



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL SUIT NO. 120 OF 2007

MARY GATHONI WERU.....PLAINTIFF

VERSUS

MT. KENYA BOTTLERS LIMITED.....DEFENDANT

JUDGMENT

A. Introduction

1. The plaintiff herein filed a suit at the Resident Magistrate's court at Wang'uru against the defendant herein claiming damages as a result of loss of business at a rate of Kshs. 250/- per day effective 18.11.2005, general damages (for psychological trauma suffered at the expense of the defendant), costs of the suit with interest at court's rate and any other relief that the court may deem fit to grant. Her case is that on or about 17.11.2005, she bought some sodas from the defendant and when she sold one Krest soda to a customer, she noticed that the same was contaminated when the said customer had consumed half thereof. That the said customer caused commotion at the busy kiosk whereupon the members of the public who gathered demanded that the plaintiff's remaining stock of the defendant's product be inspected and upon inspection, 5 other sodas manufactured and bottled by the defendant company were found to have foreign bodies in them. That as a result of the said commotion, the plaintiff's kiosk was shunned by the public as they accused her of colluding with the defendant to dispose of contaminated and/ or unfit products to the citizens of Wang'uru town. She further averred that she has suffered great loss of business and her sales have declined since the said event and her daily profit declined by a sum of Kshs. 250/- and further that she has been psychologically traumatized through the negative publicity that she has received more so to the effect that she is a shrewd business woman helping the defendant to dispose contaminated or otherwise unfit products to unsuspecting members of the public.

2. The defendant did not enter appearance and/or file its defence within the stipulated time as a result of which, interlocutory judgment was entered and the matter proceeded for formal proof hearing. The defendant filed an application to set aside the said interlocutory judgment but the same was dismissed vide a ruling delivered on 13.11.2008. However, the said orders were reversed by the Court of Appeal sitting in Nyeri in **Nyeri Civil Appeal No. 219 of 2009- Mount Kenya Bottlers Limited –vs- Mary Gathoni Weru.**

3. In their defence, the defendant denied the averments in the plaint and further averred that it is not the exclusive source of the coca cola products in Kenya. In a nutshell, the defendant denied liability and sought for the dismissal of the plaintiff's suit.

B. Evidence at the hearing

4. At the hearing of the suit, the plaintiff testified as PW1 that she was operating a kiosk where she sold sodas from the defendant and that on 17.11.2006, she sold a soda to a customer, who complained that it had particles and she shouted attracting members of the public who took some sodas and which turned out to have been contaminated as well. The public accused her of conspiring with the defendant to sell bad sodas. That the defendant's area manager (Agnes Mutuku) and sales representative (Wambugu) went to her kiosk and after explaining what had happened, they took the said sodas with them and she was informed that the sodas were taken to the defendant's laboratory for analysis. That she lost customers as she was accused of selling bad sodas and thus the number of customers declined. That she used to make Kshs. 250/- per day from the sale of sodas only, and she closed the business in December 2007. She produced her exhibits in support of her case which included receipts from the County Council, receipts for purchase of sodas from the distributor, business records and the demand letter.

5. The plaintiff proceeded to close her case. The defendant on its part did not call any witness. Directions were subsequently given for filing of written submission which directions were complied with.

C. Issues for determination

6. I have considered the pleadings before me, the evidence tendered in court and the written submissions filed herein and it is my view that the issue which I am invited to decide is whether the plaintiff proved her case on a balance of probability.

7. As I have noted elsewhere in this judgment, the defendant closed its case without calling any witnesses despite having been granted leave

to defend the suit by the Court of Appeal. However, the defendant proceeded to file written submissions. It is trite that averments in pleadings are not evidence and the court cannot be guided by pleadings since pleadings are not evidence nor can they be a substitute therefor. (See **Shaneebal Limited –vs- County Government of Machakos [2018] eKLR** and **CMC Aviation Ltd -vs- Cruis Arif Ltd (1) (1978) eKLR 103**). Further it is trite law that submissions cannot be treated as evidence or take place of evidence. (See **Daniel Toroitich Arap Moi & Another -vs- Mwangi Stephen Murithi & Another (2014) eKLR**).

8. However, this notwithstanding, the plaintiff had a duty to tender sufficient evidence to prove her case on a balance of probabilities as required by section 107 of the Evidence Act. Despite the defendant having not tendered any evidence in rebuttal, it is the duty of the court to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as ex-parte hearing is not automatic prove of a case on the required standard. The Plaintiff has to discharge the burden of proof. (See **Gichinga Kibutha –vs- Caroline Nduku (2018) eKLR** and **Haji Asuman Mutekanga –vs- Equator Growers (U) Limited, Civil Appeal No 7 of 1995**).

9. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In **Stephen Wasike Wakho & another –vs- Security Express Limited [2006] eKLR**, it was held that: -

“13. A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove.”

10. It is immaterial whether the opposing side has placed any material before the court to rebut the proponent's case. This was stated by the Court of Appeal in **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another (supra)** when it held that:-

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

11. The plaintiff's case basically is that she lost business earnings as a result of bad publicity and customers shunning away from her kiosk/shop which was caused by the fact that one of her customers had drunk contaminated soda which the said customer bought from the kiosk. She thus prayed for damages for loss of business. However, before proceeding to the determination of the question as to whether the plaintiff lost business, it is my view that the issue which this court needs to determine at the onset is whether the plaintiff tendered evidence to prove the occurrence of the said incidence. Despite the plaintiff making averments that a customer took contaminated soda and which made public shun her shop, there was no evidence tendered to prove the occurrence of the same. The said customer who took the soda was not called to testify before this court and neither were any of the contaminated sodas produced in court. In my view, the evidence tendered was not sufficient to prove the same.

12. However, even assuming that the incident occurred (and which I opine to the contrary), the plaintiff had a duty to prove the loss of business as pleaded and that the same was caused by the incident. I have perused through the business record book produced by the plaintiff and I note that the weekly sales for both 500 ml and 300 ml kept on fluctuating even before the date of the alleged incident. The plaintiff did not present sufficient evidence to prove that the decrease in the weekly sales for the soda were as a result of the said incident. I am alive to the fact that sales can dwindle as a result of many factors such as competition, poor services etc. It was therefore necessary that the loss of business be connected with the incident which, unfortunately, the plaintiff failed to do. As such, she failed to discharge the burden in that respect.

13. Further, even assuming that the plaintiff was able to prove the above, it is clear that amongst the prayers sought is that of damages for loss of business at a rate of Kshs. 250/- per day. It is trite law that special damages must be pleaded and strictly proven. (See **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR**). In the case of **Nyamogo & Nyamogo Advocates –vs- Barclays Bank of Kenya CA 69 of 2005** the Court of Appeal held that loss of business must be specifically pleaded and proven.

14. In this case, the plaintiff apart from producing a business record book, did not tender any evidence of having lost sales as pleaded. It is my view that she ought to have done more. Evidence from an accountant was necessary so as to explain the variance in the figures as shown in the said book. In **David Irungu Mwangi v Attorney General [2018] eKLR**, the court in finding that the petitioner did not prove loss of business held that:-

“55. Secondly, the petitioner did not produce audited accounts for the business. What he produced were hand written document he said proved that the company was doing well businesswise. There was no profit and loss account or balance sheet to show how much the company or the business made in terms of profit and loss to justify the claim that the business was doing as well as the petitioner put it. That would enable the court determine whether the company or business really made profit or loss. Independently audited accounts would have been necessary as proof of the company's financial muscle for purposes of considering compensation if any. The petitioner did not even produce records of the state of the business when he was finally released.....

57. It must be appreciated that a claim for loss of business is akin to special damages for it is intended to show that the claimant did suffer actual and not perceived loss. Compensation is to return the party to as nearly the same level he was before as possible. This requires proof of the actual loss suffered. From the evidence on record on this claim, I am not satisfied that the petitioner did enough to assist the court come to a reasonable and justifiable conclusion.”

15. The plaintiff's case is further that she has been psychologically traumatized through the negative publicity that she received more so to

the effect that she is a shrewd business woman helping the defendant to dispose of contaminated or otherwise unfit products to unsuspecting members of the public. She thus prayed for general damages in that respect. In her written submissions, the plaintiff prayed for Kshs. 500,000/- as general damages for loss of trust by the customers in the products that she was selling and for the loss and damage suffered and specifically loss of a source of livelihood. The plaintiff relied on the case of **Nairobi Bottlers Limited –vs- Julius Mwanthi (2018) eKLR** wherein the principles in **Donogue –vs- Stevenson (1932) AC 562** were applied and submitted that the presence of impurities in the beverages supplied to her was due to the negligence on the part of the defendant at the time of bottling the said beverages and thus the defendant is liable for any injury or damage that may be caused by the said negligence. That in this case, other than the consumer, the plaintiff also suffered loss and damage due to defendant’s negligence and which loss is a direct consequence of the negligence of the defendant.

16. It thus appears that the general damages the plaintiff seeks are based on the tort of negligence. The question therefore is whether the defendant is liable for the same. For the liability to attach on the defendant, the plaintiff must prove that the defendant owed her a duty of care, that the defendant was in breach of the said duty of care and that as a result of the said breach she suffered damages. (See **Fred Ben Okoth –vs- Equity Bottlers Limited (2015) eKLR**).

17. As for the duty of care, the court in **Fred Ben Okoth –vs- Equity Botlers Limited (supra)**, the Learned Judge held that coca-cola company owes a duty of care to consumers of its products. However, it is clear that the duty of care owed by the defendant herein is to the consumer. In the instant case, the plaintiff was not the consumer of the soda and thus the impurities, if any, in the said soda did not cause any damage to her. As such, the defendant did not owe a duty of care to her as she is not a consumer of the product produced by the defendant. That being the case, the issue as to the breach of the duty of care and damages does not arise.

18. However, despite the plaintiff making averments that other than the consumer she also suffered loss and damage due to defendant’s negligence and which loss is a direct consequence of the negligence of the defendant, the plaintiff did not tender any evidence linking her alleged damages or loss to the defendant’s fault. The plaintiff was under duty to prove that the wrongful conduct of the defendant in fact resulted in the damage which she complains of. She has not discharged the burden of proving causation and which burden rested on her. {See **Fred Ben Okoth –vs- Equator Bottlers Limited (supra)**}

19. It is my view that the plaintiff did not prove the elements of the tort of negligence so as to make liability attach on the defendant. Considering all the above, the plaintiff’s claim for general damages is not merited and the same ought to fail.

20. In **Nairobi Bottlers Limited v Julius Mwanthi [2018] eKLR**, the court upheld the lower court’s award of Kshs. 60,000/- as general damages for tort of negligence wherein the plaintiff had consumed a soda from the appellant. It is my view that, if the plaintiff had succeeded in her claim for general damages and taking into consideration the issue of inflation, Kshs. 80,000/- would have been sufficient in the circumstances.

21. In the premises foregoing, the plaintiff’s case is hereby dismissed with costs to the defendant.

22. It is so ordered.

Delivered, dated and signed at Embu this 24th day of February, 2021.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondent