



**Gitonga (Suing as the Administrator of the Estate of Mburu Gachagua also Known as Mbora Gachagua) & another v Kenya Power And Lighting Company (Civil Case 122 of 2009) [2024] KEHC 4168 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4168 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 122 OF 2009  
HI ONG'UDI, J  
APRIL 25, 2024**

**BETWEEN**

**SAMUEL MBORA GITONGA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MBURU GACHAGUA ALSO KNOWN AS MBORA GACHAGUA). ..... 1<sup>ST</sup> PLAINTIFF  
GACHAGUA SAWMILLS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA POWER AND LIGHTING COMPANY ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs' plaint dated 28<sup>th</sup> April, 2009 prays for judgement against the defendant for several orders including;
  - i. A permanent injunction restraining the defendant from lawfully disconnecting power supply in respect of accounts 05XXXX-01 and 05XXXX01.
  - ii. A mandatory injunction for uninterrupted power supply to the Plaintiffs' lawfully held accounts during paid-up-months.
  - iii. Special Damages, general damages as set out in Paragraph 10 of the plaint and further damages for loss of income at Kshs. 150,000/= per day from the date of filing suit until the day electricity supply is restored.
  - iv. Costs of this suit.
  - v. Interest on (c) and (d) above.



2. The Plaintiffs filed a written statement dated 18/12/2015 and signed by the 1<sup>st</sup> Plaintiff, who adopted it as evidence when he testified. The Plaintiffs stated that the late Mburu Gachagua was the registered owner of LR. 530/219 while the 2<sup>nd</sup> plaintiff was the registered owner of LR. 530/392 and LR 530/482. Further, that the 2<sup>nd</sup> plaintiff operated a sawmill using electricity supplied to it under account number 0513677-01 in the name of Gachagua Sawmills limited and account number 0533049-01 in the name of Mburu Gachagua. This was on all the three plots.
3. It was further stated that on or about the 20<sup>th</sup> April, 2009 the defendant disconnected electricity supply under the said account numbers demanding the sum of kshs.693,312.00/=. The same was for power allegedly supplied to them under account Number 51XXXX/01 in the name of Gachangwa Sawmill c/o Munyaka Sawmill P.o Box 203, Elburgon.
4. They stated that the 2<sup>nd</sup> Plaintiff was not indebted to the defendant having dutifully paid its electricity bills in respect of its true accounts to date and that the defendant's claim was unfounded. Further that the electricity bill relating to the deceased's account No 05XXXXXX-01 was fully paid up and that it was not alleged by the defendant that the estate was indebted to it.
5. The Plaintiff stated that following disconnection of power the sawmill lost an income of kshs. 1,200,000/= from 20<sup>th</sup> April 2009 to 27<sup>th</sup> April 2009 at Kshs 150,000/= per day. That the deceased's estate had suffered and continued to suffer irreparable loss and damage, as a result of the disconnection. They stated that despite demands being made, the defendant had failed and/or refused to justify its claim for Kshs, 693,312/= or to reconnect supply of power to the plaintiffs' premises under the aforesaid accounts. In their reply to the defence they denied paragraphs 2,3 & 5 of the defence.
6. During the hearing, the 1<sup>st</sup> plaintiff testified as PW1. He testified that he was the managing director of the 2<sup>nd</sup> plaintiff and an administrator of his father's estate. He produced a list of documents dated 20<sup>th</sup> January 2010. He explained that he had account number 53XXXX01 which the defendant allocated on 13<sup>th</sup> September 1988. They however moved to another plot where they used the defendant's account number 05333049-01 in the name of Mburu Gachagua which was fully paid for.
7. He further stated that he owned another account for Gachagua sawmill, number 05XXXX-01. That he only received a demand letter for account number 35XXXX01 which he had nothing to do with. He added that he did not owe the defendant any money and that the account number 05133093-01 was in name of Gachangwa sawmill c/o Munyaka sawmill Elburgon which did not belong to him. Also, that account number 05XXXX-01 was never used and that he never filed a suit in Nakuru CMCC No. 2488 of 2000.
8. He denied paying any bill for account number 0513609-01, and that the said account owed money and when he disputed the bill the defendant disconnected power in Mburu Gachagua's account on 20<sup>th</sup> April 2009. He said they had lost kshs. 1,200,000/= which he wished to be compensated and for loss of power supply, general damages, loss of income, an order for continued supply of power and costs of the application.
9. In cross examination he stated that the initial plot had been leased but he did not have a copy of the lease. Further that plot number 530/393 was in the 2<sup>nd</sup> plaintiff's name and he had not availed the title deed for plot number 530/482. He confirmed that he did not have authority from the company's (2<sup>nd</sup> Plaintiff) shareholders to file the present suit. He confirmed that he was served with a demand notice by the defendant but the same was not in his name. He added that he was not aware of any inspection done in April 2009 or any report. He denied shifting account number 0513677-01 to account number 05XXXX-01.



10. In re-examination, he testified that his brother and mother were shareholders of the company (2<sup>nd</sup> Plaintiff) but they were deceased. He added that account number 0513677-01 was never active and he only paid for standing charges.
11. The defendant filed its statement of defence dated 4<sup>th</sup> May 2009 where it admitted the contents of paragraphs 1,2,3,4 and 15 and denied the contents of paragraphs 6,7, 9,10,11,12,13 and 14 of the plaint. In denying the contents of paragraph 5 of the plaint the defendant stated that it disconnected supply to account number 05XXXX-01 due to non-payment of bills. That the outstanding bill was kshs. 693,312.00 owed by the 2<sup>nd</sup> plaintiff for power supplied to account number 513609-01 in the name of Gachagua Sawmills Limited which was opened on 13<sup>th</sup> September, 1988.
12. Additionally, that the defendant had disconnected supply under account number 0533049-01 on 20<sup>th</sup> April, 2009, after it discovered that the plaintiff was illegally re-loading account number 0513677-01 with account number 05XXXXX-01 contrary to the Provisions of The Energy Act (No. 12) 2006.
13. On its part the defendant called its employee Harrison Kang'ethe Mwangi (DW1) as it's witness. He adopted his statement dated 26<sup>th</sup> February 2013 as his evidence and also produced a list of documents dated 22<sup>nd</sup> January 2010. He testified that account number 513677-01 was under M.F Gachagua Sawmills and 51XXXX-01 was under Gachagua Sawmills, while 53XXXX-01 was under Mburu Gachagua. He added that account number 51XXXX-01 had a debt of Kshs. 693,312/=.
14. He further stated that disconnection was done in 2008. On 7<sup>th</sup> April 2009 they found that the premises was being supplied with power from account number 51XXXX-01 illegally. They issued a disconnection notice and when the same was not complied with, they disconnected account number 51XXXX-01.
15. In cross examination, he confirmed that the three accounts he had mentioned were in the plaintiffs' names and there could be an error in the spelling of the names. He confirmed further that the demand notice issued was in respect of account number 51XXXX-01 and that disconnection was on account number 51XXXX-01. He added that there was no confusion in the company names but just an error in the spelling of the names.
16. Parties were directed to file their written submissions which they did.

### **Plaintiffs' submissions**

17. The plaintiffs' submissions were filed by the firm of Kagucia & Company Advocates and are dated 6<sup>th</sup> January 2024. Counsel identified three issues for determination. The first issue was whether the defendant unlawfully disconnected electricity supply to accounts number 05XXXX-01 and 05XXXX-01. He submitted that the plaintiff had produced electricity bills which indicated that the aforementioned accounts were properly serviced, and by the time disconnection was done there existed no bill of kshs. 693,312.00/=.
18. Counsel contended further that the plaintiffs' company had nothing to do with the suit CMCC No. 2485 of the 2000. Further, that they had proved through various documents that David Muiruri Wanaina who was the plaintiff in that case was not a director in their company. This he stated was within the knowledge of the plaintiffs' witness that the premises they had vacated had been leased to David who owned Munyaka Sawmills. He added that the disconnection of accounts number 0513677-01 and 05XXXX/01 was unlawful. He thus argued that the bills produced by the defendant bore the name Gachangwa Sawmills and indicated the address as 203 Elburgon while the 2<sup>nd</sup> plaintiff was Gachagua sawmills limited with the address 36 Elburgon.



19. The second issue was whether the plaintiffs were indebted to the defendant for the sum of kshs. 693,312/=. Counsel submitted that the plaintiffs had proved from the bundles of electricity bills produced that no sum of Ksh.693312/= or any part thereof was at the material time owing in connection with accounts number 0513677-01 and 0533049/01. Further, that the demand notice served upon the plaintiffs related to account number 51XXXX-01 which the 2<sup>nd</sup> plaintiff had left dormant and without debt way back in 1995.
20. Lastly, on whether the plaintiffs were entitled to the reliefs sought in the plaint, counsel submitted that the 2<sup>nd</sup> plaintiff had proved its case and the defendant should be held liable for breach of contract and pay damages for the same. In addition, that the plaintiffs' witness proved that the 2<sup>nd</sup> plaintiff had suffered loss of income of Ksh. 1,200,000/= at Kshs. 150,000/= per day for the eight (8) days it remained closed. He placed reliance on the case of Nairobi CACA 215 OF 2002 (Felix Mathenge v Kenya Power & Lighting Company Limited and urged the court to award the said sum to the plaintiffs.

### **Defendant's submissions**

21. The defendant's submissions were filed by the firm of Wamasaa, Masese and Nyamwange advocates and are dated 7<sup>th</sup> February 2024. Counsel identified three issues for determination. The first issue was whether this court has jurisdiction to hear and determine the matter. His answer to this is in the negative. Further that the *Energy Act* and the Energy (Complaints and Dispute Resolution) Regulatory points to the fact that there is a statutory scheme for resolving disputes between the defendants and its customers. To support this submissions counsel relied on sections 59(3), 61(3), regulation 4 of the Energy (Complaints and Dispute Regulations) Regulations and the cases of Alice Mweru Ngai -v Kenya Power & Lighting, Kenya Company Limited among others.
22. On the second issue on whether the plaintiffs' claim was properly before the court. Counsel submitted that there was no resolution for the 2<sup>nd</sup> plaintiff's representatives to act for and on behalf of the company. That the institution of the suit was therefore unauthorized and therefore incompetent and improperly before the court. She relied on the cases Bugerere Coffee Growers Ltd v Sebaduka & other [1970] EAN147 and Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR where the court cited with approval the case of Assia Pharmaceuticals v Nairobi Veterinary Centre HCCC No. 391 of 2000.
23. Lastly, on whether the plaintiffs were entitled to the reliefs sought, counsel submitted that having found that this Court lacked jurisdiction to hear and determine this dispute and that the plaintiffs' suit was incompetent, the plaintiffs were therefore not entitled to any relief sought whatsoever. She urged the court to dismiss the suit ab initio with costs to the defendant.

### **Analysis and Determination**

24. Upon analyzing the facts, agreed issues, evidence and submissions tendered by the parties herein, it is my view that the main issue arising for determination is whether the plaintiff is entitled to the orders sought in the plaint.
25. It is the defendant which in its submissions raised the issue of jurisdiction. This issue was determined by this court in its ruling delivered on 4<sup>th</sup> March 2021, where it held that the prayers sought in the plaint could not be granted by the Energy Regulatory Commission. The ruling has not been reviewed or set aside.
26. The plaintiff in his plaint seeks for a permanent injunction restraining the defendant from lawfully disconnecting power supply in respect of accounts 0533049-01 and 054 3677-01. Further, that



a mandatory injunction be issued for uninterrupted power supply to the plaintiffs' lawfully held accounts during paid-up-months.

27. PW1 testified that they had moved from their initial plot to another plot where they used the defendant's account number 0533049-01 in the name of Mburu Gachagua which was fully paid for. Further, that account number 05XXXX-01 was never used and that he never shifted account number 05XXXX-01 to account number 05XXXX-01. DW1 testified that account number 51XXXX-01 had a debt of kshs. 693,312/= and that on 7<sup>th</sup> April 2009 they found the premises being supplied with power from account number 513677-01 illegally.
28. Upon perusal of the plaintiffs' list of documents, this court notes that the electricity bills and ETR payment slips are for account numbers 05XXXX-01 in the name of Mburu Gachagua and 05XXXX-01 in the name of Gachagua Sawmill. On the defendant's part the statements in its list of document are for account number 05XXXX-01 in the name Gachangwa Saw Mill. This is the same account that the defendant alleges to have an outstanding debt amounting to kshs. 693,312/=.
29. In *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR, the court in relying on the supreme court decision of *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR held as follows;
- “22. The foregone analysis therefore settles the issue of burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.
- On the standard of proof, the Black's Law Dictionary, (9<sup>th</sup> Edition, 2009) at page 1535 defines 'the standard of proof' as '[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’”
30. It is not disputed that the bills produced by the defendant bore the name Gachangwa Sawmills. The 2<sup>nd</sup> Plaintiff is Gachagua Sawmills Ltd whose address is Box 36 Elburgon. The account for the said Gachangwa Sawmills is 05XXXX-01. The defendant did not explain the physical address of this premises. The Plaintiff has challenged the location and address of the two premises i.e. Gachagua Sawmills and Gachangwa Sawmills.
31. If it is true that the name in account No. 05XXXX – 01 is a misspelling and actually refers to Gachagua Sawmills as alleged what stopped the defendant from correcting it and even swearing and affidavit to that effect? The defendant does not expect this court without any evidence to find that Gachangwa Sawmills and Gachagua Sawmills refer to one and the same party.
32. In view of the above, it is my opinion that the evidential burden of proof shifted to the defendant to clearly show that indeed the plaintiff's account number 05XXXX-01 was linked to account number 513609-01 which had an outstanding debt of kshs. 693,312./=. It is the defendant which was doing the supply of electricity. What was so difficult in showing that? This was not proved by the defendant and the report produced on the alleged illegal supply of power is not sufficient proof for the said linkage. It is this court's finding that the disconnection of the plaintiff's account number 05XXXX-01 was unlawful.



33. The plaintiff also prays for special damages. It is trite law that the same ought to be specifically pleaded and proved. In *Mbaka Nguru & Another -v- James George Rakwar* [Civil Appeal No. 133 of 1998 (UR)], the Court cited with approval Lord Goddard, C.J. in *Bonham Carter -v- Park* [1948] 647 T.L.R. 177 and continued:

“It will suffice to say that plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the absence of any pleading as to damages claimed under this head, we are constrained to disallow the whole of that award and we set it aside wholly.”

34. The plaintiffs under paragraph 10 of the plaint claimed that due to disconnection of their accounts by the defendant, they lost income of kshs. 1,200,000/= from 20<sup>th</sup> April 2009 to 27<sup>th</sup> April 2009 at the rate of kshs. 150,000/= per day. There was no scintilla of evidence adduced to prove the alleged special damage as required in law.

35. However, owing to the wrongful disconnection of electricity for eight (8) days the Plaintiffs must have suffered some inconvenience which entitles them to general damages. Unfortunately, upon perusal of the pleadings and the evidence I have not be able to see anything on the extent of the inconvenience suffered, making it difficult for the court to assess the extent of the award for general damages. For that reason I will give a global award of Kshs 300,000/= as general damages.

36. The claim for permanent and mandatory injunctions is not merited as that would lead to hindering the defendant from carrying out its mandate. The plaintiffs’ accounts are normal like any other and so cannot be placed in a special category to warrant the issuance of the orders sought.

37. The upshot is that the plaintiffs’ case partially succeeds and the following orders are issued;

- i. The disconnection of the plaintiffs accounts No. 05XXXXX – 01 was unlawful.
- ii. General damages of Ksh.300,000/- are awarded for the unlawful disconnection.
- iii. Prayer for a permanent injunction is disallowed.
- iv. Prayer for a mandatory injunction is disallowed.
- v. Prayer for special damages is disallowed.
- vi. The plaintiffs are awarded half of the costs.

38. Orders accordingly.

**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 25<sup>TH</sup> DAY OF APRIL, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

