REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MAKHANDIA, OUKO &M'INOTI, JJ.A)

CIVIL APPEAL NO. 189 OF 2014

BETWEEN

CAPITAL FISH KENYA LIMITED ………………………….……………….………. APPELLANT

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED …....................................... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi dated 23rd January, 2012 and delivered by Hon. Justice Hatari Waweruon behalf of Hon. J. W. Mwera

in

H.C.C. C. No. 369 of 1998)

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JUDGMENT OF THE COURT

In the amended plaint dated 16th March, 2007 the appellant claimed that it owned a fish processing plant located on the shores of Lake Victoria in Homa Bay town. In pursuit of its trade it had installed state of the art machinery and or equipment at the said plant to ensure quality products for both local consumption and export. The machinery required constant supply of electricity for optimum production. Towards this end on 16th July, 1992 it entered into an electricity power supply agreement with the respondent to supply 315 KVA. This demand necessitated the upgrading of the respondent's 11 KVA line to Homa Bay by installing a 315 KVA transformer to provide the required operational voltage to cater for the appellant's needs. According to the appellant this was necessary as a safety measure to avoid overloading the transformer. However it was alleged that the respondent did not honour its part of the bargain.

In 1993, again though the respondent agreed to provide additional 35 KVA to the appellant thereby increasing the voltage to 350 KVA, the respondent failed to upgrade the 315 KVA transformer to cater for the added load. Due to these acts, the appellant asserts, the respondent was negligent and as a result

caused an overload to the transformer with the consequence that its machinery valued at Kshs.4,814,452/= was damaged. This in turn led to scaled down productivity. Added to this was also the cost for a parallel generator that the appellant was compelled to install to ameliorate the situation.

On or about 20th April, 2004 the appellant sought for an additional 600 KVA supply from the respondent which it readily acceded to on or about 25th May, 1994 and demanded payment of Kshs.1,805,575/=. At this point the appellant was entitled to an aggregate of 950 KVA of electricity power. However the respondent instead installed a 603 KVA which again was inadequate to the appellant's needs. As a result of the inadequacy the appellant's motors to the water pump, cooling fan and compressor were all burnt. Appreciating its omission, the respondents,

according to the appellant, installed 1000 KVA in 1998 without consulting the appellant, thereby resolving once and for all the problem.

The foregoing notwithstanding the respondent all along knew that the supply of under-voltage power could and did cause damage to the appellant's machinery, equipment, and occasioned loss of production as well as business. Accordingly, between 1996 and 1997, the loss suffered by the appellant was computed in these terms:-

i. Loss due to reduced fish production from 3268 tons in 1996 to 2855 loss in 1997	12,850,000.00
ii. Reduced production and loss of fish	12,150,972.00
iii. Importation and installation of 2 stabilizers	7,500,000.00
iv. Fish exported but was condemned	6,300,000.00
v. Breakdown of machinery and repairs	4,814,452.00
vi. Fuel costs to run the generator	3,614,326.00

How did the appellant hope to be compensated for the above losses?

This is what it prayed for in the amended plaint.

i. Specific performance

ii. Special damages

iii. General damages

iv. Costs

v. Interest

Reacting to the above claims, the respondent through the re-amended defence, while admitting that indeed there was an agreement between the appellant and respondent for the latter to supply 560 KVA with a transformer of 630 KVA, denied that the appellant informed it that it required continuous supply of electricity power and further that the agreement was based on such an undertaking. That if anything, the agreement was anchored on the **Electric Power Act** and the **1953 By-laws**. It denied breach of the agreement, the alleged damage to the appellant's machinery and the resultant loss. The respondent went on to state that even if there was breach, damages did not lie. That further the appellant had been overloading the 630 KVA transformer resulting in the break down. In the premises, it pleaded that the appellant was the author of its own misfortune and in the circumstances the loss or damage suffered by

the appellant if at all could not be made good by the respondent.

In support of the claim, the appellant called two witnesses; **Alex Trachtenberg (PW 1)**, its then manager and **Gabriel Wasonga Jabong'o (PW 2)**, a registered electrical engineer. Their evidence buttressed the averments in the plaint. In a nutshell their evidence was that the appellant's plant had machines like ice machines, plate freezers, cold rooms, and chillers which use heavy compressors and for their optimum use, required 1000 KVA voltage. However, the initial contract entered into in 1992 was for the supply of 315 KVA. On 1st September, 1993 an application to increase the voltage by 35 KVA was made by the appellant. The appellant expected to get 415 volts of power but only 300 to 400 volts were supplied which led to under-voltage with consequence that there was constant power failures in the plant with attendant damage to and destruction of some of the machines. To mitigate the loss, the appellant had to buy and install two generators with fuel costs to contend with. Further the use of the generators had the effect of reducing productivity. Though the appellant severally protested to the respondent and the respondent acknowledged the problem, it did nothing despite several promises to investigate and take remedial measures. A bundle of documents showing the damage and loss incurred by the appellant as a result were tendered in evidence. As an example of their loss in exports the appellant referred to what transpired in Israel on 24th December, 1997. That on that day, it was certified from Israel where the appellant had exported 100 tons of fish that the fish was bad and had to be destroyed. To the appellant the fish was damaged because of low power supply, thereby providing inadequate freezing. They testified that overdrawing power with a transformer of a lesser rating results in motors not functioning, while a protection mechanism may lead to tripping. That if the transformer is of a lower capacity than the supply, it will blow up due to overloading and the machinery without protection will be damaged. Designers of equipment are the ones who may incorporate equipment to protect machinery from power fluctuations. They further testified that transformers must be such as can bear the supply required. On the whole however, the appellant confirmed that its claim was based on a contract with the respondent which it alleged the respondent breached due to the aforesaid circumstances and sought damages detailed elsewhere in this judgment.

On its part, the respondent called four witnesses; **Dandi Gaya Unande (DW 1)**, a senior technician, **Francis Maina Waiganjo (DW 2)**, **Eng. Joseph Wafula Masibo (DW 3)** a chief engineer and **John Onyancha Ochenge (DW 4)**, a technician. Put in perspective their evidence was to the effect that the appellant had 360 KVA power supply and hence the required transformer should have been within that capacity. The consumption at times exceeded the limit in particular when the appellant increased its machines, thereby drawing more power. When that happened the transformer would cease to function resulting in ablack out. To the respondent, the appellant's demand exceeded the supply of 360 KVA between the years 1997 and 2001. At one time there was a general countrywide power shortage resulting in respondent's inability to give the contracted power supply to the appellant. Otherwise the damage and loss suffered by the appellant, if at all, were as a result of power fluctuation due to the appellant exceeding its power limit.

They further testified that at some point, the appellant's equipment were faulty which meant that more power was being drawn but not used yet the equipment was installed by the appellant. The drawing of more power than signed for, it resulted in overloading the system due to power under-voltage and as a result some machines would not work and others would blow up. The power factor equipment on the premises of the appellant did not have protection for under-voltage relay. Such protection would stem damage to equipment in the event of under-voltage supply. It was for the appellant to install such gadget but did not. They further testified that on 22nd October, 1997 a fire broke out at the appellant's factory due to short circuiting in the metering panel where rats had damaged the wires. Further a report made on 2nd September, 1998 disclosed that the transformer was being overloaded. It was drawing more power than the authorized 560 KVA while the transformer was 630 KVA. Assessment and measurement even revealed that the appellant was in fact taking 800 KVA. The transformer was therefore condemned to fail unless a bigger one was installed. Accordingly, the respondent installed 1000 KVA transformer to save the appellant's plant and the problem was thus eased.

In a judgment crafted by Mwera, J but delivered on his behalf by Waweru, J on 23rd January, 2012, the

judge found against the appellant holding thus:-

> ***"…The court was told that in the event of a consumer exceeding the consumption over and above the contracted supply the above provisions apply and the defendant ought to discontinue the supply. DW 2 conceded that he was aware of this but the defendant did not invoke this power even as it had reports/claims that the plaintiff was overloading the transformer up to 800 KVA. That it made sense to the defendant's business objective and the plaintiff to continue operating. What all this boils down to is that the defendant breached its statutory duty to run its business of supplying power according to its agreement with the plaintiff and/or the Act. It did not disconnect power when it ascertained that the plaintiff was exceeding contracted supply. It is thus liable for any damage, the customer could/did suffer.***
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> ***Then the question of quantifying the damage came up. It is clear that the plaintiff did plead that its equipment was damaged; it bought and operated generators; it suffered reduced processing capacity; it lost four containers of fish; it bought 2 stabilizers and generally made a business loss. There were sums of money representing each loss/damage in the plaint. But there was no proof by receipts, invoices, audited accounts, waybills/bills of lading etc to support the claim. None at all. It being trite in law that not only should a claim for special damages be specially pleaded, but it is also incumbent upon the claimant to prove it, failure to prove disentitles a claimant to the award sought. And that is the case here. Although the plaintiff pleaded special damages, it did nothing to prove the same and so that claim is dismissed.***
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> ***The plaintiff, it can be said, was alive to the principle in law that general damages are not awardable in a claim of breach of contract. It did not urge the court in its submission to go that way. In sum the plaintiff succeeds on the basis of breach of statutory duty on the part of the defendant. But that breach does not attract damages. That could have been done by proof of special damages. The plaintiff did not prove that. Its claim thus fails."***

Aggrieved by the judgment and decree, the appellant has lodged this appeal on grounds that the trial court erred in law and fact in holding that the appellant had not proved special damages; that though the appellant had proved breach of contract, it was not entitled to damages; in dismissing the appellant's claim despite having entered judgment for the appellant on the issue of liability and finally failing to appreciate sufficiently or at all the appellant's submissions.

When the respondent was served with the record of appeal, it countered it by filing notice of cross-appeal on grounds that the trial court erred in law and fact in finding that the respondent was liable for breach of its statutory duty when the respondent was not in any such breach and when in fact the appellant had failed to prove the alleged breach; in finding that ***section 29*** of the **Electric Power Act** (now repealed) had not been complied with; and in awarding the appellant the costs of the suit when the appellant was not entitled to such an order.

The appeal came up for directions on 10th August, 2016 when parties agreed to canvass it by way of written submissions with limited highlights. The respective written submissions were subsequently filed and exchanged. We have carefully read and considered them alongside cited authorities.

Highlighting the appellant's submissions, **Mr. Ngang'a**, learned counsel stated that there were admissions on the part of the respondent with regard to the special damages. One such admission was by DW 2 when he conceded that he was aware since 1994 that the 1000 KVA transformer was to be installed. Instead what was installed was 360 KVA. There was thus a good basis for the trial court to enter judgment against the respondent on liability. On special damages, counsel submitted that the trial court took erroneous view that special damages can only be proved by certain types of documents. It is not that special damages must be proved by way of receipts only. To the appellant the documents it had tendered proved special damages. On the question of general damages for breach of contract, counsel submitted that whereas general damages are not generally payable for breach of contract, there are exceptions to that general rule. That in this case the conduct of the respondent was such that the appellant was entitled to such damages.

On behalf of the respondent **Mr. Murugara**, learned counsel, submitted that ***rule 29*** of the Electric Power Rules was the basis upon which the trial court hinged its decision. However, that rule deals with fault and leakage in the wiring and was thus inapplicable. That there was a contract to supply 350 KVA and nothing more. Indeed aware of this fact the appellant went out of its way to buy generators to supplement the respondent's electricity supply. That the problem was overloading which had nothing to do with the respondent. That the stabilizers installed by the respondent were to help the appellant deal with the fluctuations. On special damages, counsel submitted that the same were not specifically pleaded nor proved. That there was absolutely no evidence to support the claim for special damages. Finally, counsel submitted that there were no admissions that would have entitled the appellant to damages.

Our duty as a first appellant court, is to re-evaluate as well as examine afresh the evidence and to arrive at our own conclusion having regard to the fact that we have not seen or heard the witnesses. This position was stated in the case of ***Selle & Another v. Associated Motor Boat Company Ltd & Others*** ***(1968) EA 123***as follows:-

> ***"… This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should made due allowance in that respect …"*** [See also***Jivanji vs Sanyo Electrical Company Ltd*** ***(2003) KLR 425]***

The appellant in his both written and oral submissions has narrowed the issues in contestation into two; whether the trial court erred in its finding that special damages were not proved and secondly, whether the trial court was right in holding that breach of contract, though proved does not attract an award of damages. The respondent too has identified the foregoing as the issues for determination in its written submissions. Whereas we agree with the issues as framed, we may add the third, being the fate of the cross-appeal. Whether the judge erred in apportioning liability against the respondent.

Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See ***National Social Security Fund Board of Trustees vs Sifa International Limited*** ***(2016) eKLR***, ***Macharia & Waiguru vs Muranga Municipal Council & Another*** ***(2014) eKLR*** and ***Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)***. In the latter case this Court was emphatic that

> ***"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract …".***

The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages.

On the other hand, the appellant maintains that it was a misdirection on the part of the trial court to determine that only receipts, invoices, audited accounts, waybills, bill of lading etc would support a claim for special damages. That special damages could be proved by other means. That the court was entitled to consider the evidence adduced whether oral or documentary and arrive at its findings on whether or not special damages though pleaded were proved. For this proposition the appellant relied on the case of ***Mitchell Cotts (K) Ltd vs Musa Freighters*** ***(2011) eKLR*** in which this Court expressed itself thus:

> ***"…. In the light of the above and in the circumstances we cannot fault the superior court which accepted the only evidence which was tendered to the court on the issue, the appellant having failed to give any evidence on the value of the tyres it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance tilting***

in favour of the respondent on the critical issue of the value of the uncollected tyres. The court did its best and cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court…".

We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. Further the facts in that case are clearly distinguishable from the facts of this case. In that case the appellant had in its defence admitted the value attached to the tyres. However, its main averment in the defence was that the tyres had been delivered whereas the respondent claimed they had not. This is not the case here. Further considering the colossal amount demanded of the respondent by the appellant running into millions of shillings, the appellant could not run away from the requirement of specifically proving the loss with credible evidence. We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.

We now turn to consider special damages claims made by the appellant and the alleged evidence in support thereof.

i. Damaged electric equipment valued at Kshs.4,814,452.00.

There was no evidence of whatever kind led at the hearing of the suit to show that the appellant suffered this loss.

ii. Cost of running a generator to augment the low supply at fuel cost of Kshs.3,614,326.00.

The appellant did not produce credible evidence to show that indeed it incurred the aforesaid sum in fuel to run the generators. The statement of accounts in the appellant's bundle of documents did not show the specific amount in respect of fuel. In fact it is not clear what those sums were for.It is even apparent that costs of repair, maintenance, spares were all included.

iii. Kshs.12,150,972.00 for diminished productivity on account of power black out.

The evidence in this regard was extremely tenuous. PW 1 made no attempts to justify the figure. The production report exhibited did not solely blame the reduction in production to the shortfall in power. Other factors could as well have come into play. Alternatively, there was no evidence that the shortfall in power was solely attributable to the respondent. Indeed there was evidence that on one occasion the blackout was caused by rats damaging the wires. This aspect was not factored in the claim under this head.

iv. Kshs.25,200,000.00 loss in fish exports to Israel.

The appellant alleged that four containers of fish got damaged while the fish was being exported to Israel, which resulted in Israeli authorities condemning it as unfit for human consumption and destroyed it. There was no evidence that the fish was damaged solely by the power loss. As counsel for the respondent correctly submitted the fish could have been damaged while on transit from Homa Bay to Nairobi or from Nairobi to Israel. There was no evidence to show that the fish was damaged while in the appellant's premises or as a result of power problem attributed to the respondent at Homa Bay.

v. Two stabilizers paid for Kshs.7,500,000.00.

Again on this one, we can do no better than reiterate the respondent's submissions. It was to the effect that there was no evidence whatsoever to show that the appellant bought

power stabilizers at a cost of Kshs.7,500,000.00 which cost is claimable from the respondent. If anything, it is in evidence that the respondent in fact installed the stabilizers along the power line itself with a view to improving on the power output for that area and finally,

vi. Loss of business in the sum of Kshs.12,850,000.00.

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."***

For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages. The trial court's finding on that score can thus not be faulted.

On the second issue, the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the appellant relied on the ***Nigerian case*** of ***Marine Management Association & Another vs National Maritime Authority*** ***(2012) 18 NWLR 504***.

The respondent on the other hand maintained that there cannot be any award of general damages for breach of contract and placed reliance on the following authorities; ***Provincial Insurance Company EA Ltd v. Mordekai Mwangi Nandwa (supra),*** *and****Joseph Ungadi Kodera vs Ebby Kangisha Kavai****, **KSM C. A. No. 239 of 1997 (ur).***

The appellant having conceded to the general proposition regarding the award of damages for breach of contract, it was incumbent upon it to lead evidence so as to bring the respondent's conduct into the exceptions it alluded to above. In this case the mere fact that the appellant wrote several letters to the respondent without remedial measure being undertaken immediately cannot amount to oppressiveness, insolent or vindictive behaviour. The correspondence was responded to explaining what was being undertaken. The fact that the respondent took no corrective action only making incessant promises that the issue was under investigations is not of itself evidence of high handedness, outrageous, or insolent conduct. Further there was no agreement at the time as to the real cause of power outages. There was a blame game between them which went on for a long time. In those circumstances we do not see how the respondent can be accused of being oppressive, high handed, outrageous, insolent or even vindicative.

Lastly we turn to the cross-appeal. It turns on two aspects in the main; the finding by the trial court that the respondent breached the contract and the award of costs to the appellant. To our mind these concerns can easily be disposed of. Regarding the first concern, it is indeed true that the trial court anchored its decision on ***rule 29 (1)*** of the Electric Power rules to condemn the respondent. However that rule deals with matters of wiring, fittings and leakages. That in the event that such problems are noticed during inspection, the respondent would give immediate notice in writing to the consumer such as the appellant herein, of its intention to discontinue the supply of electricity. It is thus obvious that the respondent was not in breach of ***rule 29*** which as we have already stated contemplates situations where there are faults in the supply line of the power and do not cover instances where there was overloading. The trial court erred in extending the meaning of ***rule 29***to cover instances of over and underloading.

That said, there was nonetheless sufficient evidence of the respondent's breach of the contract, from the evidence of DW 1. In some of the correspondence, the respondent admitted the complaint of under voltage and promised to take remedial action but took too long to effectuate the undertaking. That it

eventually did so by installing a 1000 KVA is clearly an admission of its wrong doing. Undoubtedly, the appellant proved breach of contract. The ground of cross-appeal must in the circumstances fail.

On costs, we reiterate that costs are in the discretion of the court though the generally accepted principle is that costs follow the event. In this case though the trial court found in favour of the appellant on the breach of contract, it was denied damages on account of the fact that breach of a contract did not attract an award of general damages and further that the special damages pleaded were not strictly proved. Yet the trial court proceeded to award the appellant the costs of the suit. The reasoning of the trial court is not readily apparent or clear. It appears to have been an afterthought and not carefully thought through. We would have expected the trial court to give reason(s) for its decision on the costs. It did not. We are only too aware that an appellate court should not interfere with the discretion exercised by the trial court unless it is demonstrated that in exercising the discretion, it did not do so judicially but whimsically or idiosyncratically. In the absence of the trial court's reason for the decision, we cannot determine whether the exercise was judicious. In such circumstances, we must intervene. Given that both appellant and the respondent had partially succeeded in their claims, the best order on costs should have been that each party bears its own costs.

Save for our finding on costs in the cross-appeal above, both the appeal and cross-appeal fail and are all dismissed with no order as to costs.

Dated and delivered at Nairobi this 4th day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

………..….……………

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR