



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 30 OF 2013

BETWEEN

KENYA POWER & LIGHTING CO. LTD APPELLANT

AND

ABEL M. MOMANYI BIRUNDU RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Kakamega (Chitembwe, J.)

Dated 26th June, 2013

in

KAK. HCC NO. 19 OF 2011

JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the High Court (**Chitembwe, J.**), dated 26th June, 2013 allowing the respondent's appeal from the judgment of the Principal Magistrate, Kakamega in Civil Case No. 21 of 2010. In that suit the respondent had sued the appellant for orders that it reconnects electricity to his premises and general damages for breach of contract. The learned Principal Magistrate granted the first prayer of reconnection of electricity but found that the prayer for general damages had not been proved. On the latter prayer the learned Principal Magistrate stated:-

“As regards general damages for breach of contract the court has not been provided with sufficient materials especially the bylaws referred to in the electricity supply agreement... and... in any case this court does not consider general damages for breach of contract a proper remedy. In any case the plaintiff was supposed to mitigate his losses and not just expect to be compensated by an award of damages

.....

.....
As matters stand no general damages for breach of contract are granted.

The plaintiff is also awarded costs and interest.”

The respondent was not satisfied with the orders of the subordinate court and therefore appealed to the High Court at Kakamega. The High Court allowed the respondent's appeal with respect to general damages and awarded him a sum of Kshs.200,000/=.

The appellant was now the one aggrieved and therefore lodged the appeal before us citing four (4) grounds which were condensed into three when its counsel, **Miss Sechele**, argued grounds 1 and 2 together and the remaining grounds separately. In our view however, those grounds of appeal raised only two issues namely, that general damages for breach of contract were not awardable and that even if special damages would have been awarded the respondent was not entitled to the same as he took no step to mitigate his loss.

The facts giving rise to the trial before the two courts below and eventually the appeal before us are not complex. The appellant is a supplier of electricity to consumers in this country and in that regard by an electricity supply agreement between it and the respondent, it regularly supplied electricity to the respondent until 11th December, 2009 when it disconnected its supply on the basis that the respondent had failed to pay a certain bill. The two courts below however, found that the appellant had not properly notified the respondent of his liability which, in any event, was eventually settled. The respondent, as a result of the disconnection, sought reconnection and general damages he had suffered until reconnection.

On those facts the subordinate court stated:-

“As regards the reconnection of the plaintiff's electricity supply the court finds indeed the defendant did not provide proper explanations as to why the plaintiff's electricity supply was being disconnected even after it was clear there was a dispute of the Kshs1,400/=. If the defendant had sent a copy of cheque in issue to the plaintiff he would have understood why Kshs.1,400/= was still being demanded from him. In the absence of such explanations the plaintiff was entitled to treat the demand for Kshs.1,400/= as arbitrary. The order for reconnection is granted.”

And the High Court stated:-

“Since the power was disconnected on 10.11.2009 (sic) even before the appellant was aware of the outstanding balance of Kshs.1,400/= it was not advisable for the respondent to demand reconnection fee before restoring the power supply. In any event there was no demand note for that amount.”

On the respondent's claim for general damages, the High Court stated:-

“Although counsel for the respondent appears to suggest that the appellant ought to have specifically proved general damages it is clear that where there is a wrong which is established to have occurred then damages ought to follow. I do find that a sum of Kshs.200,000/= would be reasonable compensation for the appellant

.....
The appeal on general damages is hereby allowed and the appellant is awarded a sum of Kshs.200,000/=.”

Miss Sechele, learned counsel for the appellant, in her address to us faulted the learned judge for

awarding general damages for breach of contract. In her view, the only damages awardable for breach of contract are special and must be specifically pleaded and strictly proved which was not done in this case. In learned counsel's view, only nominal damages could have been awarded and could have been limited to only reconnection fee. Learned counsel also submitted that the respondent took no steps, such as immediately seeking a mandatory injunction directing reconnection of electricity to mitigate his loss.

The respondent, who is an Advocate of the High Court of Kenya, represented himself before us. His main argument was that the disconnection of electricity to his premises was without basis as he had no outstanding bill to settle with the appellant. The respondent saw nothing wrong with the award of general damages for breach of contract. In his view, the sum awarded of Kshs.200,000/= was after taking into account mitigating factors.

We have considered the record of the proceedings in both the subordinate court and those of the High Court. We have also considered the grounds of appeal, the submissions of learned counsel and the applicable law. Having done so, we think this appeal turns on whether the High Court Judge was entitled to award to the respondent Kshs.200,000/= as general damages.

In his amended plaint dated 3rd November, 2010 the respondent prayed for:-

“1. A refund of 1,400/=.

1A. The defendant be ordered to re-connect electricity on contract number 22741271.

2. General damages for breach of contract.

3. Costs and interest on a & b.

4. Any other order.”

The subordinate court granted the order of reconnection and costs but found, as already stated, that there was no basis to award general damages. The High Court, on general damages, thought otherwise and awarded to the respondent the aforesaid sum. We think with respect, that the learned Judge of the High Court fell into error in awarding the respondent general damages for breach of contract. Authorities are legion to the effect that no general damages may be awarded for breach of contract. See *Oharamshi - Vs- Karsam [1974] EA 41* which was cited with approval in *Provincial Insurance Co. East Africa Ltd - Vs- Nandwa [1995 – 98] 2 EA 288*. The latter decision was cited to the learned Judge of the High Court. Notwithstanding that this settled position of the law was expressly brought to the attention of the learned Judge, and was alluded to by the subordinate court, we are puzzled that the learned Judge still awarded the respondent the said general damages. The learned Judge did not refer to any authority in law or otherwise for his award. On this aspect of the respondents' claim the learned Judge stated:-

“Since the power was disconnected on 10.11.2009 (sic) even before the appellant was aware of the outstanding balance of Kshs.1,400/= it was not advisable for the respondent to demand reconnection fee before restoring the power supply. In any event there is no demand note for that amount. In any case the respondent could have included that claim in its subsequent bill. It was the respondent that had caused the problems and it ought to have approached the appellant with humility and explain to him what the problem was the respondent simply exercised its muscles and went to the pole and disconnected the power.....

In the end, I am satisfied that damages ought to have been awarded to the appellant.....”

The above quotation from the Judgment of the learned Judge of the High Court, suggests that the learned Judge, with all due respect to him, does not appear to have appreciated that the respondent's claim was one of breach of contract yet the respondent's amended plaint was before him. That amended plaint

at paragraph 3, stated:-

“3. The plaintiff entered into a contract with the defendant for the supply of electricity on or about the 22nd August, 2003.”

And in paragraph 16, the respondent pleaded:-

“16 The plaintiff avers that the defendant breached the express and implied contractual terms when its employees took away the fuse on 11th December, 2009.”

While in paragraph 2 of the prayers, the respondent prayed for:-

“2. General damages for breach of contract.”

There was therefore no doubt that one of the respondent's main claims was for general damages for breach of contract. He even gave particulars of breach. And when he testified before the subordinate court, he reiterated those particulars. He however, said nothing about how he had suffered save that his electric gadgets remained ***“lying idle.”*** He did not particularize the suffering. He could have stated the loss the non-functioning of the electrical gadgets caused him which in our view, was clearly ascertainable and quantifiable and ought to have been specifically pleaded and strictly proved. In the case of ***Mohammed Hassan Musa and another -Vs- Peter M. Mailanyi & another [Civil Appeal No.243 of 1998]***, this Court stated:-

“It has been held time and again by this Court that special damages must be pleaded and of course strictly proved.”

In this case, the respondent claimed damages for breach of contract. This, in our view, was a special damage claim which should have been specifically pleaded and strictly proved. As the respondent did not consider it a special damage claim, he did not specifically plead the same and of course could not lead evidence on the same. Clearly therefore the award of Kshs.200,000/= as general damages was, with due respect to the learned Judge, not proper.

Based on what we have already said herein, this appeal must succeed. We allow the same, set aside the judgment and decree of the High Court, and substitute therefore an order dismissing the respondent's appeal before the High Court.

In all the circumstances, we make no order as to the costs of this appeal. The order of the High Court on costs is not disturbed. Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY 2015

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR