



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 482 OF 2012

PETER NJUGUNA KIMANI T/A KAPITAL WOOD & GENERAL.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....DEFENDANT

JUDGMENT

1. By his amended plaint dated 12th October 2015 and filed in court on 14th October 2015, the plaintiff, *Peter Njuguna Kimani T/A Kapital Wood & General* instituted suit against the defendant, the *Nairobi City County* seeking special damages in the sum of KShs.11,609,300; general damages for malicious damage to property; costs of the suit and interest.
2. In his amended plaint, the plaintiff pleaded that he registered his business in 1998 and that at the time his cause of action arose, he was operating a furniture workshop and showroom on a rented space on plot number 209/11925; that on 6th June 2012, the defendant through its agents or servants maliciously demolished his business premises (the subject premises) and in the process destroyed *inter alia*, his stock in trade, raw materials, machinery, uncollected goods and repair items belonging to his customers. The goods, equipment and items allegedly destroyed together with their respective values were particularized in paragraph 9 of the amended plaint. Their total value constitutes the plaintiff's claim for special damages.
3. It is the plaintiff's case that the enforcement notice used as authority to demolish the subject premises related to plot number 4361/6 Shauri Moyo located along Jogoo Road and was not intended for the premises.
4. In its statement of defence filed on 18th June 2012, the defendant denied the plaintiff's claim *in toto* and put him to strict proof thereof.
5. On 21st January 2019 when the suit was scheduled for hearing, though served with a hearing notice, the defendant and its counsel on record failed to attend the court. Hearing thus proceeded *ex parte*.
6. During the hearing, the plaintiff testified as PW1 in support of his case and called two additional witnesses. In his evidence, the plaintiff testified that he was the sole proprietor of Kapital Wood & General, a business which deals with the making and sale of furniture and related activities.
7. He recalled that on 6th June 2012, at around 7.30am, PW2 who was one of his workers notified him that his business premises had been demolished by the defendant's agents and that nothing was salvaged from therein. He went to the premises and confirmed the position communicated by PW2.
8. According to the plaintiff, prior to the demolition, an enforcement notice had been dropped in the workshop addressed to the owner/developer or occupier of plot number 4361/6 Shauri Moyo, Jogoo Road while his business premises was located on a different parcel of land namely plot number 209/11925.
9. It was thus his case that the enforcement notice was not meant for the subject premises as besides indicating the wrong land parcel number, there was no ongoing development on the land which could have been the illegal development referenced in the enforcement notice.
10. The plaintiff further asserted that after the demolition, he took stock of the items that were destroyed by checking on the stock sheets the items that had been salvaged or delivered to customers prior to the material date. He compiled a report titled "damage analysis after demolition on 6th June 2012 by NCC" which he produced as *pexhibit 1*. He also produced the stock sheets as *pexhibit 2*.
11. According to the plaintiff, he computed the value of the destroyed items based on their cost and regarding raw materials, he computed

their value based on supplier invoices and receipts which he produced collectively as *pexhibit 3*. The plaintiff recalled that he took photographs of the premises after the demolition which he produced as *pexhibit 4*.

12. PW2 *Lucy Njeri Kimani* testified that on reporting to work in the plaintiff's premises on the morning of 6th June 2012, she saw county council *askaris* arrive with a bulldozer. They started demolishing structures in neighbouring plots before they proceeded to demolish PW1's furniture workshop and showroom without giving her an opportunity to salvage anything. She recalled that the city county *askaris* were in uniform and were accompanied by the police. She then notified PW1 about the incident.

13. PW3, *John Otieno*, another of PW1's employees testified that he also witnessed the demolition. He replicated PW2's evidence in all material particulars and in addition, he recalled having noted that the bulldozer the defendant's agents were using in the exercise belonged to the defendant.

14. After the close of the hearing, pursuant to this court's directions, both parties filed their written submissions. The plaintiff filed his submissions on 5th February 2019 while those of the defendant were filed on 21st February 2019. The plaintiff filed further submissions on 3rd April 2019 without leave of the court. The further submissions were thus irregularly filed and should not have been admitted into the court record.

15. I have given due consideration to the pleadings, the evidence on record as well as the parties' rival submissions and all the authorities cited. I have also read the entire court record. I note that the plaintiff filed on 28th January 2014 what he described as a statement of agreed issues but the issues framed therein do not appear to have been agreed upon by the parties since the statement is not executed by the defendant's advocates on record.

16. After analysing all the material placed before me, I find that only two main issues crystallise for my determination in this case. These are:

- i. Whether the plaintiff has established to the required legal standard that the defendant unlawfully and maliciously destroyed his property as alleged.
- ii. Whether the plaintiff is entitled to the reliefs sought.

17. Before addressing the above issues, I would like to deal with a preliminary point raised by the defendant in its submissions to the effect that the suit is incompetent as in its view, the plaintiff did not have *locus standi* to institute the suit. It is pertinent to note that this issue was not pleaded in the defendant's statement of defence but was made belatedly in its submissions.

18. It is trite law that parties are bound by their pleadings and cannot be allowed to depart from them at any stage of the proceedings. Even the court is barred from adjudicating and making findings on issues that do not emanate from the pleadings filed by the parties in a suit. There is a plethora of authorities that support the above proposition but in this case, I am content to rely on the Court of Appeal's decision in ***David Sironga Ole Tukai V Francis Arap Muge & 2 Others, [2014] eKLR*** where the court in addition to pronouncing itself on the subject also gave the rationale behind the principle in the following terms:

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

19. Having not pleaded the claim that the plaintiff did not have *locus standi* to institute the suit, the defendant is estopped from raising that issue in its submissions and consequently, I will not spend any time belabouring the claim because it is not an issue in contention in this case.

20. Turning now to the merits of the case, I will start by addressing the first issue isolated above. Upon evaluating the evidence adduced by the plaintiff, I find that the plaintiff tendered documentary evidence to substantiate his claim that in June 2012, his business registered as Kapital Wood & General was licenced to operate a furniture workshop and showroom on plot number 209/11925 along Jogoo Road. The evidence is in the form of a certificate of registration issued under the *Registration of Business Names Act* dated 8th April 1998 and a business permit issued by the defendant on 16th January 2012.

21. From PW2's and PW3's evidence, it is evident that the plaintiff's furniture workshop and showroom was demolished on the morning of 6th June 2012 by the defendant's workers and everything that was in the premises was destroyed. PW2 and PW3 were eye witnesses to the incident and their evidence has not been controverted by evidence to the contrary. The photographs taken by the plaintiff of what used to be his workshop produced in evidence as *pexhibit4* supports PW1, PW2 and PW3's oral testimonies and further proves to the required standard that the premises were in fact demolished as alleged. I so find.

22. The plaintiff's case is anchored on the claim that the demolition was unlawful, malicious and illegal as it was based on an enforcement notice meant for another property but for undisclosed reasons, the defendant's agents decided to demolish and destroy his property even though it was not listed in the enforcement notice.

23. A perusal of the enforcement notice dated 12th March 2012 which was filed in court on 23rd October 2013 reveals that it was addressed to the owner/developer/occupier of plot number 4361/6 Shauri Moyo Jogoo Road giving them 7 days' notice to remove structures and a filling station which were allegedly being constructed contrary to the provisions of the *Physical Planning Act* failing which the defendant would demolish them at their own cost. The enforcement notice was clearly issued in respect of structures erected on land which was

different from the land on which the plaintiff carried on business.

24. From the foregoing, it is not in doubt that the subject premises were demolished without giving the plaintiff any notice leave alone adequate notice. The plaintiff was also not served with an enforcement notice as required by *Section 72 (1) and (2) of the Physical and Land Use Planning Act No. 13 of 2019*. In the circumstances, it is my finding that the demolition was not only unjustified and unlawful but it amounted to a violation of the plaintiff's constitutional right to fair administrative action enshrined in *Article 47 (1) of the Constitution*.

25. In the absence of any explanation from the defendant regarding why its agents picked on the plaintiff's premises for demolition without any legal basis, I have no hesitation in finding that the said demolition was motivated by malice. And as the unlawful demolition was perpetrated by the defendant's agents, I find the defendant vicariously liable for the loss occasioned to the plaintiff as a result of its agent's actions.

26. Having found that the plaintiff's premises were unlawfully and maliciously demolished and that his property as specified in his pleadings were destroyed in the process, I find that he suffered loss and damage for which he is entitled to an award of damages.

27. In his submissions, the plaintiff did not address his prayer for general damages and it is apparent that he abandoned the prayer and rightly so I must add considering that the loss complained of constituted the value of items destroyed in the demolition. It is thus my finding that the plaintiff is only entitled to an award of special damages.

28. It is an established principle of law that special damages must not only be specifically pleaded but must also be strictly proved. See **Paul Audi Ochuodho V Joshua Ombura Orwa, [2014] eKLR**.

29. In paragraph 9 A-G, H and I of the amended plaint, the plaintiff specifically pleaded the special damages claimed from the defendant. He produced documentary evidence in the form of supplier invoices and numerous receipts in a bid to prove his claim. They were produced collectively as *pexhibit3*.

30. I must point out at this juncture that as a matter of law, invoices cannot be used as evidence of payment in a claim for special damages. This position was emphasized by the Court of Appeal in the case of **Jamal Mohamed Bandira V Owners of the Motor Vessel "Nasibu", [2020] eKLR** where the court held as follows:

"...an invoice or a proforma invoice is not evidence of payment of the quoted sum. In Total (Kenya) Limited v Janevams Ltd [2015] eKLR, this Court, citing its earlier decision in Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2019] eKLR 720 held that: -

"...A proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made... "A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods..."

31. Guided by the above authority, in calculating special damages, I will disregard all invoices except those which bear confirmation that the amounts stated therein were paid. I will also take into account all receipts evidencing cost of the items pleaded in paragraph 9 of the amended plaint. Having thoroughly combed through the documentary evidence presented by the plaintiff, I find that he has specifically pleaded and strictly proved an amount of KShs.623,441 out of the amount claimed in the sum of KShs.11,609,300.

32. For all the foregoing reasons and findings, I find that the plaintiff has proved his claim against the defendant on a balance of probabilities. I consequently enter judgment for the plaintiff against the defendant in the total sum of KShs.633,441 together with costs of the suit and interest. The award shall attract interest at court rates from date of filing of the amended plaint until payment in full.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendant

Ms Mwinzi: Court Assistant