



REPUBLIC OF KENYA



KENYA LAW
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Skytech Communications Resources Limited v San Valencia Limited (Civil Appeal E0837 of 2022) [2024] KEHC 9223 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E0837 OF 2022

JM NANG'EA, J

JULY 30, 2024

BETWEEN

SKYTECH COMMUNICATIONS RESOURCES LIMITED APPELLANT

AND

SAN VALENCIA LIMITED RESPONDENT

(Being an appeal from the judgement of the Chief Magistrate's court at Nairobi Milimani Commercial Court (Hon. G Mmasi- SPM) delivered on 31/01/2020)

JUDGMENT

Grounds of Appeal and reliefs sought.

1. By a Memorandum of Appeal filed on 19/10/2022, the appellant faults the said trial court's judgment on grounds that may be summarized as hereunder:
 1. That the Learned Magistrate erred in law and fact in failing to consider and apply relevant guiding principles and case law and thus failed to award special damages to the appellant.
 2. That the Learned Magistrate erred in law and fact by failing to consider the appellant's submissions on the quantum of special damages awardable in the case.
 3. That the learned Magistrate erred in law and fact in failing to award special damages against the weight of evidence.
2. The appellant therefore seeks the following orders;
 - 1) That the appeal on special damages be allowed.
 - 2) That the Lower Court's judgement disallowing special damages be set aside.



3.) THAT this court does assess and award special damages pleaded in the suit before the lower court.

And

4.) THAT the costs of the appeal together with interest thereon be granted to him.

Analysis and determination.

3. Learned Counsel for the parties filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate granted the appellant, the plaintiff in the suit before the lower court, general damages in the sum of Ksh. 4,000,000 for loss of user as well as the costs of the suit and interest. The judgement followed the appellant's suit in which it sought general damages, special damages of Kshs. 10,200,000, the costs of the suit and interest on account of damage to its office equipment by fire that allegedly broke out owing to the negligence of the respondent's employees. Among the particulars of negligence pleaded in the suit is that the respondent's employees left a deep frier in their restaurant unattended thereby causing a fire break-out.
4. The respondent filed defence traversing the allegations of negligence and loss occasioned to the appellant. In the alternative and without prejudice, the respondent contended that any fire break-out at the material time was accidental and was thus not attributable to its employees' negligence. The respondent therefore prayed for dismissal of the suit with costs.
5. The appellant's evidence at trial underscored the averments in the suit. Its Director (PW2) testified that on the material date at 2.00 am he received a telephone call informing him of a fire incident in their offices. He rushed to the scene where he found members of a Fighters Brigade helping to put out the fire. After the fire was successfully extinguished it was discovered that the appellant's office equipment including Telecommunication devices, CCTV Cameras, Broadcast devices, Audio devices, Visual devices and computers had been damaged.
6. PW2 further testified that he reported the incident to their Insurance Company which commissioned a Loss Assessor called Cunningham & Lindsey Kenya Limited to assess the loss caused to the appellant by the fire. A Director of the company (PW3) tendered the assessment report dated 19/12/2011 in evidence showing that the loss suffered amounted to Kshs. 10,200,000 . The report notes inter alia that the value of damaged and undamaged property in the appellant's premises was Kshs. 5, 694,487 and Kshs. 1,073, 742 respectively. The sum insured under the fire policy was established to be Kshs. 4, 120,000. As a result of the damage, the court was told that the appellant had to close its business for 2 years and laid off its employees. Invoices showing purchase of the destroyed property were said to have also been burnt. The appellant's Insurer declined to pay compensation due to the missing invoices.
7. Among the fire fighters was PW1, a Fire Fighting Officer employed by the defunct Nairobi City County Council and who was on duty at the material time. He told the court that on arriving at the scene with other fire fighters after being alerted, they noticed that the Mezzanine floor of the building housing the appellant and the respondent was on fire. According to him the fire originated from the respondent's kitchen where there was an unattended to frier. In his opinion , an electrical fault can cause fire as well. The witness produced his report about the incident.
8. The respondent called its restaurant's manager in its defence. His evidence is that he was not on duty at their restaurant on the material date . Their night guard alerted him of the fire at about 2.30 am. He went to the premises and found fighters trying to contain the fire. The defence witness told the court that their kitchen frier was intact and so it was not the cause of the fire according to him.



9. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the lower court and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR. As exhorted in these decisions, an appellate court should also bear in mind the fact that it neither heard nor saw the witnesses testifying in order to gauge their demeanour.
10. In her impugned judgement, the learned trial magistrate was of the view that the special damages claim was not strictly proven by receipts and invoices contrary to the law and declined to award the same. Regarding general damages, she granted the appellant Ksh. 4,000,000 for loss of user observing that it was compelled to close its offices for 2 years because of the damage. Based on the Memorandum of Appeal the appellant, however, seems to be contesting only the decision of the trial court not to award special damages.
11. The appellant's Counsel submit citing the Court of Appeal case of *Mitchell Cotts (K) LTD V. Musa Freighters* (2011)eKLR inter alia that a claim for special damages is not necessarily proven only through documentary exhibits. It suffices if there is otherwise credible evidence of loss caused by the defendant. In the cited case, my learned brother (*Sergon J.*) accepted oral evidence of the value of tyres supplied to the respondent in the absence of documentary proof, as for instance by means of purchase receipts. The Court of Appeal in that case endorsed the High Court's decision to award special damages non-production of supporting documents notwithstanding.
12. The appellant herein contends that despite the unavailability of purchase receipts in respect of the destroyed items, the loss occasioned was pleaded and, furthermore, the evidence of PW1 and the Loss Assessor's report tendered by PW2 corroborates the appellant's evidence regarding the loss suffered. The appellant further points out that , in any event, the respondent did not dispute or discredit the Loss Assessor's report.
13. The respondent's submissions in reply are that the trial court rightly declined to award special damages for want of proof . The learned Counsel for the respondent restated the legal position that special damages should not only be specifically pleaded but also strictly proven and not left to conjecture or speculation. Reference is made to the provisions of section 109 of the *Evidence Act* which provides that the burden of proving a fact " lies on the person who who wishes the court to believe in its existence, unless it is provided that the proof of that fact lies on any particular person". It is the respondent's argument that the appellant did not discharge that legal burden. The appellant's explanation that documents supporting the value of the damaged property were destroyed in the fire is dismissed , with the respondent observing that no effort was made to source for requisite supporting documents.
14. It is trite law that a claim for special damages must not only be specifically pleaded but also strictly proven (see *Capital Fish Limited V. Kenya Power and Lighting Company Limited* (2016) eKLR among many other judicial determinations on the subject). Having so said, I must concur with the appellant' submissions. The special damages claim was pleaded and expert evidence as to the value of the loss has been tendered in the absence of purchase receipts said to have burnt in the fire .The evidence meets the legal threshold of proof on a balance of probability as guided in the case of *Mitchell Cotts (K) LTD supra*. In the circumstances the respondent's submissions are distinguishable.

Determination.

15. Consequently, the appeal succeeds on all the stated grounds. The special damages claim of Kshs. 10,200,000 is found to have been proven on a balance of probability and is hereby granted. The trial



court's judgement on special damages is accordingly set aside and substituted with an order granting the appellant special damages in the sum of Kshs. 10,200,000 as pleaded. The appellant will have the costs of the appeal.

Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 30TH DAY OF JULY, 2024 IN THE PRESENCE OF :

The Appellant's Advocate, Ms Kathike

The Respondent's Advocate, Mr Waweru

The Court Assistant, Ruth

J. M. NANG'EA

JUDGE

