IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 215 OF 2002

FELIX MATHENGE …………………….....................………… APPELLANT

AND

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

(*An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ransley, Comm. of Assize) dated 18th June, 2002*

In

H. C. C. C. No. 418 of 2001)

****

JUDGMENT OF THE COURT

FELIX MATHENGE, the appellant, is the registered proprietor of all that parcel of land known as L.R. NO. NGONG/NGONG/10345, the suit property, upon which stand six magnificent flats all of which are rented out to tenants, while the respondent is ***KENYA POWER & LIGHTING COMPANY LIMITED,*** a State Corporation and a monopolistic entity engaged in the distribution and supply of electricity within the Republic of Kenya.

By a plaint dated 15th January, 2001 and filed in he High Court of Kenya at Nairobi, the appellant averred that he had installed electricity meters to cater for all flats in the suit property and that at all material times there existed a valid covenant between the respondent and each tenant by which the respondent was obligated to supply power on billing the tenant and ensuring that the tenant paid his bills. The appellant further averred that the respondent either negligently or with intention to deceive or with malice raised bills in respect of the flats which bills on the face of it were unconscionable and over inflated and ranged between Kshs.12,097.10 to Kshs.246,495.15 excess per flat. As a result of the raised bills the tenants were forced to vacate the flats. The respondent then demanded payment of the unpaid bills from the appellant and when he refused to pay, the respondent disconnected power supply to the suit premises. In or about May, 2000 after some protracted negotiations the respondent called upon the appellant to apply for the installation of the new meters which meters would be used for fresh billing. The appellant duly obliged but the respondent continued to bill for the vacant flats and refused to restore power supply nor to waive the exaggerated bills.

In paragraphs 18 and 19 of the plaint the appellant avers:-

"18. It is the Plaintiff's case against the Defendant that he cannot be condemned to any further losses arising from the Defendant's negligent act in failing to collect bills due from the Plaintiff's former tenants or sue the said tenants for fraudulent use of electric (sic) power if at all.

19. As a consequence of the Defendant's failure in its duty the Plaintiff has lost income by way of rent on account of tenants' reluctance to occupy flats without electricity. The Plaintiff shall claim the market rental value of his premises or Kshs.17000.00 per month per flat whichever will be higher in respect of all the flats from 1.8.98 to date of trial"

The appellant sought, inter alia, judgment against the respondent for loss of rental income; a declaration that the appellant is not liable to pay the outstanding electricity bills; an order for immediate restoration of power supply to the suit premises and punitive and exemplary damages for negligent conduct.

The respondent was duly served with a summons to enter appearance but it failed to do so and consequently the Deputy Registrar entered interlocutory judgment for the plaintiff on 14th September, 2002. The suit was set down for formal proof during which the appellant and an architectural analyst testified. However, the learned Commissioner of Assize in a somewhat perfunctory and incoherent judgment held:-

"***The defendant cut off the tenant's supply and cannot be forced to supply electricity to the suit premises until the amount due to the defendant had been paid. ----- If the tenants cannot be found then the plaintiff is obliged to pay the bills and if he does not wish to do this then, the defendant is not in my view bound to supply electricity to the plaintiff."***

The learned Commissioner of Assize then dismissed the suit.

The appellant sought to challenge the said judgment on not less than eleven grounds of appeal. However, in our view, only two issues arise for consideration in this appeal. First, did the learned Commissioner for Assize err in making findings on liability? Second, had the appellant proved his damages; if so, how much?

We would attempt to resolve the first issue bearing in mind the submissions made before us by *Mr. Muturi*, for the appellant. The respondent having failed to enter appearance within the prescribed time after the appellant had requested for it, it became mandatory upon the court to enter interlocutory judgment and for the appellant to set down the suit for assessment of damages. Having entered interlocutory judgment, it was not open once again for the same court in the instant case to state that the appellant had not proved liability against the respondent. The role of the court after entering the interlocutory judgment in such a case like this was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages. See ***KAVINDU & ANOTHER VS. MBAYA & ANOTHER [1976] KLR 164***. We would agree, therefore, with *Mr. Muturi* that it was an error on the part of the Hon. Commissioner of Assize to dismiss the suit for want of proof of liability instead of merely assessing damages.

The appellant testified that he lost rental income of Kshs.17,000/- per flat per month from 1st August, 1998 until 7th May, 2002 when the suit was heard. He stated that the flats had been vacant since the date the respondent disconnected the power supply. He asked us to assess the damages and award him the loss of income. Mr. Bosire, for the respondent, did not address us on the question of damages but only resigned himself to asserting that he supports the judgment of the superior court.

The record shows that the learned Hon. Commissioner of Assize erroneously omitted to assess the damages he would have awarded had he held that liability against the respondent had been proved.

It is true that the appellant suffered loss of income because of the unreasonable and capricious behaviour of the respondent. But, he needed not to have taken about four years to remedy the situation. He ought to have taken all reasonable steps to mitigate the loss he had sustained consequent upon the wrongful act of

the respondent. He neglected to act to off set his losses which he would have warded off by paying what was due to the respondent so as to attract back to the suit premises the tenants who had been forced to vacate. By doing this he would have minimized his damages.

As the appellant was not at all a man of straw, it was, unreasonable for him to wait for four (4) years before re-connecting the power supply to the suit premises. We think that he could have done so within a period of twelve (12) months of which period the appellant should be entitled to damages. These work out to:-

Kshs.17,000/-x6x12 months = Kshs.1,224,000/=.

We award the appellant the sum of ***Kshs.1,224,000/-*** as general damages for loss of rental income together with interest at court rates from the date of filing suit until payment in full. We dismiss the claim for punitive or exemplary damages as not having been proved.

The appellant shall have the costs of this appeal and of the suit in the High Court.

DATED and DELIVERED at NAIROBI this 13th day of March, 2008.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…………………………………..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR