

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO. 310 OF 2016**

**NANKABIRWA IRENE:.....PLAINTIFF
VERSUS
UMEME LIMITED:.....DEFENDANT**

BEFORE HON.JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit seeking general damages, special damages, aggravated damages and costs of this suit. The Plaintiff is the owner of Mutasiga Coffee Factory situate at Semuto, Luwero District. The factory was a consumer of electricity supplied by the defendant. On the 10th February, 2016, the defendant installed a new transformer at the factory premises to off load the village transformer. On the 14th February, 2016, there was a fire at the factory. The plaintiff claims that the fire at the factory was a result of the negligence of the defendant or its agents.

AGREED FACTS

According to the joint scheduling memo filed on 10th June 2019 the following are the agreed facts:

1. The Plaintiff is the owner of Mutasiga Coffee Factory situate at Semuto, Luwero District.
2. The Plaintiff's factory was a consumer of electricity supplied by the defendant.
3. On the 10th February, 2016, the defendant installed a new transformer at the factory premises to off load the village transformer.

4. On the 14th February, 2016, there was a fire at the factory.
At scheduling, the following issues were agreed upon:

- 1. Whether or not the fire was caused by the Defendant's negligence.***
- 2. Whether the parties are entitled to the remedies sought.***

The parties both filed final written submissions that were considered by this court.

The plaintiff was represented by Counsel *Mr.Nelson Nerima* whereas the defendant was represented by Counsel *Mr.Paulo Kaweesi*.

Whether or not the fire was caused by the Defendant's negligence.

Both parties agreed that there was a fire at the plaintiff's factory however the dispute is the cause of the fire. It is the plaintiff's case that the fire outbreak was caused by the defendant's negligence due to the shoddy work done by the defendant's contractor who had recently installed a transformer.

The particulars of the defendant's negligence according to the plaintiff were as follows;

- a. Poorly terminating the service cables by using improperly insulated ferrules.
- b. Leaving uninsulated wires.
- c. Using unqualified personnel to do wiring work.
- d. Failing to properly supervise or inspect work.
- e. Failing to adhere to statutory service and construction standards.

The defendant refuted these allegations stating that;

- i) *the defendant carries out its duties in a lawful and professional manner*
- ii) *it never poorly terminated the service cables by using improperly insulated ferrules as is alleged*
- iii) *all its personnel have acquired training in skills to enable them to carry out their duties professionally*
- iv) *it does not use the services of unqualified people and one were approved in relation to the Plaintiff's premises*
- v) *all work is supervised by engineers*
- vi) *its obligations and duties are governed by the relevant codes and practices*
- vii) *the plaintiff's actions and inactions amount to contributory negligence*

The defendant under Paragraph 9 of the WSD accused the Plaintiff of contributory negligence through *illegal power connection; using poor cables; using unqualified personnel; failing to prevent the fire from spreading and failing to put in place adequate safety measures.*

For a party to succeed in negligence, the plaintiff ought to prove that the defendant owed him a duty of care, broke that duty and the plaintiff suffered a loss. A breach of any duty gives a right of action in negligence to the person affected. The professional or skilled person must bring to his task a reasonable degree of skill and knowledge and must exercise reasonable degree of care.

Neither a very high nor a very low degree of care and competence judged in the light of particular circumstances of each case, is what the law requires. In other

words, where skilled work is undertaken, want of skill is negligence in law. The standard of knowledge and care differs in different time.

Under **Sections 101, 102 and 103 of the Evidence Act Cap 6**, the plaintiff has a duty to prove the facts alleged exist. The burden of proof is on a balance of probabilities.

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. ***See In re H (Minors) [1996] AC 563 at 586***

According to the evidence of the PW2 who wrote a report admitted as Exhibit PE2 showed that the fire started as a result of a short circuit. In the report, it was observed that the factory was picking power from an Umeme service line through a metering unit supplied by Umeme. This supply was later changed when a transformer was supplied by Umeme and the plant was supplied power from the

metering unit to the metre box. Umeme sub contractors installed the transformer 3 days prior to the fire outbreak. The existing service cable was replaced with an aluminum one i.e an aluminium cable was connected to an existing copper cable which can cause heating in the cable on full load. The service cable terminations should have been done using properly insulated ferrules unlike what was done using a beverage bottle or left uninsulated in the connection box. This was a hazard and in case the different phases touched a short circuit would occur. This termination led to a *short circuit* which ignited the combustible coffee husks that started the fire which led to loss of property in the factory. The fire would not have happened if the sub contractor had done the work professionally during installation of the transformer.

The defendant analyzed the Report of PW2 (Exhibit PE2) in their submissions. They submitted that; *PW2 did not examine other possible causes of the fire like poor internal wiring. He stated in item 3 of the Report that the factory had been destroyed and that internal wiring could not be examined. The other reason could be because he did not visit the premises after the fire outbreak. The Report did not examine and investigate in detail the possibility of the blast in roof causing the dry coffee husks to burn as a result of a short circuit. He did not investigate if the blast was as a result of a short circuit. He simply concluded that the fire was caused by poor workmanship of the Defendant's subcontractor who installed the new transformer. He claimed that the workers joined an aluminum cable with a copper cable which "could" have caused the fire. See the second last page of the Report. The witness used the word "could" in the Report which means that he was not sure of the actual cause and simply suspected. Secondly, he did not explain scientifically how the joining of aluminum to copper causes fire. In this case if he*

claims that the Defendant's workers while installing the transformer joined copper with aluminum cables which caused the fire, how come the transformer which was 65 metres away, according to his Report was not affected and instead the fire started from the Plaintiff's factory roof?

DW1 explained to court that he used to visit the Plaintiff's factory and that he used to caution the manager who he thought was the owner of the factory about the poor wiring. He told court that improper wiring was the likely cause of the fire. He offered an alternative explanation that the Plaintiff was using power illegally by tapping power from the former old line which could have resulted into a short circuit.

The defendant also submitted that *the parties and witnesses agree that the works were carried out by a sub – contractor. DW2 told court that the subcontractor who installed the transformer was called Podtec Limited and that it (Podtec Ltd) was procured at the Plaintiff's request. It is therefore our submission that Podtec Limited was an independent contractor whose acts and omissions do not bind the Defendant. The Defendant should therefore not be held liable for the acts or omissions of Podtect Limited. The Defendant's work was only to commission the completed works. If the Plaintiff was well aware that the transformer was installed by a sub-contractor or an independent contractor, then she should have sued Podtect Limited and not the Defendant, Umeme Limited.*

When determining a case like this, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred (see Lord Hoffman explained in, *In re B (Children) (FC)* [2008] UKHL 35). The credibility of individual witnesses and the probability or

improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the plaintiff's or the defendant's version. The version presented by the plaintiff to substantiate the allegations in the plaint, must be found on the whole to be more probable or likely than that of the defendant if court is to decide in favour of the plaintiff. The process of reasoning includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible, in the sense of acceptable, credible or suitable (see *Bates and Lloyd Aviation (Pty) Ltd and Another v. Aviation Insurance Co (1985) 3 SA 916 (A)*)

From the foregoing evidence and the submissions of counsel, I find it more likely than not that the fire was caused as a result of the *short circuit* which ignited the combustible coffee husks that started the fire. The defendant's theory poor internal wiring or tapping of power as being possible causes of the fire were never substantiated and this court cannot indulge in speculations. The defendant did not lead any evidence to rebut the plaintiff's evidence apart from giving possibilities that were rebutted by the plaintiffs' witnesses.

The report was the only evidence brought before this court that labored to determine the cause of the fire. PW2 wrote this report basing on his experience and academic qualification. Paragraphs 3 and 4 of his witness statement state that he is an electro-mechanical engineer and holds the following professional qualifications:

- a) Bachelor of Science in Electro-Mechanical Engineering from University of Dar es Salaam (2012).
- b) Post Graduate Degree In Project Planning and Management from Uganda Management Institute (2017).
- c) Corporate Member of the Uganda Institute of Professional Engineers.
- d) Incorporated Engineer of the Engineering Council (UK).

I agree with the plaintiff's submission that PW2 falls well within the ambit of an expert within the meaning of section 43 of the Evidence Act which provides as follows:

“When the court has to form an opinion upon a point of foreign law or of science or Art or as to identity of handwriting or finger impressions, the opinion upon that point of persons especially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions, are relevant facts, such persons are called experts.”

In *Divie v. Edinburgh Magistrates (1953) SC 34 at 40*, it was held that:

“The duty of the expert witnesses is to furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.”

The court would generally determine the standard of care expected of professionals by examining during trial the evidence of experts from the same or similar profession. It is inevitable that the evidence of experts on the expected

professional standards would at times conflict. See ***Bolitho v City and Hackney Health Authority [1998] AC 228 ; Hotel Royal@Queens Pte Ltd v JM Pang & Seah (Pte) Ltd [2014] 3 SLR 967***

The defendant's submission that the plaintiff ought to have sued the sub-contractor does not hold water either. The defendant had the contract with Podtect Limited to install the new transformer to which the plaintiff was privy. The contract and its obligation or rights thereto between the defendant and the sub-contractor did not in any way confer any of the obligations therein to the plaintiff to give her a right to sue Podtect Limited in case they did shoddy work. The Learned Authors of **HALSBURY'S LAWS OF ENGLAND 4TH EDITION** address this particular situation as follows;

"The doctrine of privity of contract is that as a general rule at common law, a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it. The parties to a contract are those who reach agreement ... (emphasis mine)"

In addition, the defendant's counsel has submitted that the sub-contractor was an independent contractor. However, the defence of independent contractor was not pleaded. No evidence at all was led by the defendant to prove that Podtec Limited was an independent contractor. Even the contract was never produced in evidence.

Be that as it may, the statutory responsibility for safe supply of electricity is on the defendant as a licensee under the Electricity Act. Section 77(8) of the Electricity Act provides as follows:

(8) Where damage or loss is caused to the consumer by the negligence of the licensee in the exercise of powers conferred on the licensee by this

Part, the consumer is entitled to prompt payment of fair and adequate compensation by the licensee for the damage or loss sustained as a result of the exercise of those powers.

The defendant owed the plaintiff a duty of care as a consumer. The defendant breached this duty which caused loss to the plaintiff hence making her liable in negligence.

Whether or not the Plaintiff is entitled to the reliefs claimed?

Having found the defendant liable in negligence entitles the plaintiff to reliefs for the loss suffered as a result of the negligence.

Special Damages

The plaintiff sought special damages, general damages and costs for the suit.

PW1 Denis Ssewankambo who is a professional loss adjuster computed the plaintiff's loss as follows;

Building 42,203,200

Machinery 93,127,000

Stock 10,447,200

Assessed loss 145,777,400

Special damages must not only be specifically pleaded but they must also be strictly proved. see ***Borham-Carter v. Hyde Park Hotel [1948] 64 TLR.***

PW1 led evidence to show the plaintiff's loss as a result of the fire and also attached a loss assessment report that was admitted in evidence as PE1.

However the plaintiff did not adduce in evidence any documentary evidence whatsoever that caused the figures arrived at as the loss incurred. However, not in all cases should court require documentary evidence in proof of special damages. Furthermore, strict proof of special damages does not necessarily mean proof by documentary evidence. In the present case, the factory caught fire. To require the plaintiff to adduce documentary proof for the claims would be asking the plaintiff to prove the damages beyond reasonable doubt. I will adopt the reasoning in the following cases to guide this court in arriving at a just decision. In ***MUGABI JOHN VERSUS THE ATTORNEY GENERAL HIGH COURT AT JINJA CIVIL SUIT NO. 133 OF 2002***- it was held that:

“The law relating to special damages is settled. ***W.M Kyambadde v.Mpigi District Administration (supra) and Bonham Carter v. Hyde Park Hotel Ltd (1948) 64 TL P 177*** the guiding principle is that special damages must be specifically pleaded and strictly proved. See also ***Hassan v.Hunt [1964] EA 201; Kainamura Melvin Consultant Engineering & 7 Or’s v. Connie Labada, S.C.C.A No. 61 of 1992; J.B. Semukima v. John Kaddu (1976) HCB 16.***

It is noted that the Defendant’s Counsel faults the Plaintiff for not availing receipts, books of accounts or evidence of paying tax as proof of the special damages claimed. My understanding of the phrase; “specifically pleaded and strictly proved”, from the above cited authorities is that proof needs not necessarily be documentary or physical in nature.

In practice, where a party claims that he or she has suffered special damages or injury of a kind that may not be proved by documentary or physical evidence, the duty lies upon him or her to plead full particulars to show the nature and extent of the damage claimed, that is; the amount he or she claims to be recoverable. This operates fairly to inform the

Defendant sufficiently of the case he or she is to meet so that he or she is not taken by surprise. See ***Shah v. Mohamed Haji Abdalla [1962] EA 769***.

The stated position confirms that for as long as there is sufficient proof of the loss actually sustained which is either a direct consequence of the Defendant's action/omission or such a consequence as a reasonable man would have contemplated, this would suffice in place of physical and/or documentary evidence. See ***Byekwaso v. Mohammed [1973] HCB 20***".

The plaintiff therefore is awarded special damages of **145,777,400/=**.

General damages

The plaintiff also sought general damages to a tune of UGX 50,000,000.

As far as damages are concerned, it is trite law that general damages are awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, 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 circumstance and

nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

The plaintiff clearly suffered damage as a result of the defendant's actions. I find the award of UGX 20,000,000 as sufficient general damages to compensate the plaintiff for the inconvenience suffered.

Interest

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal v Warid Telecom Uganda HCCS No. 224 of 2011,*** Court held that;

“ A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due”

Special damages shall attract an interest of 12.5% while general damages shall attract an interest of 15% from the date of judgment.

The plaintiff is awarded costs of the suit.

I so order.

Dated, signed and delivered be email at Kampala this 30th day of April 2020

SSEKAANA MUSA
JUDGE