



**IN THE HIGH COURT OF MALAWI**

**LILONGWE DISTRICT REGISTRY**

**CIVIL CAUSE NO 8 OF 2011**

**BETWEEN:**

**WIZA KUMWENDA-----PLAINTIFF**

**AND**

**ELECTRICITY SUPPLY COMMISSION OF MALAWI---DEFENDANT**

**CORAM: HON. JUSTICE M.C.C. MKANDAWIRE**

**Ulaya/Kumwenda for Plaintiff**

**Kambauwa, for Defendant**

**Ms Mthunzi, Senior Court Reporter**

**Mr Itai, Court Interpreter**

**JUDGMENT**

**INTRODUCTION**

The plaintiff, Mwiza Kumwenda by a writ of summons commenced this action against the defendant, Electricity Supply Commission of Malawi ESCOM claiming damages including punitive and exemplary damages, loss of residence and costs of this action following a fire that broke out at the residence of the plaintiff which resulted in the house completely burning out including the property in the said house. The defendant ESCOM denied such claim.

## PLEADINGS

1. The plaintiff was at all material times a Malawian residing at plot no 44/95 in area 44 with his family and using electricity supplied by the defendant.
2. The defendant a limited liability company were engaged in the business of generating, transmitting and distributing electricity throughout Malawi.
3. The plaintiff entered into a contract with the defendant for the stable supply of electricity save for acceptable fluctuations.
4. The said contract was also governed by the Electricity Supply Commission Regulations.
5. In breach of the said contract, the defendant negligently allowed excessive voltage to be supplied to the plaintiff's house thereby causing a fire that destroyed the entire house and property therein.
6. Particulars of negligence;
  - 6.1 Failure to note and correct the heavy short circuit from the three phase power supply line to the house.
  - 6.2 Failure to provide proper insulation on the area around the three phase power supply line where the service line branches off to the house of the plaintiff.
  - 6.3 Failure to constantly inspect the plaintiff's premises to ensure compliance with safety standards.
  - 6.4 In the alternative, the plaintiff shall plead
    - 6.4.1 Breach of Part 1 Regulation 6(1)(b) and Part 2 regulation 15(1) (a) of the electricity (Wiring) Regulation.
    - 6.4.2 Res Ipsa Loquitor
7. The plaintiff in consequence has suffered considerable loss and damage.
8. Particulars of damage;
  - 8.1 All house hold property was burnt and destroyed
  - 8.2 Burnt house which cannot be repaired or maintained.
  - 8.3 Loss of residence
9. Therefore the plaintiff claims for;
  - a) Damages including punitive and exemplary damages to be assessed.
  - b) Loss of residence

c) Costs of the action.

The defendant in their defence pleaded as follows:

1. The defendant puts the plaintiff to strict proof of paragraph 1 of the statement of claim.
2. The defendant admits paragraph 2.
3. The defendant denies contents of paragraph 3.
4. The defendant still denies paragraph 3.
5. The defendant denies paragraph 5.
6. The defendant denies being negligent and that if indeed the plaintiff suffered the alleged damage by fire or any damage, the same was occasioned without any negligence on the part of the defendant and in circumstances which the defendant has no control and of which they had no knowledge.
7. The defendant therefore denies the alleged loss or damage.

## **EVIDENCE**

In order to prove its case, the plaintiff paraded six ( 6) witnesses. In defence, the defendant paraded two (2) witnesses. The evidence of Wiza Kumwenda PW NO 1 is that he is the owner of the house on plot NO 44/95 in area 44. On the 20<sup>th</sup> of August 2011, he had left his house for work at around 6:45 am. When he started work, he got a call from his cousin Moshe Kumwenda who was staying with him at the house that the house was on fire. He went to call the police who later on called the fire people from the city of Lilongwe and they all went to the house. The fire brigade extinguished the fire but after extensive damage had already been done to the house. He observed that the service line was down and part of it which was connected to the house melted. Later, the ESCOM people arrived at the scene and they cut out part of the service line.

Moshe Kumwenda was PW NO 2. He told the court that he was residing at this house together with his aunt and that the plaintiff is his cousin. His evidence is that on the material day at around 6;30 am, he went outside the gate of the

house doing some general cleaning. As he was there, he heard people screaming from inside the gate that there was fire on the house. He dashed to the house and saw sparks of fire on top of the house at the D-Iron area where the service line connects to the house. He immediately entered into the house to ensure that everybody that was inside was evacuated. Later on he observed that that part of the service line connecting to the house was burning. The fire became so intense that they could not rescue any property. He told the court that he is the one who informed the plaintiff about the fire and that later on the plaintiff, the fire brigade from the city of Lilongwe and the defendant ESCOM arrived at the scene. He saw ESCOM officials removing the cut out and they also took the meter from the box. By the time the fire was put off, the entire house together with the properties in the house were completely burnt

The witness was subjected to a very lengthy and intensive cross-examination. He however stuck to his word about the events on that material day. In cross-examination, he disclosed that in the room where there was intensive fire, there was a florescent bulb. In re-examination, he disclosed that the room which caught fire was not occupied.

The evidence of PW No 3 was that of Mr Robert Jiya. He is the Chief Fire Officer from the City of Lilongwe. He has 12 years experience. He is the one who conducted the inspection at the house of the plaintiff. He tendered his fire report as P Ex no 3(a). His opinion was that this was a downward burnout as opposed to an upward burnout. As an expert in fire, this meant that the fire did not originate from within the house. The report indicated that the epicenter of the fire is presumed to be around the D-Iron and some sections of the service line. The witness underwent a bombardment of cross-examination. He stressed the fact that about 2 meters of the service line from the D-Iron was burnt and that this part was later on cut off by the defendant's officials. He also told the court that the epicenter of the fire was determined through the burning of the bricks. In re-examination, the witness said that their finding was that the epicenter of the fire was presumed to be at the D-Iron where the service line and the D-Iron intersect.



PwW NO 4 was Mrs Kantchenche who is a neighbour to the plaintiff. She had no details as to how this fire had started. All she confirmed was that her neighbour's house and property were burnt to ashes on the material day.

The evidence of PW NO 5 was that of Mr Charles Kanyemba Mvula. He is a highly qualified electrical engineer. He holds a Bachelor of Science and Master of Science degrees in electrical engineering from the University of Malawi (the Polytechnic) and the United Kingdom respectively. He graduated from the Polytechnic in 1991. He has worked for Carlsberg and Limbe Leaf both very reputable companies in Malawi. Since 1999, he has been self employed running his own business concern known as Electrics Limited. As an expert in the field of electrical engineering, his evidence was that he was engaged by Mwiza Kumwenda to inspect the burnt house at plot no 44/95 at area 44 in the city of Lilongwe. After the inspection he produced a report which he tendered as PEx 5(a). His finding was that the fire outbreak was due to the short circuit of the wires supplying the house where insulation got damaged by sharp ages of the house roof iron sheets which were interconnected to the ESCOM service iron figure 8 cable at the top of the roof. He said that the fixture which was supplying the D-Iron that is the wire from the ESCOM line was loose. In his opinion, due to the loose fixture holding the D-Iron was just moving when the wind was blowing and then the wires were contacting the sharp ages of the iron sheets. The exposed parts led to the sparks which were next to the ceiling and this generated fire. It was the evidence of the witness that from his knowledge, ESCOM's responsibility ends at the meter box and the owner has the responsibility from the D-Iron.

The last witness for the plaintiff was PW NO 6 Rosemary Ligomeka. She was a neighbour to the plaintiff. She informed the court that on the material day as she was about to leave for work, she saw lights flickering. As she was coming out of the house, her worker shouted that there was fire at the house of Mr Kumwenda now the plaintiff. She tried to call the fire department at the city as well as ESCOM but to no avail. Later on she saw ESCOM and the fire brigade arriving at the scene but it was already too late.

The defendant invited two witnesses. Dw NO 1 was Grey Kadziputa who works as a linesman at ESCOM. He has been with the defendant since 2005. His duties are to rectify electrical problems and also install meters. On the material day, as he was on his way to work, he was informed by his office that there was a fire incident at area 44. He therefore diverted to area 44. On arrival there, he observed that the fire was too intense. He also observed that the cut out to the meter was already removed and all he could do was to go to the sub-station to remove the fuse in order to isolate the house from supply. He also found that the fuses at the transformer were not blown off. He went back to the scene and removed the emergency meter and two service wires which were broken by the fire. The voltages were recorded and they were normal at between 240-239. He concluded by saying that on the material day, there were no faults reported from that place and he tendered the fault sheets. The witness underwent a barrage of questions in cross examination. It was very clear from his answers that he was not an eye witness as to where the fire had started from. He however insisted that there was no electrical problem at the house in as far as ESCOM is concerned. The witness also attempted to venture into some hearsay evidence in particular on the issue that someone at the scene had told him that he had heard an explosion from the room where the fire had started. He could however not even pin point at this person and this was very dangerous piece of evidence.

The next witness and last one for the defendant was DW NO 2 Mr Macdowell Kumatso. He is the District Engineer for the defendant. He holds a Bachelor of Science in Engineering which he obtained from the University of Malawi the Polytechnic in 2003. He is an expert in areas of electrical engineering. He informed the court that he is the one who investigated the fire incident herein. He said that he personally went at the scene at area 44 and conducted interviews and installation inspection. He produced a report which he tendered as DEx 2(a). According to his findings, the fire herein was not caused by any electric fault on ESCOM's side. It was caused by an internal problem on the plaintiff's side. The witness also tendered the supply agreement form which is DEx 3. He particularly brought to the attention of the court clause 8. He also referred to the log sheet

DEx 1(2). In conclusion, he said that their finding was that the fire started inside the house but could not tell as to what had started it.

During cross examination, the witness was very clear that he could not tell with precision as to what was the cause of the fire. He however insisted that there was no short circuit to cause the sparking. What was also clear from his answers during cross-examination is the fact that before ESCOM can connect the power to the consumer there is certification that everything is in order at the house. He said that was the procedure that was followed before power could be connected to the plaintiff's house.

### **ANALYSIS OF THE EVIDENCE**

There are two versions that have been given in this case. The plaintiff's side has advanced the school of thought that the fire had started from the top of the house going downwards. There are three witnesses from the plaintiff's side that have subscribed to this version. PW NO 2 was physically present when the fire started and he was consistent that the fire had started from the top of the house where the service line supplied by the defendant meets the D-Iron. This witness is just an ordinary person who has no expertise in electrical engineering. What he said however is crucial because he was personally there and as a lay man in this field, he did not require a degree in electrical engineering in order to tell what is a spark and what is fire. The evidence of this witness was not at all shaken during cross-examination. The evidence of Mr Jiya a fire expert is very crucial. He actually confirmed the version given by this ordinary witness that the burning of this house was top-bottom a sign that the fire had started from the top of the house. This witness even tendered photographs of the burning confirming that this fire had come from the top. The evidence of PW NO 5 Mr Charles Kanyemba Mvula was extremely helpful because not only did it confirm the version of both PW NO1 and 2, but it even went further by giving an expert opinion as to what should have caused this fire. This opinion did not come out from the evidence of DW NO 2 Mr Macdowell Kumatso who was an expert brought by the defendant.

Having looked at the evidence of DW NO1 and DW NO 2, with due respect, these two witnesses were very wanting. It was therefore not surprising that DW NO 2



could not even give his opinion as to what was the cause of this fire and where it had started from. Both witnesses were very speculative and on most occasions left this court in abeyance. I thought that as an expert, DW NO 2 should have been in a position to give this court his opinion as to what was the cause of this fire. I can excuse the Linesman DW NO 1 that may be this field was very complex for him, but not DW NO 2 who boasted of having a degree from the University of Malawi in Engineering. He claimed that he had visited the scene and conducted a detailed inspection and investigation yet at the end of the day, he could not tell the court as to the cause of the fire. I found that these two experts that is PW NO 5 and DW NO 2 were miles apart in as far as they had conducted their investigations. Pw NO 5 really showed that he is an expert in this area and his findings were reasonable and understandable. As for those of DW NO 2, the findings were as confusing as he himself was left confused that he could not even tell what was the cause of this fire. If he was unable to give an opinion on the cause of the fire, the defendant should have invited a more conversant expert at least to give an expert opinion. Both DW NO 1 and 2 went further by saying that they had interviewed people at the scene who informed them that they had heard an explosion. The two witnesses concluded that this should have been an explosion of a fluorescent bulb. Pressed to mention as to who these people they had interviewed were, these two defence witnesses were tongue tied. I found this type of evidence unreliable and inadmissible as it was purely hearsay. PW NO 2 who was right at the scene was not at all interviewed by these people and so were the neighbours to the plaintiff. One therefore wonders as to who were these people DW NO 2 was talking about. Certainly these should have been imaginary bystanders. May be these might also have been some overenthusiastic passersby who cannot even be traced. This court is therefore satisfied that the fire was caused through sparks which were ably explained by PW NO 5. These sparks were as a result of the looseness of the D-Iron which was moving as the wind blew and the wires were touching each other due to the removed insulation as a result of sharp iron ages there.

The court has looked at the dynamics of electrical supply system in Malawi. The defendant have heavily relied on the Agreement ForThe Supply of Electricity Form



A which has clause 8 which sets down the parameters of responsibility. In other words, this clause provides that any electrical equipment beyond the ESCOM'S metering point shall be procured, installed and maintained by the customer. Such equipment shall remain his/her at all times. The Corporation shall not be responsible for damage to property/equipment or injury to life resulting from the customer's installation side.

On their side the plaintiff have brought to the attention of the court Part 11, Regulation 15 (1) (a) of the Electricity (Wiring) Regulation which provides that the consumer's installation shall have conductors sufficient in size and power for the purposes for which supply of electricity is to be used; constructed, installed and protected so as to prevent as far as is reasonably practicable, danger to person or property.

What the court has found to be true in this case is that the defendant had connected supply of power to the plaintiff's house after having satisfied themselves that the D-Iron was properly set and that everything around the D-Iron was in order. The defendant certainly should have noted the sharp iron edges that were there at the time they were making the connection. The presence of those sharp edges should have made the defendant to make sure that they provide durable insulators so that the service wires are fully protected. It should have been their duty to assess as to whether to connect the power or not. The court was informed by DW NO 1 during cross examination that he has been working in that jurisdiction where the plaintiff's house is for a long time but for the past 4 years, he has never visited the plaintiff's house even on a routine inspection. If a routine inspection was done, the defendant could have detected the rooming danger about the D-Iron being loose and the consequences of the service wire scratching against the sharp edges of the iron sheets.

## **FINDING**

I find that the defendant did not fulfill their statutory duty and they were negligent in the performance of their duties. They had breached their duty of care. They are therefore responsible for the damage that was caused to the house

of the plaintiff including the loss of property therein. The damage to be assessed by the Registra. I award costs to the plaintiff.

**DELIVERED THIS 16<sup>TH</sup> DAY OF NOVEMBER 2016 AT LILONGWE**

**M.C.C. MKANDAWIRE**

**JUDGE**