



REPUBLIC OF KENYA



Nyota v Modern Coast Building & Constructors Limited & another (Civil Appeal E002 of 2022) [2023] KEHC 26744 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E002 OF 2022**

DK KEMEL, J

DECEMBER 20, 2023

BETWEEN

JAPHETH AYUB NYOTA APPELLANT

AND

**MODERN COAST BUILDING & CONSTRUCTORS LIMITED 1ST
RESPONDENT**

HOSEA NG'ANGA KURIA 2ND RESPONDENT

(An appeal from the Judgement and decree of Hon. N. Barasa (Principal Magistrate (PM) in Webuye SPMCC No.192 of 2018, dated and delivered on 23rd November 2021)

JUDGMENT

1. This appeal arises from a cause that was filed in the subordinate Court at the Senior Principal Magistrate's Court, Webuye on the 20th December 2018. According to the Plaintiff, on 31st March 2018 the Appellant while heading on with his business as the norm at his shop located at Mukhonje Shopping Centre situated on plot No. NK/LWA.1476 along Eldoret-Webuye Road at 1600hrs, the 2nd Respondent under the instructions of the 1st Respondent carelessly and/or negligently drove, controlled and/or managed motor vehicle registration No. KAS 459 W-2C 1829 Scania Trailer, causing the same to lose control and violently run into his shops, as a result of which the Appellant incurred loss and damages for which he blames the Respondents and holds them jointly and severally liable, directly and/or vicariously.
2. The Appellant filed a material loss claim against the Respondents. He costed the bills of quantities for reconstruction and claimed damages to a tune of Kshs. 630,400/=. He further claimed general damages for loss of amenities arising thereof; costs of the suit and interest on the decretal sum at Court rates from the time of the filing of the lower Court suit.



3. The Respondents on the other hand filed defence denying the averments in the Plaint in exception of the descriptive part for the parties. The Respondents alleged that in case of any negligence, it is on the part of the Appellant and proceeded to rely on the doctrine of *res ipsa loquitur* and the provisions of the Highway Code and *Traffic Act* Cap 403 of the Laws of Kenya.
4. The Respondent dismissed the allegation that the Appellant is entitled to claim for reconstruction of the damaged shop as particularized as the same is exaggerated and not supported by any documentary evidence and placed the Appellant to strict proof.
5. Upon a trial being heard on the main suit, the trial magistrate concluded that there was no dispute that an accident occurred and that the issue for determination was which of the parties was to blame for the said accident. The issue of liability between the parties was apportioned at a ratio of 20% against the Plaintiff/Appellant and 80% against the Defendants/Respondents.
6. The issue of liability between the parties was accordingly accepted. This Court would not interfere with this decision by the trial magistrate.
7. What was in contention was the issue of quantum. The trial magistrate dismissed the claim as it was strictly on the material loss damage and that the same having not been proved could not warrant the award pleaded.
8. The Appellants being dissatisfied with the said judgment filed an appeal challenging the judgment of the trial magistrate. They raised several grounds of appeal challenging the decision on quantum and the ultimate dismissal of the suit.
9. By consent of the parties, the appeal was canvassed by way of written submissions. Both parties filed their written submissions.
10. The Appellant submitted that the trial magistrate erred in law and in fact in finding that his claim for material damages ought to be substantiated by production of receipts and his failure to rely on the availed valuation report by sub-county works officer, Lugari Sub-County and the costed bills of quantities as prepared by a qualified person who is an employee of the County Government of Kakamega Ministry of Roads, Infrastructure, Public Works and Energy. He relied on the case of *Nkuene Dairy Farmers Co-operative Society Limited vs Ngacha Ndeiya* (2010) eKLR and *CA NO. 310 of 2005 Abdi Ali Dere vs Firoz Hussein Tundal & 2 Others* (2013) eKLR.
11. According to the Appellant, he was seeking compensation for reconstruction and not construction as noted by the trial magistrate. The Appellant noted that he had not constructed the destroyed shops and if he had he would have the receipts indicating how much he spent for the construction. He relied on the case of *Silas Mutua Mberia vs Muthoni Njue Veronica* (2021) eKLR.
12. Counsel for the Appellant submitted that the Respondents did not challenge the assessor's report and that the same was produced in the lower Court subject to their consent and that the Respondents did not avail any contrary evidence. He relied on the case of *Scarce Commodities Limited & Another vs Augustus Wafula Wambati* (2022) eKLR.
13. Counsel for the Appellant submitted that the Appellant only needed to avail proof of the extent of the damage to his shops which he did by production of photographic evidence that were taken by the assessor and what exactly it would cost to repair the same as per the costs bill of quantities as produced in Court without necessarily proving that the repairs were actually done and paid for. Counsel submitted that the balance of proof on the Appellant was at all times on a balance of probabilities and not higher.



14. Counsel submitted that the Appellant's claim was not for expenses already incurred but once for restoring his damaged shops to its pre-accident state. The Appellant was not legally required or obligated to specifically prove the claim by production of receipts like in the case of special damages.
15. Counsel urged this Court to set aside the lower Court's judgement on quantum and substitute the same with a judgement as it deems just and fit. Counsel further prayed for costs in this appeal and the trial Court.
16. Opposing the appeal, Counsel for the Respondents submitted that parties are bound by the pleadings. The Appellant's claim is a material damage claim and he could not in his main prayer in the Plaint pray for general damages and that the pleadings are not consonant with the evidence on record. Counsel relied on the case of Kenya Commercial Bank Limited vs Sheik Osman Mohammed, CA No. 179 of 2010.
17. Counsel further submitted that the Appellant is not entitled to the pleaded Kshs. 630,400/= and claims for material damages must be specifically pleaded and strictly proved with as much particularity as special damages. Counsel relied on the case of David Bagine vs Martin Bundi (283 of 1996) (1997) eKLR.
18. According to Counsel for the Respondents, during the cross-examination of the Appellant it was established that he only itemised the costed bill of quantities which outlined the estimated costs for repair and the cost is an average which is likely to vary with +10% or -10% of the total estimate. Counsel further submitted that the Appellant failed to plead specifically the parts of the shops that were damaged due to the alleged accident supported by costs that was required to repair the same in the Plaint. Such an omission is fatal to the claim and hence warranted the dismissal. Counsel submitted that the Respondents ought not to be condemned to pay expenses that were not incurred by the Appellant for the alleged repairs and/or reconstruction of the damaged shops.
19. Counsel also submitted that repair and/or reconstruction costs are special damages which should be pleaded and proved with certainty. The Appellant pleaded Kshs. 630, 400/= however the Respondents were not certain if actually the repairs costed the pleaded amount. He further submitted that the Appellant ought to have called an assessor who filled his assessment report on the damaged shops as alleged and an electrical engineer to guide the Court on the materials required to fix the electricity in the shops. The lower Court lacked proper evidence before it to make the award claimed. Counsel relied on the case of James Kiarie Kibobi vs Daniel Ongeru & Another (2021) eKLR.
20. It was also submitted that the Appellant failed to produce receipts of the monies used in the reconstruction of the shops and that makes it doubtful if indeed the shops were re-constructed as alleged. Further, no evidence was availed to show that he was the owner of the parcel of land the shops were located as no search record or receipts were produced to prove the same. The police abstract does not capture the suit property. He relied on the case of Union Bank of Nigeria PLC vs Alhaji Adams Ayabule & Another (2011) JELR 48225 (SC) (SC221/2005) (16/2/2011).
21. Counsel urged this Court to consider the fact that the Appellant is required to strictly prove what repairs were done and or reconstruction of the damages shops or he is merely seeking compensation for what he did not incur.
22. Counsel finally prayed for the decision of the trial Court to be upheld and that the appeal be dismissed with costs.
23. This being the first appellate Court, I am obligated to re-evaluate evidence adduced before the trial court and arrive at an independent determination. I take note of the fact that unlike the trial Court, I



did not get the benefit of taking the evidence adduced first hand and therefore was not able to observe demeanour of witnesses and that I have given due allowance over the same. This position was held in *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

24. In a material loss claim that takes a form of special damages, proof of the claim must be specifically made.
25. The pleadings must reflect the pre-accident value. This figure is obtained from the assessor who goes through all the items damaged by the vehicle, costs the same in his report and then further costs what the actual value of the shops would be if “sold /rented as is”.
26. I note that in their written submissions in the lower court, the Appellant had cited the *David Bagine* case, but the Appellant appears to have misunderstood the import of those case in that he failed to avail any probable evidence in form of an assessors report to prove material damage. Receipts were still necessary to show that repairs were actually done and paid for.
27. The proof of the case is required by law. That proof was to avail the assessor’s report and the assessors together with the original documents. If the witness is not able to be traced, a party must turn to the [*Evidence Act* Cap 80](#).
28. Nothing was availed by the Appellant to show re-construction of the shops, the number of days for which the hiring was done during that exercise. A claim for material damage requires further evidential material to prove the claims as pleaded.
29. This therefore brings this Court into the question whether the Appellant was legally the owner of the shops at the time of the accident. No evidence was availed by the Appellant to show that he was the legal owner of the land the shops were constructed on or that he was a tenant thereon. Further, he did not produce a business permit. He admitted to the same in cross examination but only availed a letter from the chief to show that he was the owner of the plot. Given such a scenario, even this Court would be hesitant to grant his claim to compensation for the same.
30. In the absence of a valid title at the time of the accident either as proprietor or lessee, the Appellant cannot claim for business loss as he was operating illegally. It is trite law that he who comes to equity must come with clean hands. They cannot seek to be compensated for a business that they cannot prove was running legally at the time of the accident. In any case, it was incumbent upon the Appellant to prove that he had already expended the amounts claimed so as to entitle him to be reimbursed for those sums. It would appear to me that the appellant sought to be paid the monies before embarking on reconstructing the alleged demolished premises. This is akin to putting the cart before the horse. This is contrary to the rules of evidence. The appellant must first incur the expenses before he could seek to be reimbursed thereof. He should not be permitted to receive payment before reconstructing the premises. Again, it is noted that the appellant failed to avail evidence to the effect that he is the registered owner of the plot upon which the premises had been erected or that he is a tenant thereof and further failed to avail the valuation expert who prepared the bill of quantities to testify. On this ground, the decision reached by the trial court in dismissing the suit was quite proper and must be upheld as the suit had not been proved beyond a preponderance of probabilities.



31. In the light of the foregoing, I am satisfied that the lower Court was right in holding that the Appellant's suit ought to fall as it failed to meet the required stand

17. Accordingly, I find no merit in this appeal. The same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF DECEMBER 2023

D.KEMEI

JUDGE

In the presence of :

Miss Kinyua for Appellant

No appearance for Kimaru Kiplagat for Respondents

Kizito Court Assistant

