



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 19 OF 2019

PYRAMID HAULIERS LTD.....APPELLANT

VERSUS

NEHEMIAH KINYANJUI.....RESPONDENT

(Appeal from the Judgment and decree (Hon. B. Cheloti, (SRM) delivered on 2nd April, 2019 in Kajiado in CMCC No. 314 of 2017 at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The respondent filed an amended plaint dated 2nd July 2018 before the Chief Magistrate's Court, at Kajiado, against the appellant for special damages of Kshs. 1,916,698. 92, loss he sustained due to a road accident that occurred on 7th November, 2016 when the appellant's vehicle registration No. KAR 095 M damaged his container on Plot No. Kajiado/Kisaju/2785 owned by Anastacia Wanjiru. The special damages claimed were for loss of income, cost of reconstruction, investigation and surveyor's fees. He also prayed for costs and interest. He attributed the accident to the negligence of the appellant's driver, servant or agent.
2. The appellant filed a statement of defence dated 6th July, 2018, denying the appellant's allegations of negligence and loss in the amended plaint. The appellant also denied particulars of special damages and put the respondent to strict proof. It sought dismissal of the suit with costs.
3. The suit was heard by **Hon. B. Cheloti, (SRM)**, and in a judgment delivered on 2nd April, 2019, she awarded special damages of Kshs. 1,000,000, interest at 12% from the date of the decree and costs of the suit.
4. The appellant was aggrieved with that judgment and filed a memorandum of appeal dated 4th July, 2019, raising the following grounds, namely:
 - a. The learned magistrate erred in both fact and law by not pronouncing herself on the issue of liability.*
 - b. The learned trial magistrate's award of special damages to the respondent is so arbitrary and erroneous as it is not couched in any legal or factual basis.*
 - c. The learned trial magistrate erred in both fact and in law by ignoring the issues raised by the appellant during trial, in the appellant's submissions and, the authorities cited in making her pronouncement.*
 - d. The learned magistrate erred both in fact and in law by not setting out the points for determination and the reasons for her decision thereby abdicating her judicial responsibility.*
 - e. The learned trial magistrate's award of special damages was erroneous as the same was not strictly proved as required by law.*
5. This appeal was disposed of through written submissions.
6. The appellant submitted through its submissions dated 6th January, 2020, on the principles that guide an appellate court to decide whether or not to interfere with the decision of a trial court. It relied on *Mbogo v Shah* [1968] EA 93; *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2 EA 212.
7. The appellant argued that the respondent did not prove his case on a balance of probability and relied on section 107 of the Evidence Act and the decision in *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR. According to the appellant, the respondent did not prove that a container existed and its ownership; occurrence of the accident, involvement of the appellant in the accident, appellant's

ownership of the alleged motor vehicle, destruction of the container and loss of rental income.

8. The appellant submitted that apart from the investigation report, all other documents were only marked for identification but were not produced as exhibits and, therefore, they did not form part of the respondent's exhibits. It relied on **Kenneth Nyaga Mwigie v Austin Kaguta & 2 others** (2015) eKLR.

9. The appellant blamed the trial magistrate for delivering a judgment that did not conform with the requirements of Order 21 rule 4 of the Civil Procedure rules. It relied on **Ochieng v Amalgamated Saw Mills** (2005) 1 KLR 151 and **Flanner v Halifaz Agencies Ltd** [2001] ALL ER.

10. The appellant also faulted the evidence of PW2, arguing that the witness could not demonstrate how he arrived at the dimensions of the alleged container as he did not find debris on site when he visited the scene. He asserted that the witness was unable to tell the exact time of the accident; he did not establish the ownership of the vehicle that was involved in the accident; he did not prove the existence of tenants on the alleged parcel of land; and, that he did not produce receipts for court attendance and for preparation of the investigation report.

11. Regarding special damages, the appellant argued that the respondent's claim was unsubstantiated as no receipts were produced to support it. It asserted that the bill of quantities alluded to was also neither marked nor produced as an exhibit and was also not mentioned in the trial court's decision. The appellant relied on **Agnes Wanjiku Ndegwa v Kenya Power & Lighting Company** [2014] eKLR on proof of special damages.

12. The appellant further argued that neither the respondent nor the investigation report substantiated or provided proof of losses sustained due to alleged loss of rental income. It urged the court to allow the appeal with costs of both suits.

13. The respondent submitted through his written submissions dated 31st August, 2020, that he proved his case as required. He stated that he produced his list of documents dated 10th July, 2017 with the consent of the appellant's counsel who did not object to their production, subject to him producing original photographs of the accident and the original receipts relating to the investigation report fees and court attendance fee, which documents were attached to his submissions.

14. The respondent contended that although the consent was not captured in the proceedings, and the decision in in **Shah v Aguto** [1970] EA 266 notwithstanding, he had expected that the issue of the consent would have been captured in the proceedings and judgment. He argued that were it not for the consent between counsel for the parties, the court would have dismissed his claim at the first instance.

15. The respondent maintained that the photographs of the scene of accident speak for themselves. According to the respondent, the record of appeal was not complete as the appellant only attached the amended plaint, the assessor's report and the submissions to suit his case and left out the rest of the documents.

16. He submitted that the assessor's report is on record and the assessor testified that the photographs of the scene of accident were proof that the appellant's lorry rammed onto the container causing damage. He also stated that the Power of Attorney was proof that he had the authority of the owner to manage her properties as he deemed fit.

17. The respondent defended the trial court decision, arguing that it did not abdicate its judicial responsibility. He argued that although the trial court's judgment may not have complied with the requirements of Order 21 rules 4 and 5, it was curable under section 79A of the Civil Procedure Act since the irregularity did not affect the merits of the case or the jurisdiction of the court. He relied on **Ramjibhai v Rattan Singh son of Nagina Shah** (1953) 20 EACA 71 (at 73).

18. The respondent contended that there was no need to report the accident since he found police officers at the scene. He also stated that when one is claiming for damaged goods, the police abstract is different from the one for personal injury and, therefore, the details listed in 1 (iv) –i to v would not be covered in the normal police abstract.

19. He argued that the role of PW2 (assessor) was to give an estimate of the cost of putting up a similar container at the same place and the photographs of the damaged container gave him an idea of what the container looked like.

20. Regarding ownership of motor vehicle registration number KAR 095 M, the respondent submitted that the copy of records and the contents of what was written on the insurance sticker was proof of ownership. He further submitted that the names of the tenants and their mobile details were on his list of documents and that the assessor's fees and court attendance receipts were attached to his written submissions while the bill of quantities was part of the assessor's report.

21. The respondent argued that the appellant did not call any witness or produce documents to counter his claim but relied on its pleadings and submissions which could not be taken as evidence. He relied on **Fibre Link v Star Television Production Limited** [2015] eKLR and **Efil Enterprises Limited v Dickson Mathamyo Kilonzo** (Civil Appeal NO. 28 of 2015–Machakos). He urged the court to dismiss the appeal with costs.

22. I have considered this appeal, submissions and the authorities relied on. This being a first appeal, it is by way of a retrial and parties expect this court to reanalyze and reconsider the evidence afresh and come to its own conclusion on that evidence. The court should, however, bear in mind that it did not see the witnesses testify and give due allowance for that.

23. In **Gitobu Imanyara & 2 others v Attorney General** [2016] e KLR, the Court of Appeal stated that;

[A]n 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 allowances in this respect.

24. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.

25. The respondent testified that on 7th November, 2016, the appellant's motor vehicle hit and destroyed a container he had constructed on Parcel No. Kisaju/2685 owned by his sister. He visited the scene of accident and took photographs. He further carried out a search which confirmed that the motor vehicle that caused the accident belonged to the appellant. He obtained a police abstract on the accident. He also commissioned an assessor from **Cenaa Insurance Investigators** to assess the damage caused.

26. The respondent testified that the damaged container had 6 shops, two of which had been occupied at Kshs. 2,500 per month; two others were to be occupied that week the accident occurred and the remaining two were to be occupied soon. He blamed the driver of the motor vehicle for the accident since the vehicle veered off the main road to the container, approximately 40 meters off the road. He prayed for compensation for the loss suffered to enable him re-construct his container, as well as the loss of rent.

27. PW2, **Elphas Namunyu**, an investigator with Cenaa Insurance Investigators, testified that he was requested by the respondent to do verifications of the damage. He visited the scene and found that the structure had been demolished. He took details and proceeded to Isinya Police Station where an abstract was issued. He also testified that they engaged a quantity surveyor to query the bill quantities for the damages. They took measurements of the documentation of the structure from the road and found that it was not on a road reserve. The respondent also informed them that there were tenants at the time of the accident. He prepared a report which was in the respondent's supplementary list of documents. The fees for the report was Kshs. 219, 998.2, inclusive of VAT. He was also claiming Kshs. 15,000 for court attendance.

28. The appellant did not call witnesses.

29. The trial court considered the evidence and stated at page 2 of its brief judgment:

The court has viewed the evidence from the plaintiff's witness as well as the submissions by both the plaintiff and defendant as well as the annexed authorities. Upon reviewing the same the court is of the view that an award of Kshs. 1,000,000/= is adequate compensation to the plaintiff. The court awards interest at cost (sic) of 12% from the date of decree as well as costs of the suit.

30. It is that finding that prompted the present appeal. The main issue for determination, as can be gleaned from the grounds of appeal, is whether the respondent proved his suit as required and whether the trial court erred in awarding special damages of Kshs. 1,000,000 to the respondent.

31. The appellant argued that the trial court was wrong in making the award, that it did not make a decision on liability and that the respondent did not prove his claim for special damages. In particular, the appellant argued that the respondent did not produce documents in support of his claim for special damages.

32. The respondent on the other hand contended that he proved his claim and that the trial court acted properly in making a finding in his favour. He maintained that counsel for the parties consented to production of the documents which were attached to his written submissions. He maintained therefore, that he proved his case to the required standard.

33. I have considered the arguments by parties and perused the trial court's record. The respondent impleaded the appellant for the damage of his container on parcel No. Kajiado/Kisaju/2685 on 7th November 2016 following a road traffic accident involving the appellant's motor vehicle KAR 095M

34. On liability, the only evidence before the court was from the respondent. He stated that the vehicle belonged to the appellant and that it veered off the road and hit the container about 40m away from the road. A search and insurance records confirmed that the vehicle belonged to the appellant. The appellant did not call evidence to controvert the respondent's evidence. It could, therefore, argue that liability was not proved. Although, the trial court did not state specifically that the appellant was liable, this could be inferred from the fact that it found in favour of the respondent.

35. According to the plaintiff, the respondent claimed for:

a. cost of construction of Kshs. 1,686, 700

b. Rental income for two shops at Kshs. 5,000 per month until payment.

c. loss of income for four other shops which were likely to be taken (save for the damage) at Kshs. 10,000 per month for the period to be determined by the court

d. investigator's and surveyor's fees of Kshs. 219, 998.92

36. From the claim pleaded, it is clear that the respondent was seeking special damages for what he said was loss occasioned by the damage to his container. The first was cost of re-construction and the second was loss of rental income from the damaged units in that container while the last claim was for investigator's and surveyor's fees.

37. These being special damage claims, the law is settled that special damages must not only be specifically pleaded, they must be strictly proved. In ***Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited*** [2016] eKLR, the Court of Appeal stated:

[I]t is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit

38. The same court reiterated that position in ***Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)***, that:

It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract.

(See also ***Mitchell Cotts (K) Ltd v Musa Freighters*** [2011] eKLR).

39. The Supreme Court of Nigeria weighed in on the issue in ***Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another*** (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), where **Mahmud Mohammed, JSC.** stated:

I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

40. The respondent claimed special damages. He, however, did not provide evidence that would support the claim for Kshs. 1,686,700 for reconstruction of the container. This claim was based on the opinion of the investigator who stated in the report dated 7th December 2016 at the conclusion:

We have placed the claim at Kshs. 1,686,700 being the value of reconstructing/ rebuilding the container. This amount is subject to additional cost of investigator's and quantity surveyor's fees of Kshs. 219,998.92 and loss of rent from tenants for months of November and December 2016 at the rate of Kshs. 2,500 each.

41. The report gave the final figures as cost of construction Kshs 1,686,700; investigation and quantity surveyor's fees Kshs. 219,99.92 and loss of rent for December and November 2016 Kshs. 10,000. Attached to the report was the bill of quantities by the quantity surveyor.

42. The investigation report was an opinion of the likely cost of reconstruction of the damaged container and not the cost incurred in the reconstruction. There was no evidence that the respondent had in fact reconstructed the container. No receipts were produced to prove either, that this had been done. In fact, the respondent stated in his testimony in court, that he wanted compensation so that he could reconstruct the container.

43. Similarly, there was no evidence that the respondent was receiving rent from two units in the damaged container because there was no lease or tenancy agreement or even receipts in that regard. The claim having not been proved was not awardable. The trial court did not state in its judgment why it allowed Kshs. 1,000,000 as special damages and how they were made up.

44. I have perused the record of appeal and the undated supplementary record filed by the respondent on 22nd September 2020. Among the documents filed there with is a copy of receipt from the investigators dated 15th December 2018 for Kshs. 219,998.92. The suit was filed on 2nd August 2017 and the plaint was amended on 2nd July 2018. The receipt for charges for investigation had not been issued by then and it was not one of the documents filed together with the plaint or in the supplementary list although mentioned as item No. 8 on the amended list of documents filed with the amended plaint.

45. The receipt was non-existent when the plaint was amended and, in fact, the respondent submitted before this court that he attached the documents on his submissions filed before the trial court. That is not the way of producing documentary evidence. That is; documentary evidence cannot be produced through submissions in our adversarial system. Evidence attached to submissions cannot be considered to have been properly produced for purposes of supporting a party's case.

46. Flowing from what I have stated above, it is plain to this court that the respondent did not prove his claim before the trial court. The trial court fell into error when it allowed a claim for special damages that had not been strictly proved as required by law.

47. Consequently, this appeal succeeds. The judgment and decree of the trial court dated 2nd April 2019 is hereby set aside and replaced with an order dismissing the suit with costs. The appellants shall also have costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 23RD DAY OF JULY 2021.

E C MWITA

JUDGE