that there was no breach of the power supply contract as no such contract existed in the first palace. The appellant had, on a balance of

probabilities, proved existence of the contract and its breach by the respondent.

40. We now turn to consider whether any tenants vacated the appellant's premises due to disconnection of power supply and if so, whether the appellant proved that she suffered any loss of rental income or future income.

41. From the evidence on record, power supply was disconnected on 26th August, 2003. The appellant testified that **"when power was disconnected tenants started moving out. Initially there were 43 tenants as at October 2002, November 38, December 21 and by January 2003 there were none up to January 2005. It got fully occupied in March 2005."**

The appellant said that power supply was reconnected in December, 2004.

42. The appellant testified that the block had 46 rooms; 45 of them were reoccupied and the monthly rent for each room was Kshs.2,000/=. She neither supplied the particulars of those tenants nor any evidence as to the amount of rent they were paying. She merely stated that **"the caretaker is there to confirm the tenants".** However, the caretaker was not called as a witness.

PW2 testified that there were 45 rooms in total and all the tenants moved out after the power cut. He was unable to recall the date when supply was re-connected.

43. In paragraph 5 of the plaint, the appellant had pleaded that:

> *"**5. The defendant has totally failed to supply the power as per contract and all she plaintiff's tenants have left the premises and the plaintiff has lost rental income of Shs.1,366,000/= as at March, 2004 and claims the same from the defendant and also claims future loss of rent from the defendant upto the time it restalls the supply to her premises."***

Did the appellant actually prove that loss plus the claim for future rent, all amounting to Kshs.2,160,000/= as found by the trial court, although it capped it at Kshs. 2 million in accordance with its pecuniary jurisdiction?

44. The learned judge held that "the learned magistrate erred in law and fact in holding that the Respondent had proved loss of rental income and future income in the absence of evidence that the 45 tenants occupied the premises, vacated as a result of the disconnection and as to how much they were paying the Respondent."

45. We think the learned judge was right in arriving at that conclusion. Firstly, the appellant's evidence was not consistent with her pleadings. For example, she said that by January 2003 upto January 2005 she had no tenants at all, yet she said that the disconnection was in August 2003 and in December 2004 supply resumed. Secondly, the appellant did not prove that she had tenants at all, and if so, the amount of rent they were paying.

46. The caretaker who would have provided such information was not called as a witness. The appellant did not produce the rent book or a receipt book showing payments of rent in respect of the suit premises.

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

The appellant did not discharge that burden of proof. See this Court's decision in **MOHAMMED ALI & ANOTHER v SAGOO RADIATORS LIMITED [2013] eKLR.**

47. Even in cases where the defendant does not adduce any evidence and only formal proof is done, the plaintiff must still prove a claim of special damages to the acceptable standard of proof.

48. In **RATCLIFFE v EVANS (1892) 2QB 524, Bowen LJ said at pages**

532 & 533:

> ***"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax and old and intelligible principles. To insist upon more would be vain pedantry".***

49. The appellant failed to prove that the alleged departure of her tenants was caused by disconnection of power supply since a number of them had moved out long before the disconnection; also failed to prove the amount of rent that she was collecting; and actual loss of the same as a result of disconnection of the power supply.

50. For the foregoing reasons, this appeal must fail and it is so ordered. Each party shall bear their own costs of the appeal as well as costs of the lower courts' proceedings.

Dated and Delivered at Nairobi this 23rd day of June, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIrb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR