Milly Glass Works Limited v Gathagah & 2 others (t/a Salgina Wood Venture) (Civil Appeal 170 of 2017 & 4B of 2018 (Consolidated)) [2023] KEHC 235 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEHC 235 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 170 OF 2017 & 4B OF 2018 (CONSOLIDATED)

JM NGUGI, J

JANUARY 26, 2023

BETWEEN

MILLY GLASS WORKS LIMITED .... APPELLANT

AND

CHARLES GACHERU GATHAGAH .... 1ST RESPONDENT

LEWIS MWANGI NJOROGE .... 2ND RESPONDENT

KARANJA GATHAGA .... 3RD RESPONDENT

T/A SALGINA WOOD VENTURE

(Being an appeal from the judgment/decree of Hon. N. Makau, RM in Nakuru CMCC No. 76 of 2015)

JUDGMENT

1. The Respondents in Civil Appeal No 170 of 2017 (hereinafter referred to as "Respondents), brought a suit against the Appellant in the same appeal (hereinafter, "Appellant") sounding in the tort of negligence following a road traffic accident which occurred on June 27, 2015. The road traffic accident involved three vehicles: two of them – Motor Vehicle Registration No KXG 632 and Motor Vehicle Registration No KBT 203Q – belonged to the Respondents while the third motor vehicle, Registration No KBL 757J/ZD3700, a trailer, belonged to the Appellant.

2. Following the accident, Motor Vehicle Registration No KXG 632 belonging to the Respondents was totaled and written off. The other Motor Vehicle was extensively damaged. The Respondent's claim was for the value of the written off motor vehicles as well as other consequential economic damages arising from the accident. For some reason which remains unclear, no liquidated damages claim was made for the second Motor Vehicle which was extensively damaged.

3. The Appellant filed a Defence. Hearing commenced. The Respondents called its two witnesses and closed its case. Before the defence case started, the parties entered into a consent on liability: it would be apportioned at 15% to 85% in favour of the Respondents. Since the parties would not agree on damages, the parties submitted the case to the Learned Trial Magistrate for determination of that issue.

4. The Respondents had made four heads of claims for special damages in the Amended Plaint:

    a. First, the value of Motor Vehicle Registration No KXG 632 which was written off: Kshs 1,130,000/-

    b. Second, the assessors fees: Kshs 10,000/-.

    c. Third, value of lost logs (timber) which the Respondents claim were in the two vehicles: Kshs 300,000.

    d. Fourth, loss of user for 60 days: Kshs 5,280,000/-.

5. During the trial, the Respondents called two witnesses. The 1st witness was the 1st Respondent. In pertinent part, he said that on March 29, 2015, the two subject Motor Vehicles were transporting logs and that KXG 632 had 7 tonnes of logs while KBT 203Q had ten tonnes of logs. He said that they would usually sell Kshs 30,000/- per tonne meaning that the logs would altogether have fetched the Respondents Kshs 300,000/-. The 1st Respondent claimed that after the accident all the logs got lost.

6. Regarding the Motor Vehicles, the 1st Respondent testified that the Motor Vehicle Registration No KXG 332 was a total write off as Diplomatic Assessors said that it would cost Kshs 1,150,952/- to repair it while its value before the accident was Kshs 1.2 Million. The salvage value according to the assessors was Kshs 380,000/-. The 1st Respondent produced the two reports by the assessors as well as a receipt of Kshs 10,000/- for the assessment.

7. The 1st Respondent also testified that as a result of the accident, the Respondents had been forced to hire one lorry to ferry logs. They would pay Kshs 22,000/- per trip for the vehicle and the vehicle would take two trips per day. This was the basis, he said, for the liquidated claim of Kshs 5, 280,000/- for loss of user as they had to hire the two motor vehicles for 90 days. He produced a bundle which he described as permits and receipts for the transactions hiring the motor vehicle.

8. Regarding the second motor vehicle, the 1st Respondent produced a receipt showing that he bought a new engine and gear box for Kshs 750,000/-. However, that figure was never pleaded in the Amended Plaint and it was not pursued any further. The Learned Trial Magistrate did not award it; and it would appear that the Respondents are not aggrieved by the refusal to do so. The amount was not awardable because it was not specifically pleaded.

9. In cross-examination, the 1st Respondent said that the receipts for the motor vehicle hire shows weekly costs but that they do not show the distance covered. He conceded that the receipts did not have stamp duty. Regarding the logs which were being carried on the day of the accident, the 1st Respondent said that he had no documents from a weighbridge to show that the vehicles were carrying the tonnage he claimed.

10. The Respondents also called Evans Kinyanjui Gathuku as a witness. He was the driver to the second Motor Vehicle – KBT 203Q. He adopted his filed witness statement in examination-in-chief. He produced photos showing the Motor Vehicles carrying logs taken after the accident. He said that he was carrying about 10 tonnes in his motor vehicle when the accident happened. His colleague, Patrick Mulwa, was driving the other motor vehicle and he died as a result of the accident. He said that all the logs got lost in the accident.

11. In cross-examination, the witness conceded that he did not have any documents from a weighbridge to confirm that he was carrying logs in the vehicle.

12. In a considered opinion, the Learned Trial Magistrate returned a verdict awarding the Respondents special damages of Kshs 820,000/- for the net loss of the Motor Vehicle which was written off; Kshs 10,000/- for the assessment fees paid to the assessors; Kshs 300,000/- as compensation for the stolen logs. She then discounted it for the agreed contributory liability of 15% to come up with a final figure of Kshs 960,500/- which she awarded to the Respondents.

13. Both parties were dissatisfied with the judgment given. On its part, the Appellant is particularly aggrieved by the award of Kshs 300,000/- for the allegedly stolen logs. All the eight enumerated grounds of appeal in Civil Appeal No 170 of 2017 are directed at this head of award.

14. On the other hand, the Respondents are particularly aggrieved by the refusal to award loss of user as pleaded. All the four grounds of appeal they enumerated in Civil Appeal No 4B of 2018 are directed at this head of award.

15. The two appeals were consolidated on February 03, 2020 and this judgment is with respect to both. The consolidated Appeal was canvassed by way of written submissions. Neither party deemed it necessary to orally highlight.

16. I have read and considered the respective arguments in those submissions.

17. As a first appellate court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in *Selle & another vs Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

> I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif vs Ali Mohamed Sholan* (1955), 22 E A C A 270).

18. This same position had been taken by the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:-

> It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

19. The appropriate standard of review established in these cases can be stated in three complementary principles:

    a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. Second, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. Third, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

20. To my mind, only two issues are presented in the cross-appeals:

    a. Was the Learned Trial Magistrate correct to award a sum of Kshs 300,000/- for the allegedly lost logs?

    b. Was the Learned Trial Magistrate correct to decline to award the sum of Kshs 5,280,000/- for loss of user?

21. The Appellant argues that there was no proper foundation and basis to award the amount of Kshs 300,000/- for the allegedly lost logs. It argues that the amount was not strictly proved as required by law and that the Trial Court made incongruent findings about the allegedly lost logs. Further, the Appellant argues that no proof was made regarding the value of the logs other than the figures which were uttered in Court in oral testimony.

22. The Respondents' evidence regarding the allegedly lost logs was in the form of oral testimony of both their witnesses as well as an agreement with Dakika by which they hoped to show that they had entered into an agreement to purchase logs/trees. That agreement is, no doubt, immaterial to show that there were 17 tonnes of logs in the two Motor Vehicles on the date the accident occurred.

23. Turning to the oral evidence of the witnesses, I would agree with the Appellants that it was insufficient to establish the claim in two ways. First, in the circumstances of the case, the oral testimony was insufficient to establish what the actual tonnage of the logs was as well as the claim that the logs were actually lost. In particular, there was no documentation at all whether internal from the business (for example, loading documents or inventory sheets) or external (for example, from the weighbridge station or the prospective buyer of the logs) to show that the particular tonnage was actually loaded on to the two motor vehicles on the day of the accident. Second, there is no official report of the loss to the Police or any other government agency. Such a report would have at least have shown that following the accident, all the logs were stolen and the Respondents were unable to recover any. No such evidence was available.

24. Additionally, as the Appellant argues, the evidence adduced to claim the figure of Kshs 300,000/- for the logs was insufficient. All the 1st Respondent did was claim from the witness stand that they "normally" sold the logs at Kshs 30,000/- per tonne. There was absolutely no authority or support in support of that claim. There was no attempt to establish the witness (the 1st Respondent) as an expert in timber markets so that he could lay a proper foundation for the opinion he proffered. The result was that the Court ended up improperly relying on the opinion of the 1st Respondent on the matter of price to base its decision of the loss the Respondents allegedly suffered under this head.

25. The conclusion, then, is that the award of Kshs 300,000/- as compensation for allegedly lost logs was improper in the circumstances – both because the fact of loss was not sufficiently proved and the specific economic damages were also insufficiently established.

26. I will now turn to the refusal by the Learned Magistrate to award compensation for loss of user. The Respondents argue ponderously that the Learned Trial Magistrate erred in failing to rely on the two binding authorities they had submitted namely: *Eliud Maniafu Sabuni v Kenya Commercial Bank* [2002] eKLR and *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd* [2015] eKLR.

27. In the former case, the eternally erudite Ringera J (as he then was) had this to say on the question whether damages for loss of user are recoverable where a chattel has been completely written off following a tortious act by the Defendant:

> I agree with counsel for the plaintiff that the cases show that damages for loss of a user of a motor vehicle are awardable in appropriate cases. Indeed, as I have stated herein above when propounding the general principle of compensation, the plaintiff is entitled to damages for both the value of the chattel destroyed by the defendant's tortious act and any reasonable consequential loss. And none of the cases cited by the defendant repudiate that principle. All they do is emphasize, correctly, that special damages – and loss of user is an item of special damage – must be pleaded and strictly proved and that the plaintiff is under a legal duty to reasonably mitigate his loss.
>
> There is no authority cited for the defendant's broad submission that damages for loss of user cannot be awarded in respect of a chattel which has been damaged beyond repair and I know of none. However, I do agree with the submission that once the plaintiff has been compensated for the value of the vehicle he cannot then claim for damages for loss of user thereof subsequently. That would clearly be double compensation. That, however is not, in my understanding, the same thing as to say that a claim for the value of the article destroyed and for loss of user thereof cannot be entertained in the same action. I apprehend the position in law to be that the plaintiff whose chattel is damaged by the tortuous act of the defendant is entitled to damages for loss of user thereof for a reasonable time and that what is a reasonable time is a matter of evidence in a particular case. In a situation where the chattel is not damaged beyond economic repair, the reasonable time would be the period found to be necessary for repair thereof. In a situation, such as the present one, where the chattel is found to be completely destroyed, that is to say, beyond economic repair, the reasonable period would be the time it would take the plaintiff to procure a similar chattel in the market.

28. In other words, Ringera J held that in Kenya, damages for loss of user are recoverable in appropriate cases even if the chattel in question has been written off as a consequence of the tortious act by the Defendant. The Respondents here complain that the Learned Trial Magistrate failed to follow this binding authority and award them damages under that head of claim.

29. However, the Respondents mischaracterize the findings and analysis of the Learned Magistrate. The Learned Magistrate was quite clear that she accepted the principles established in the authority that damages for loss of user are recoverable in appropriate cases. However, she was, correct in my view, also clear that a Plaintiff must specifically establish that claim and prove the damages strictly. She concluded that in the case before her not sufficient proof had been laid to lead to a finding that the Respondents were entitled to the amounts claimed.

30. From the evidence on record, the Learned Trial Magistrate was correct in her analysis and conclusion. The 1st Respondent claimed on the witness stand that he hired a lorry which undertook two trips per

day for 90 days and for each trip he paid Kshs 22,000/-. He produced a "bundle" of Kenya Forest Service Movement Permits and "receipts" to substantiate this. I have closely studied this "bundle". It consisted of three KFS movement permits and receipts therefor. They are for the periods: August 04, 2015 to August 08, 2015; August 10, 2015 to August 12, 2015; and July 13, 2017 to July 17, 2015. The movement permits contain no notation as to the actual dates of transport. As aforesaid, the Sale Agreement for trees with Dakika is dated 29/03/2015. The 1st Respondent also produced two invoices (not receipts) allegedly from Mafanikio Contractors Limited. They contain supposed itemization of trips by vehicles identified as KAY 451 (10 trips); KAG 982T (12 trips); KAV 807M (11 trips) in one invoice. In a second invoice, it is itemized as KAY 451 (14 trips); KAG 982T (12 trips); KAV 807M (13 trips) and KYU 531 (11 trips). A third invoice itemizes KAY 451 (14 trips); KAG 982T (11 trips); KAV 807M (13 trips) and KYU 531 (12 trips). These single leaf "invoices" then have calculations all in total adding to the whooping Kshs 5,280,000/- the Respondent claims.

31. The Learned Trial Magistrate was not persuaded that the amounts had been sufficiently proved. She pointed out that what had been produced were "invoices" not receipts. She is right. I would also add that the "invoices" look suspiciously ersatz for transactional documents itemizing such huge amounts of monies. They contain extremely few details for such serious transactions. No dates are included; no details about the drivers; no details about the origins and destinations of the trips: just huge figures of amounts allegedly owed. In addition, the dates on the "invoices" are equally suspicious: one is dated July 17, 2015; the second one is dated July 24, 2015; and the third one is dated August 01, 2015.

32. To appreciate the insight that these "invoices" are probably inauthentic, consider the following facts:

    a. First, the 1st Respondent claimed that he hired one vehicle that took two trips per day. Yet, the Respondents produced in evidence three receipts listing at least four vehicles!

    b. Second, by the Respondents' own testimony, there should be some regularity in the invoicing which clearly shows two trips per day. The "invoices" produced show no such regularity.

    c. Third, the movement permits produced indicate one vehicle: KYU 531 – a marked incongruence with the other documents produced by the Respondents.

    d. Fourth, the period covered by the "invoices" is not the 90 days the 1st Respondent claims he had to hire another vehicle. The accident occurred on June 29, 2015. The last "invoice" for the allegedly replacement vehicle is dated August 01, 2015. That is a mere 33 days later. For these invoices to be believed, the 1st Respondent would have to "amend" his testimony to provide that he was sending the logs in three trips per day!

33. I believe this is enough said to show that the evidence tendered would never have led to a finding that the loss of user claims was sufficiently proved. If not, one may also add, as the Appellant urged, that no ETR were produced for the transactions; no VAT payable indicated; no details of the alleged trips; no inventories of goods delivered and received. In short, the attempted substantiation of this head of claim was simply incredible. The Respondents cannot be said to have reached the threshold of evidentiary proof required in civil cases to establish their claim in this regard. The Learned Magistrate was eminently correct in dismissing this head of claims.

34. Having come to these conclusions, the outcome of the appeal will be as follows:

    a. The Holding By The Learned Trial Magistrate Awarding The Respondents Ksh 300,000/- As Compensation For The Lost Logs Is Hereby Set Aside. In Its Place There Shall Be A Finding Declining An Award Under This Heading.

b. The Holding By The Learned Trial Court Declining To Award Any Compensation For Loss Of User Is Affirmed.

c. All The Other Findings And Awards By The Learned Trial Magistrate Are Hereby Affirmed.

d. In View Of The Outcome Of The Consolidated Appeal, Each Party Will Bear Its Own Costs.

35. Orders accordingly.

DATED AT NAIROBI THIS 16TH DAY OF JANUARY, 2023

………………………

JOEL NGUGI

JUDGE

DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023

……………………………

HILLARY CHEMITEI

JUDGE