



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CIVIL APPEAL NO. 72 OF 2018

NICOLAS ANGWENYI SIRO T/A

RIVERSIDE CONTINENTAL RESORT..... APPELLANT

VERSUS

DUKE ORIKU GISEMBA..... RESPONDENT

(An Appeal from the judgment of N. Lutta SPM delivered on the 8th of August 2018 in CMCC No. 688 of 2009)

JUDGMENT

1. Nicolas Agwenyi Siro t/a Riverside Continental Resort the appellant filed suit against Duke Oriku Gisemba the respondent in CMCC No. 688 of 2009 on the 7th December 2009 seeking special damages of Kshs. 900,000/- for damage caused to the perimeter wall of Riverside Continental Resort. He also sought general damages for loss of business, reputation and loss of earnings plus costs of the suit.

2. In a defence filed on the 2nd February 2010 the defendant denied that he was the owner driver and or beneficial owner of the motor vehicle registration number KAR 797U Toyota Prado. He denied occurrence of the accident on the alleged day and the alleged negligence. He averred that if the accident happened then the appellant substantially contributed to it as particularised at paragraph's 6 (a) to (f).

3. In a judgment dated the 8th August 2018 Hon. Lutta dismissed the appellant's suit for failure to prove his case against the respondent. The instant appeal challenges the said decision. The appellant has 6 grounds of appeal as follows;

- i. That the Trial Magistrate erred in law and fact by dismissing the appellant's suit without properly evaluating the evidence and the law*
- ii. That the Trial Magistrate erred in law and fact by holding that the appellant had failed to prove ownership of the property.*
- iii. That the Trial Magistrate erred in law and fact by holding that the appellant failed to produce a quantity surveyor's report.*
- iv. That the Trial Magistrate erred in law and fact by failing to determine how much he could be awarded if the suit was successful*
- v. That the Trial Magistrate erred in law and fact by dismissing the suit yet no defence was tendered.*
- vi. That the Trial Magistrate erred in law and fact by failing to appreciate that it was a liquidated claim.*

The appellant seeks that the appeal be allowed and that the judgment and decree in Kisii CMCC No. 688 of 2009 be set aside, the appellant be allowed to produce further evidence on appeal and it be substituted with an order allowing the appellant's claim.

4. My duty as the first appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that the court had no opportunity of hearing or seeing the parties as they testified. (see **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**).

5. The appellant testified as on the 3rd of March 2009 the defendant whilst in the course of his duty as a driver and owner of Vehicle registration number KAR &9&U Toyota Prado negligently drove the said vehicle along Kisii- Kisumu road and caused the said vehicle to veer off the road and crashed into his premises known as Riverside Continental Resort. As a result of the accident his perimeter wall and kitchen equipment were destroyed and he incurred expenses of Kshs. 900,000/- in repairs. He had to employ security at the premises. He suffered loss of business and loss of earnings. During cross-examination he told court that he had receipts of the repairs he undertook, he did not have the hotel permit nor the agreement for security services. He denied exaggerating the damage done. He admitted that there was a

time the wall was damaged and repairs done. In re-examination he maintained that he did the repairs and paid for the expenses. He told court that he was operating a hotel called Riverside Continental Hotel.

6. The record shows that after the appellant closed his case, the defendant did not testify as the defendant failed to turn up in court on the date fixed for hearing.

7. In a brief judgment dated the 8.8.2009 the trial Magistrate dismissed the appellant's case for reasons that though the appellant alleged that the Hotel in question belongs to him, he failed to produce any Title deed, lease certificate or service agreement to demonstrate that the said Riverside Continental Resort belonged to him. That though the appellant alleged that he suffered a loss amounting to Kshs. 900,000/- no report by a quantity surveyor was tendered in court to demonstrate the extent of the damage. The trial magistrate held that the appellant had not proved his case against the defendant on a balance of probability and dismissed the appellant's case with costs to the respondent.

8. Parties canvassed the appeal by way of written submissions. The appellant in his submissions dated 10th June 2020 submitted that he relies on the grounds stated in the memorandum of appeal. That the facts and evidence relating to the claim are set out in the pleadings and evidence adduced in court. That the court should re-evaluate the evidence adduced and come to its own conclusions. That the appellant's claim was not properly adjudicated as his claim was proved on a balance of probability.

9. The respondent relied on his submission in the Court below dated 6th June 2018 and added that it was the duty of the appellant to prove his case. That the appellant failed to adduce evidence to show that to establish ownership of the business and or property or premises. That the appellant annexed a copy of official search of the property a document which was not part of his documents in the Court below nor does it form part of the Record of Appeal. That the appellant has not preferred an appeal against this Court's Ruling that rejected his application to adduce further documentary evidence. That the appellant has in his Record of Appeal attached the documents which were not produced in the Court below. The documents are the Quantity Surveyor's report, Bills of Quantities (see pages 19-25 of the Record of Appeal). That Order 21 Rule 4 of the Civil Procedure Rules, 2010 contains the contents of judgment. That none of those refer to quantification of a claim upon dismissal that it is discretionary. That it is not fatal to a parties claim that has been dismissed if the trial magistrate fails to quantify what the court could have awarded. On the ground of failure to defend a suit it was submitted that failure to call a defence witness is not the same as failure to defend a suit. That the appellant being the plaintiff had the duty to prove his case. On the ground of liquidated claim, it was submitted that the claim before the court was not a liquidated claim, but a claim for un-liquidated damages.

ANALYSIS AND DETERMINATION

10. After carefully considering the record of appeal and submissions the issues for determination are whether the appellant proved his claim as per his plaint and whether the trial magistrate erred in dismissing the appellant's suit.

11. The appellant in his plaint sought special damages of Kshs. 900,000/- and general damages for loss of business, reputation and loss of earning. The appellant describes himself as a male adult trading as Riverside Continental Resort. At paragraph 6 the appellant avers that his property known as Riverside Continental Resort was extensively damaged. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides that, *whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.* Section 109 of Cap 80 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.* Section 112 of Cap 80 provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. In the case of Anne **Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005]1 EA 334**, the Court of Appeal held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

It is therefore trite law that who makes a claim has the burden to prove the fact or facts pleaded in his pleadings.

12. In this case the appellant averred that he was Nicholas Angwenyi Siro trading as Riverside Continental Resort. The appellant's case was dismissed for reasons that he failed to prove that he owned the said business. Apart from stating that he was trading as Riverside Continental Resort, the appellant failed to produce any business certificate or ownership document to prove that he was trading as Riverside Continental Resort. He was asked for a hotel permit and he did not produce it. I find that the trial magistrate did not err in finding that the appellant failed to prove ownership of the business.

13. The appellant pleaded at paragraph 6 of his plaint that he would produce at the hearing a quantity surveyor's assessment of the damage and cost of repairs to the damaged premises and equipment. The only documents the appellant produced were a bundle of receipts marked 2 (a) (b) (c) and (d) and an investigation report. During cross examination he told court that he did not have the quantity surveyor report. The said report was not produced to prove the extent and cost of the damage.

14. From the court record the respondent was forced to close his case as he failed to attend the hearing. A defense was filed by the respondent on the 2nd of February 2010. What did not happen is that the defendant did not testify. I find that the trial magistrate did not err in dismissing the suit even though no evidence was tendered by the respondent. The trial court considered if the plaintiff had proved his claim having been cross-examined on the issue of ownership and the surveyor's report.

15. The plaint indicates that the appellant was seeking *special damages of Kshs. 900,000/- and general damages for loss of business, reputation and loss of earning.* To prove the claim of Kshs. 900,000/- the appellant relied on the receipts produced. I have perused the said receipts, they refer to Siro Riverside, N/Siro/ Riverside Continental, Nicholas Siro/ Riverside. These receipts show that the payment was

made some materials. Had the appellant established the nexus between him and Riverside Continental then he would have been awarded the total sum of the receipts if they tallied with the quantity surveyor's report. The trial court noted that though a claim was made for Kshs. 900,000/- there was no report by a quantity surveyor tendered in court to demonstrate the extent of the damage. In this case the appellant failed to adduce evidence on the alleged damages for loss of business, reputation and loss of earnings. The practice is that when a court dismissed a party's claim the trial court should indicate the award it could have awarded had the claimant proved its case on damages. Failure to do so would not in my view be a ground to set aside a dismissal order.

16. Lastly was the appellant's claim liquidated. In the case of **CIMBRIA EAST AFRICA LIMITED v KENYAPOWER & LIGHTING CO. LIMITED [2017] eKLR** Ochieng, J. held:

“A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;

A liquidated demand is in the nature of debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a „debt or liquidated demand? but constitutes, damages?”

Bearing in mind the true meaning of a liquidated demand as defined in BLACK'S LAW DICTIONARY and the Supreme Court Practice (1985) Volume 1, the respondents' claim was not for a liquidated sum. The fact that the appellant had quantified what he believed he was entitled to did not render it a liquidated demand. In this case the appellant's claim was for special damages of Kshs. 900,000/-. This claim was not a liquidated claim, it required to be proved at the trial. Receipts were produced in evidence but no surveyor's report to back the said payments.

All in all, I find that there is no merit in the appeal and it is dismissed with costs to the respondent.

Dated, signed and delivered at KISII this 24th day of September 2020.

R.E. OUGO

JUDGE

In the presence

Mr. Kaba h/b for Mr. Masese for Appellant

Miss Mutiria for the Respondent

Jackie Court Assistant