REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 1090 OF 1994

JEREMIAH MAINA KAGEMA……PLAINTIFF

V E R S U S

KENYA POWER & LIGHTING CO LTD……DEFENDANT

J U D G M E N T

In this suit filed on 18th March, 1994, the Plaintiff brought an action for damages against the Defendant Company for negligence and/or breach of a statutory duty. The Plaintiff was the owner of the property known as L.R. Number 61 (Site and Service Scheme) in Ol Kalou Town on which he had built residential houses. On the 27th day of April, 1991, a fire erupted in one of the houses on the aforesaid property destroying certain structures of the house before it was put out by members of the public and some police officers. The cause of that fire was the subject of the Nyahururu Senior Resident Magistrate's Fire Inquiry No. 48 of 1991. The Learned Magistrate, Honourable J.N. Kirembui, in his ruling of 8th May, 1992 concluded that the fire was as a result of an electrical fault. On 23rd May, 1994, judgment was entered for the Plaintiff in default of appearance but the same was set aside by Bosire J. on 29th September, 1994 as there was a Memorandum of

Appearance on record at that date and the time for filing a defence had not elapsed. The Court is required to determine the following issues as filed on 8th May, 1995:-

1. Whether a fire caused by faulty electricity supply lines erupted in the building (L.R. NO. 61) at Ol Kalou Town on 27th April, 1991;

2. Whether there was a Fire Inquiry conducted by the Senior Resident Magistrate's Court at Nyahururu and which ruled that the fire was caused by an electrical fault;

3. Whether that fire was caused by the negligence of the Defendant's staff;

4. Is the doctrine of res ipsa loquitur applicable to this case"

5. Who is to blame for the electrical fault, if any, that caused the fire"

6. The costs of replacements to the damaged premises and who should pay for the same"

The facts that a fire erupted on the property L.R. NUMBER 61 at Ol Kalou Town on 27th April, 1991 and the cause thereof was ruled to be an electrical fault by the Senior Resident Magistrate at

Nyahururu are not disputed.

However, the Defence led evidence and argued that the fire could have been caused by a source other than electricity. On the issue of whether the dectrine of res ipsa loquitur applies to this case, I must state that no evidence was led by the Plaintiff to shift the burden of proving the cause of the fire to the Defendant. The meaning of this maxim was explained by Kennedy L.J. in **Russel v. L. & S. W. Ry [1908] 24 T.L.R. 548 at p. 551** as follows:-

"….that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was s ome negligence, upon the facts as shown and undisputed, than that the occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows th at what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."

The Learned Judge then continued:

"***Res ipsa loquitur does not mean, as I unders tand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of."***

That maxim, that the thing speaks for itself, is a principle of evidence and not tort law. It can only be pleaded where the event is unexplained by the Plaintiff and not as here where he has consistently averred that the cause of the fire was an electrical fault. Indeed, his counsel, Ms. Ritho, relied on the doctrine in **Rylands v. Fletcher [1868] L.R. 3 H.L. 330** which does not require proof of negligence to establish liability. Res ipsa loquitur is therefore misplaced here.

In his evidence on 12th October, 2000, the Plaintiff stated that he was called from his house, a distance from the residential property, by his sister in law who informed him that one of the houses on L.R. NO. 61 was on fire. He rushed there and found the fire had already been extinguished by the police and members of the public. When he could not tell how the fire occurred, he asked Simon Ngigi Mburu (P.W.2) to examine the wiring of the house which he did and concluded that the fire was caused by the Defendant's low voltage cable that passed through the ceiling and not any wiring defects in the house (P.M.F.1, 2 is his affidavit to that effect). That affidavit was sworn on 10th June, 1994. The Plaintiff also testified that none of the fuses in his house were replaced after the incident. They were left intact.

However, the burnt cable from the meter box to his house and the fuses in the meter box were removed and taken away by the Defendant's personnel. A valuation report was prepared by John K. Mbuguaa (P.W.5) of Mbugua & Associates (Land Valuers) on 29th December, 1993. He put the cost of recostruction of the building based on the 1993 prices at Shs. 180,000/= which the Plaintiff prays for as special damages. Although Simon Ngigi Mburu (P.W.2) was called as an expert witness, he falls short of the requirement of Section 48 (1) of the Evidence Act (Cap. 80) which requires the witness to be specially skilled in his area. He had stated that he is an expert in determining the cause of fires but he could not produce any professional certificates or qualifications to justify his being speciallyskilled. He simply said that he had worked for Nui Electrical Company from 1991 to 1993. Under cross-examination by Mr. Khawaja, he said he had not ascertained whether the switches were burnt and had not seen the burnt cables. It is unfortunate that a qualified electrician or electrical engineer was not called by the Plaintiff. Joseph Mathenge Warutere (P.W.3) was a tenant in the building who switched off the power at

the meter box. He said that he was called by the househelp of the burning house and rushed to remove a baby from that house. He testified that the fire was in the ceiling and not in the kitchen or bedroom and that is principally thereason he managed to get through to the baby. Esther Muthithi (P.W.4) was the househelp and she gave evidence to the effect that she had put the child to sleep and shortly thereafter noticed smoke from the ceiling. She screamed for help and called Joseph Mathenge (P.W.3). She denied any allegation that she could have started the fire using a jiko in the kitchen. For the Defence, Manases Chege Kinyua (D.W.1), a supervisor with the Defendant then in Nakuru, testified that there was no short circuit in the power supply line but the conduit pipe from the supply terminals to the house was burnt.

The wire inside the conduit pipe was not visible as the pipe was inside the concrete wall. He stated that the Company's liability stopped at the meter box and since none of the fuses was blown, the problem could only be in the house wiring system. He further stated that the Company does not check if the wiring is properly done in the house. William Onyango (D.W.2), a craftsman with the Defendant, testified that the main supply cable came through the conduit pipe and was protected by fuses at the transformer. These fuses were intact and the fault could not be on the Company's side. Looking at the evidence, it is clear that an electric fault caused the fire in question. There is no way a jiko could have burnt the ceiling and the conduit pipe therein. It was an electric fault which was not due to the Defendant's negligence. In her submissions, Ms. Ritho referred to the case of **Midwood & Co. Limited v. Mayor, Aldermen and Citizens of Manchester [1905] 2 K.B. 597** which dealt with a nuisance caused by electricity vaporizing an inflammable gas that exploded causing a fire. With respect, that case is inapplicable to the present suit. The second case of **Northwestern Utilities Limited v. London Guarantee and Accident Company Limited [1936] A.C. 108** is relevant. In embodying the rule of strict liability in Rylands v. Fletcher (supra), Viscount Hailsham L.C. Lord Blanesburg and Lord Wright held at p. 109:-

"….as the appellants were carrying gas at high pressure which was very dangerous, if it should escape, they owed a duty to the owners of the hotel, to exercise reasonable care and skill that the owners should not be damaged. The degree of care which that duty involved must be proportioned to the degree of risk involved."

Counsel's reference to the case of **Quebec Raillway, Light, Heat and Power Company Limited vs. Vandry and Others [1920] A.C. 662** on liability for the escape of electric current is correct except for the fact that the appellants were negligent in not grounding their transformers, that is, connecting a wire to the earth from the transformers.

Mr. Khawaja submitted that the Defendant was not liable under the Electric Supply Lines Act (Cap. 315), repealed, as such liability ended at the point where such electric supply line reaches the supply terminals. He relied on section 2 of Electric Power Act (Cap. 314), repealed, that defines a service line as any portion of any electric supply line through which electrical energy is or is intended to be supplied up to the point where such electric supply line reaches the supply terminals. In fact, section 12 of the former Electric Supply Lines Act (Cap. 315) conferred statutory liability for damage caused by a supply line. That section relied on by Ms. Ritho unfortunately does not aid her client. The preposition that the supplier's liability ends at the point when electricity is delivered to the consumer is supported by **Pearson J. in Sellars v. Best [1954] 2 All E.R. 389 at p. 394** where he states:-

"They are responsible, of course, for bringing the electricity along their own lines and for making and continuing to have, it may be, a proper connectio n at the terminal supply points…….It seems to me too much to say that the Board are responsible for what the occupier by himself and his contractors and agents have done or omitted to do to his own chattels on his own premises."

It is in the Plaintiff's evidence and also that of Simon Ngigi Mburu (D.W.2) that the wiring of the house was done by him (P.W.2) and not by the Defendants. Since the fire broke out only in the ceiling, then no negligence can be inferred on the Defendant's part. None of the fuses blew, and on a balance of probability, it is reasonable to conclude, as I do, that it was an internal defect in the wiring system of the house that caused the fire. On the issue of special damages of Shs. 180,000/= for repairs to the building, no receipts were produced. The loss of income of Shs. 150,000/= for ten months in which the houses were not occupied was not pleaded nor supported by evidence. Accordingly, I agree with the Defence that these prayers must fail on the authority of **Herbert Hahn v. Amrik Singh 1 KAR 738 where Kneller J.A** held that special damages must not only be specially claimed, but also proved strictly.

I, therefore, dismiss the Plaintiff's suit with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 30th day of July, 2001.

ALNASHIR VISRAM

JUDGE