



**Uzuri Foods Ltd (Elliot's Bread Division) v Mwangi (Civil Appeal
588 of 2016) [2024] KEHC 13140 (KLR) (Civ) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13140 (KLR)

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

CIVIL

CIVIL APPEAL 588 OF 2016

TW OUYA, J

OCTOBER 31, 2024

BETWEEN

UZURI FOODS LTD (ELLIOT'S BREAD DIVISION) APPELLANT

AND

JOSEPH MUGO MWANGI RESPONDENT

*(Being an appeal of the Hon. D.O Mbeja (MR), Senior Resident Magistrate) Delivered
on 24th August 2016 in Milimani Commercial Courts Civil Suit No 85 of 2008)*

JUDGMENT

Background

1. The Plaintiff/Respondent sued the Appellant/Defendant in Milimani Commercial Courts Civil Suit No 85 of 2008 for alleged breach of contract and recovery of unpaid extra cent due. After the trial, the lower court entered Judgment against the Appellant for special damages of Kshs 163,815. The Appellant filed its Memorandum of Appeal dated 2nd September, 2016 against the impugned Judgment.
2. On or about 6th October 2005, the Plaintiff entered into an agreement with the Defendant to distribute and sell the Defendant's bread products and confectionary when supplied with the same by the defendant. It was one of the terms of the said agreement that the Defendant would regularly supply the Plaintiff with sufficient stock to enable the Plaintiff to trade profitably at all material times and to give the Plaintiff his monthly extra cent statements after which he would be paid his extra cent. In breach of the said agreement between October 2006 and March 2007, the Defendant has consistently failed to provide the Plaintiff with sufficient stock as requested by the Plaintiff. The plaintiff has therefore suffered loss of Kshs.2,200 per day from 20th March, 2009 which he attributes to the Defendant who stopped supplying the Plaintiff with stock. The Plaintiff also claimed an extra cent refund of



Kshs.163,815 for the period between October, 2005 and 3rd March, 2008. The alleged breach is averred to have taken place between October 2006 and March 2007.

3. The matter went into full trial and the trial court found in favour of the plaintiff. The Defendant being dissatisfied with the outcome of the case filed a memorandum of appeal based on the following grounds:
 - a. The learned Magistrate erred in finding that the Respondent was entitled to the claim for Kshs 163,815/= being special damages when no receipt(s) or other material evidence was produced to show that the respondent incurred the alleged loss.
 - b. The learned magistrate erred in awarding Kshs 163,815/= when no evidence to prove the special damage was produced.
 - c. The learned magistrate erred in holding that standard of proof in Civil case is on a “balance of probabilities” when the claim was founded on special damage that needed to be specifically proved.
 - d. The learned magistrate erred in applying the principal of “balance of convenience” in a special damage claim.
 - e. The learned magistrate erred in introducing extraneous matters unrelated to the issues before court in arriving at the Award.
4. They seek for the following orders:
 - a. The appeal be allowed.
 - b. The Judgement and decree aforesaid be set aside and the pontiff’s case dismissed.
 - c. The Appellant be awarded costs of the original case and of this Appeal plus interests at court rates.

Submissions

5. The Appellant urges the court to appreciate the Respondent’s position as borne out the pleadings and amended plaint dated 8th March 2012. The crux of the plaintiff’s case can be discerned from clause 9 of the plaint where the particulars of the loss and damage were: “extra cents due from October 2005 to 3rd March 2008” and “loss of income of K h.2,200/= per day from 20th March 2009”.
6. The appellant argues that the Respondent’s claim was in the realm of alleged breach of contract, for which special damages were sought. He points out that the trial court found in many aspects against the Respondent but still ruled in his favor. For instance, in his judgement, the learned Magistrate at page 3 stated that:

“clause 4C of the agreement dated 6th October 2005 states and I quote “The agent will be issued with company official receipt of the money received every day.” The Plaintiff has not produced a single document to prove this fact. Section 107(1) of the *evidence Act* states and I quote; whoever desires any court to give judgement as to any legal right or liability depends on the existence of facts which he asserts must prove that those facts exist.”

The court at page 66 proceeded to state as follows:

“...the Defendant has maintained that he did not receive any payments from the Plaintiff for the sums claimed of 50 cents. This allegation has not been supported with any cogent



evidence backing this position. As earlier stated, the onus of proof squarely lies on, he who alleges. The contract herein did not carry with it a default clause. The intention of the parties was to interpret it the way it is. This Court is reluctant to infuse any default clause in the agreement dated 6th October 2005. It is incumbent upon the court to establish if the Plaintiff has established a prima facie case against the Defendant. This court does find that the Plaintiff has failed. This suit was filed in the year of our Lord 2008. The breach complained of was committed in the year 2009. This is an afterthought.”

7. The court proceeded to dismiss the Respondent’s/Plaintiff’s case further, where the learned magistrate at page 67 stated as follows for reasons:
 - i. “In the statement there is no reference to the contents of paragraph eight of the amended plaint where the loss is computed from 20th March 2009, long after this suit had been filed in court.
 - ii. Paragraph 7 of the amended plaint was not amended. The Plaintiff has not come out very clearly as to whether his claim of Ksh. 2,200/= per day is from 20th March 2005 as amended at paragraph 9 of the amended plaint and the averment at paragraph 8 that the loss has been suffered since 20th March 2009, when the Defendant stopped supplying. There is obviously a missing link.
 - iii. The Plaintiff is claiming a loss of income for over 77 months which translates to about 2,310 days in the sum of ksh.5,082,000/=. This was not specifically pleaded neither has it been proved.”
8. The Appellants submits that the court misdirected itself by applying wrong principles of “Balance of probabilities” and “balance of convenience” in a special damage claim. The learned Magistrate relied on a letter dated 24th March 2006 that was addressed to agents generally and not to the Plaintiff specifically. The Respondent did not show how he lost the sum of ksh.163,815/= or any other sum or at all. The doctrine of “balance of probabilities” and “balance of convenience” did not avail to the Respondent/Plaintiff when the court had in prior section of the judgement proceeded to make correct findings that the Plaintiff had not proved his case.
9. It is trite law that special damages must not only be pleaded, but that they must also be specifically proved. The plaintiff’s claim for special damages fails as the same is not specifically particularized and proved as required by law and shouldn’t be allowed. I wish to rely on the cases of Muchee Ntiga V David N. Waweru (2014) Eklr, Delta Haulage Services Ltd V Complast Industries Ltd & Another (2015) Eklr And Douglas Odhiambo Apel & Another V Telkom Kenya Ltd Ca No. 115 Of 2006.
10. In Muche Nthiga v David N Waweru (2014) eKLR. Honourable Ngaah Jairus J in upholding the trial court’s decision and dismissing the appeal for lack of proving special damages quoted the court of appeal sitting at Nairobi in civil Appeal No. 180 of 1993 William Kiplangat Maritim & Another v Benson Omwenga which cited with approval its earlier decision in Charles C. Sande v Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992 (unreported) where it said:

“As we pointed out in the beginning of this judgement, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is trite law that special damages must not only be pleaded, but that they must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law.”



11. The court also quoted its decision in *Coast Bus Services Ltd v Sisco E. Murunga Ndayi & 2 others* civil Appeal No. 192 of 1992 (unreported) where it is stated:

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was the time of trial. If at the time of filing suit, the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars.”

12. In *Delta Haulage Services Ltd v Complast Industries Limited & Another* (2015) eKLR Honorable Mabeja J held that:

“By failing to produce the documents it was relying on as evidence in case, the Plaintiff had failed to strictly prove the special damages it was claiming. That being the case, I find that the plaintiff did not prove its claim to the standards required, and its claim therefore fails accordingly, the suit is hereby dismissed with costs.”

13. In *Douglas Odhiambo Appel & Another v Telkom Kenya Ltd CA No. 115 of 2006*, the court of appeal stated that:

“.....a plaintiff is under duty to present evidence to his claim. Such cannot be supplied by pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.....unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed.....submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court been the plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur.”

14. We humbly submit that the Respondent was not entitled to special damages of Ksh.163,815/=. This amount had been claimed as unpaid extra cent dues. Although the Respondent had pleaded it, he has not produced any official receipts to reflect his position. During cross examination, the Respondent admitted that he never possessed the said receipts. We refer the court to the case of *Maritim and Another vs. Anjere* (1990) EA312 where it was held that:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

15. Further, this holding was elaborated in the case of *Cecilia W. Mwangi & Another V Ruth W. Mwangi* (1997) eKLR in which the court held that “loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. “The Appellant reiterates that the Respondent never possessed official receipts of his claim. Therefore, his failure to produce such official receipts or financial records disqualifies him from the award of special damages of Ksh.163,815/=. The Respondent had failed to strictly prove the alleged claim which is founded on special damages.



16. In this case, the burden of proof lay with the Respondent/Plaintiff. The incidences of this burden arose when he was required to produce receipts or financial records to justify the alleged loss of Ksh.163,815/=. However, he failed contrary to the requirements of section 107,108 and 109 of the Evidence Act. In the case of *Hellen Wangechi v Carumera Muthini Gathua* (2005) eKLR, it was held that:

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the..... test applied when coming to a decision in my particular case. The fact was succinctly put forth by Rajah JA in *Bristestone PTE Ltd v Smith & associates Far East Ltd* (2007) 4SLR (R) 855 at 59: ‘The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”

17. The Respondent’s alleged loss of earnings in the sums of Ksh.163,815/= could not be proved without official receipts or financial records. During cross examination, the Respondent also admitted that he never possessed the official receipts. In absence of such critical evidence, the trial court mistakenly titled the balance of convenience in favour of the Respondent. On this point, we rely on the case of *Douglas Kalafa Ombeva v David Ngama* (2013) eKLR, where the Court of Appeal held that:

“Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

18. By stating that the balance of convenience titled in favour of the Respondent/Plaintiff in this special damages claim, the court was acting in a vacuum and whimsically.

19. The Appellant submits that the learned magistrate misdirected himself by entering judgement in favour of the Respondent/Plaintiff. We humbly pray that the Honourable court allows the appeal proceeds to dismiss the plaintiff’s claim with costs.

20. The Respondent has not participated in this appeal and has not filed any submissions therefore the court will rely on the record.

Analysis And Determination

21. The Court has considered the pleadings, the evidence on record and the submissions on record accompanied by supporting authorities. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1.

22. The issue as to whether and when an appellate court can interfere with a trial court finding was settled by the Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

23. With the above in mind, and with due caution, the court has re-evaluated the Respondent claim against the evidence adduced. The Respondent filed this case vide a plaint dated 21st December 2007 which was amended on 8th March 2012. He prayed for:



- a. Special damages for Kshs 163,815 together with interest at court rates.
 - b. Kenya Sh. 2,200 per day from 20th 2009 plus interests.
 - c. General damages for breach of contract
 - d. Cost of this suit
24. In his evidence he relied upon his witness statement supported by:
- a. Agreement of 6th October, 2006
 - b. Letter of 2nd December, 2006 indirectly referring extra cent policy.
 - c. Letter of 8th December, 2006 indirectly referring extra cent policy
 - d. Letter of 24th March, 2006 directly referring extra cent policy
25. The Respondent's claim was that he incurred a loss of ksh. 2200 per day from October 2006 to March 2007 as a result of the Respondent failing to supply him with bread as per term of the agreement. The Respondent also claimed an extra cent refund of kshs.163,815 for the period October 2005 and 3rd March 2008. The Respondent relied on an agreement entered into on 6th October 2005. He also produced a letter dated 2nd December 2006 which referred to extra cents by the Appellant addressed to customers not the Respondent. He produced another letter dated 24th March 2006 addressed to all agents that they continued to be charged extra cents. He also adopted his witness statement dated 24th April 2015 as part of the evidence in chief.
26. The Respondent's evidence was challenged by the Appellant in cross examination:
- i. There was a provision in the agreement Clause 4c that 'the agent will be issued with company official receipt of the money received every day'. The Respondent failed to produce any receipt to this effect.
 - ii. The Respondent admitted that the 50 cents was paid as security in the event of loss and that he was not deducted any money.
 - iii. The Respondent agreed with a Mr. Moffat, a representative of the Appellant company who has since died that he did not have proof of his daily sales of 40 to 60 crates per day.
 - iv. The Appellant called a witness Mr. William Macharia Gekuru who testified that clause 4 of the contract was never effected and that if payments were to be made then receipts would have been issued. There were none issued to the Respondent.
 - v. The plaintiff did not come out clearly as to whether the claim of kshs.2,200 per day was from 20th March 2005 as amended at paragraph 9 and the averment at paragraph 8 that the loss has been suffered since 20th March 2009.

Issues For Determination

27. The following issues are identified for determination:
- a. Whether there was a valid contract between the Appellant and the Respondent
 - b. Whether the Appellant was in breach
 - c. Whether the Respondent discharged his burden of proof



a. whether there was a valid contract between the parties

28. The document relied upon dated 6th October 2006 represents a contract for its purposes and intentions but is signed only by one party, the Respondent and not the Appellant. It also lacks a default clause which ordinarily gives the basis for legal recourse for any party in the event of breach. Lastly, it is undated, lacks a commencement date and is indefinite. For the above reasons, the document can only pass for an agreement letter between the parties and not a contract for purposes of enforceability.

b. Whether the Appellant was in breach of the agreement

29. For the reasons given above, that the agreement falls below the threshold of enforceability of a contract, any party alleging breach must prove it beyond a balance of probability. From the issues raised in paragraph 26 above, the plaintiff failed to prove that he was earning kshs.2,200 per day and was unclear as to whether the claim was from 20th March 2005 as amended at paragraph 9 and the averment at paragraph 8 that the loss has been suffered since 20th March 2009. His witness statement made no reference to the contents of paragraph 8 of the amended plaint where the loss is computed from 20th March 2009, long after this suit had been filed in court. The respondent cannot be held to be in breach where no liability has been proved against him. The trial court found that:

“The Plaintiff is claiming a loss of income for over 77 months which translates to about 2,310 days in the sum of ksh.5,082,000/=. This was not specifically pleaded neither has it been proved.”

30. This court concurs with the trial court finding that this claim was not proved to the required standard and must fail. The applicable law as to the burden of proof is found in Sections 107, 108 & 109 of the *Evidence Act*. Whereas it is well trodden that the same is on a balance of probabilities, meaning that the Court will assess the oral, documentary and real evidence advanced by a party and decide which case is more probable as was held in the Court of Appeal decision in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR. Hence, the duty of proving the averments contained in the claim lay squarely on the Appellant.

31. The Respondent’s second claim was extra cent refund of kshs.163,815 for the period October 2005 and 3rd March 2008. This claim was also faulted in that the Respondent failed to produce any receipts to prove that he was actually owed that money, he admitted that the 50 cents was paid as security in the event of loss and that he was not deducted any money to this effect. He also admitted that he had no proof of sales of 40 to 60 crates per day as he claimed. In the case of *Douglas Kalafa Ombeva v David Ngama* (2013) eKLR, the Court of Appeal held that:

“Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

32. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that: -

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal



evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

c. Whether the Respondent discharged his burden of proof

33. Concerning liability, the legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

34. The analysis and finding in issues a) and b) above is that the Respondent failed to discharge his burden of proof beyond a balance of probabilities on the two claims he made. The claim for loss of income for over 77 months which translates to about 2,310 days in the sum of ksh.5,082,000 was not specifically pleaded neither was it proved. For this reason, the claim fails.

35. Concerning the Respondent’s second claim for extra cent refund of kshs.163,815 for the period October 2005 and 3rd March 2008, the Respondent failed to produce any receipts to this effect as per clause 4 of the agreement to prove that he actually deposited amounts he was claiming. He also admitted that whatever sums he deposited was meant for security for any losses against the Appellant. The Respondent based the calculation of kshs.163,815 on the basis that he made average daily sales of 40 to 60crates but failed to adduce any evidence to confirm this allegation. The above is a special damage claim which is pleaded but not supported by evidence and it therefore fails.

36. This court faults the trial court for finding that the Respondent proved that the Appellant owed him ksh. 163,815/= as pleaded in the amended plaint for there was no evidence to support this finding. The trial court misdirected itself further by relying on the principle ‘balance of convenience’ instead of ‘balance of probabilities’ which is the applicable principle in a claim for special damages in the instant case. In the case of *Douglas Kalafa Ombeva v David Ngama* (2013) eKLR, the Court of Appeal held that:

“Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”

37. For the reasons stated above, this court finds that the Respondent failed to prove his case against the Appellant to the required standard in a special damage claim and therefore the case could not succeed.



38. This Appeal therefore succeeds and the judgement by the trial court delivered on 24th August 2016 in Milimani Civil suit No. 85 of 2008 is hereby set aside with costs of both the trial court and this appeal to the Appellant

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31st DAY OF OCTOBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant Ms Wanyonyi for Macharia

For RespondentN/A

Court Assistant..... Martin

