REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 264 OF 2009

BETWEEN

NICHOLAS ANGWENYI SIRO

T/A RIVERSIDE CONTINENTAL RESORT.....PLAINTIFF

AND

FINLAY KIRUI .....1ST DEFENDANT

MILLENIA MULTI PURPOSE CO-OPERATIVE....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff's claim set out in the plaint dated 7th December 2009 is that he is the owner of Riverside Continental Resort situated at Mosocho along the Kisii – Kisumu Highway. His claim is that on 24th September 2007, the 1st defendant negligently drove motor vehicle registration number KAU 240L ("the Lorry") owned by the 2nd defendant and caused it to veer off the road and crash into his premises causing extensive loss and damage to the perimeter wall, building and contents within the property. He claimed special damages amounting to Kshs. 87,000,000/-, general damages for loss of business, reputation and loss of earnings, cost of the suit and interest.

2. The defendants, in their statement of defence, denied the plaintiff's claim. They denied that the plaintiff had capacity to sue as such or that he owned the premises. They asserted that the accident did not take place as stated by the plaintiff but that if it did it was not as a result of the first defendant's negligence. They also contended that if the accident took place it was as a result of unforeseen factors. The defendants also denied that the plaintiff was entitled to any damages.

Matters in issue

3. After the close of pleadings, the matter was set down for hearing. It was initially heard by Okwany J., who took part of the plaintiff's (PW 1) testimony. I took over the matter and heard the testimony of an accountant, Aaron Moronga Motari (PW 2) and Michael Sironga Angwenyi (PW 3). Plaintiff's evidence mirrored his case as set out in the plaint while the defendant did not call any witnesses. The parties also filed written submissions at the end of the trial.

4. From the pleadings, evidence and submissions, there are three issues for determination:

a. Whether the plaintiff has capacity to bring this suit.

b. Whether the defendants were liable for the accident.

c. If the answer to (b) is in the affirmative, the nature and extent to damages available to the plaintiff.

5. The parties also filed written submissions which I will outline together with the evidence as I deal with each issue.

Whether the plaintiff was the owner of the suit premises

6. This is a preliminary issue for determination as it establishes the capacity of the plaintiff to make his claim against the defendant.

7. In the plaint, the plaintiff described himself as the owner of the business ***trading as Riverside Continental Resort***. He produced a Certificate of Registration dated 5th December 2005 issued under the ***Registration of Business Names Act (Chapter 499 of the Laws of Kenya)*** which shows that Michael Siro Angwenyi carrying on business under the name of Riverside Continental Resort. He also produced another Certificate of Registration dated 17th December 1985 issued under the ***Registration of Business Names Act*** showing that Sirona Limited was carrying on business under the name of Kisii Riverside Motel. Both businesses were situated the on land parcel WEST KITUTU/BOGUSERO/2285 ("Plot 2285") owned by the plaintiff.

8. Counsel for the plaintiff submitted that the plaintiff was entitled to relief as he was the registered proprietor of Plot 2285 which entitled him to agitate the claim.

9. Counsel for the defendants submitted that evidence presented by the plaintiff was contrary to the pleadings. He argued that the Certificate of Registration of Business showed that Riverside Continental Resort was the business name for Michael Siro Angwenyi and not Nicholas Angwenyi Siro and since Nicholas Angwenyi Siro was not the owner, he could not sue as such. Further, that no reason was given why Michael Siro Angwenyi could not bring the suit on his own.

10. The question of capacity to sue and be sued is fundamental to any cause of action. In ***Apex Finance International Limited and Another v Kenya Anti-Corruption Commission*** **NKU HC JR No. 64 of 2011 [2012]eKLR**, the court cited a decision of the Supreme Court of Nigeria, ***Goodwill and Trust Investment Ltd and Another v. Witt and Bush Ltd*** **Nigerian SC 266/2005 which encapsulated the fundamental nature of the issue of capacity. The court observed that:**

> *It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising f*rom the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. *When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, "where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned."*

11. In this case, the plaintiff identified himself as ***Nicholas Angwenyi Siro t/a Riverside Continental Resort*** yet the Certificate of Registration of Business name dated 5th December 2005 showed that it is ***Michael Siro Angwenyi t/a Riverside Continental Resort***. **Nicholas Angwenyi Siro** (PW 1) and **Michael Siro Angwenyi** (PW 3) are two different natural persons, each with separate legal capacity and distinct legal rights and obligations. Although the property on which the business was situated, Plot 2285, was owned by the plaintiff, the suit was not agitated on that basis. It was filed and prosecuted on the basis that **Nicholas Angwenyi Siro** was trading as ***Riverside Continental Resort*** and he is bound by that pleading.

12. The plaintiff chose to litigate in a capacity that he did not have and although I would have thought it was a misdescription which is curable by amendment, the certificate issued under the ***Registration of Business Names Act*** cannot be amended in these proceedings to give the plaintiff capacity. Throughout the case, the plaintiff had the opportunity to rethink his pleadings as the issue was specifically pleaded by the defendant. I find and hold that the plaintiff lacks capacity to sue as ***Riverside Continental Resort*** as the business and the proper person to agitate the case on behalf of the business is **Michael Siro Angwenyi**.

13. Notwithstanding the finding I have made regarding the capacity of the plaintiff to agitate the case, I still have to consider the other issues framed for determination assuming that the plaintiff was the proper person to agitate the cause of action.

Liability for the accident

14. PW 1 testified that on 24th September 2007 at about 5.30pm, he was outside the kitchen within the suit premises when he heard a bang from the road side. He found the Lorry had veered into the compound and hit the perimeter wall and the kitchen. PW 3 produced photographs which showed that the incident had had taken place. PW 1 also produced a police abstract which confirmed that the particulars of ownership of the lorry and the fact that the 1st defendant was the Lorry driver.

15. The question for consideration is whether the plaintiff proved negligence on the balance of probabilities as alleged in the plaint. The defendant submitted that the plaintiff did not prove any of the particulars of negligence and that the fact that the Lorry hit the building was not enough to prove that the defendants were liable. Counsel for the defendant relied on the decision in ***Kiema Muthuku v Kenya Cargo Handling Services Limited*** **[1991] 2 KAR 258** where the Court of Appeal held that the plaintiff bore the burden of proving negligence as, *"there is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."* Counsel contended that the fact that the defendants did not call any witness did not discharge the plaintiff's burden of proving negligence as the Court of Appeal stated in ***Abson Motors Limited v Dominic B. Onyango Konditi*** **[2018]eKLR** that, *"in view of the fact that the appellant did no call any witnesses to testify, it followed that the respondent proved his case against the appellants on a balance of probabilities."*

16. The plaintiff's position was that PW 1's evidence on the accident was uncontroverted and that given the totality of the evidence, the defendants were fully liable.

17. Did the plaintiff prove negligence in these circumstances? **Sections 107**, **108** and **109** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. PW 1 produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that the Lorry was owned by the 2nd defendant and driven by the 1st defendant. Further the photographs of the scene produced by PW 3 confirmed that the accident did take place as described. The police abstract relied on was produced without objection and established the fact of the accident in addition to the testimony of PW 1

(see ***Joel Muna Opija v East African Sea Food Limited*** **KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR**).

18. In my view, this is a case where the plaintiff could rely on the doctrine of *res ipsa liquitor* to establish liability. In ***Nandwa v Kenya Kazi Limited*** **[1988] eKLR**, Court of Appeal (Gachuhi JA) cited, with approval, a portion ***Barkway v South Wales Transport Company Limited*** **[1956] 1 ALLER 392**, **393 B** on the nature and application of the doctrine of *res ipsa loquitur* as follows:

> The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.

19. As the Court of Appeal explained, this is a rule of evidence and not pleading and it is that once the plaintiff establishes a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on its part. Apart from the fact that the accident took place, the testimony of PW 1 was that the Lorry veered off the road, hit the perimeter fence and caused damage to the building on the suit premises. The photographs of the scene produced by PW 3 leave no doubt that the Lorry left the road and ploughed into the building.

20. The facts I have outlined in the absence of any explanation are *prima facie* evidence of negligence. It is not common for a lorry to veer off the road and crash into a building. It was the burden of the defendants to show that the accident was caused by factors beyond their control. The defendants did not call any witnesses or proffer any evidence to support their defence.

21. I therefore find that the 1st defendant was liable for causing the accident and since he was an employee of the 2nd defendant, it was vicariously liable. Consequently, the defendants are fully liable, jointly and severally for the accident.

Damages

22. The plaintiff pleaded that as a result of the accident, it suffered loss and damage as follows:

> i. Extensive damages to the perimeter wall of Riverside Continental Resort – Kshs. 700,000/-.
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> ii. Extensive damages to the Kitchen of Riverside Continental Resort – Kshs. 1,000,000/-.
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> iii. Extensive damage to the equipment in the kitchen whose repair and replacement cost – Kshs. 2,000,000/-.
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> iv. Extensive damage to the executive conference hall – Kshs. 1,000,000/-.
>
> v. Damage to the Laundry – Kshs. 2,000,000/-.
>
> vi. Cost of security hire – Kshs. 1,000,000/-.
>
> vii. Labour – Kshs. 1,300,000/-.
>
> viii. Loss of business at Kshs. 96,320/- per day for 2 years and 3 months totaling to Kshs. 78,000,000/-.

23. The plaintiff's claim including the claim of loss of business is in the nature of special damages. The general and well settled principle is that special damages must be pleaded and proved and that degree of certainty and particularity of proof required must depend on the circumstances and nature of the loss and damage (see ***Hahn v Singh*** **[1985] KLR 716** and ***Capital Fish Kenya Limited v Kenya Power and Lighting*** **[2016]eKLR**). I now turn to consider each aspect of the claim in light of the general principle I have cited.

24. The photographs produced by PW 3 show how the lorry veered off the road and damaged the perimeter wall and ploughed into the building. A close examination of the photographs shows that the kitchen was part of the building that was damaged. The plaintiff relied on a bill of quantities prepared by Lucas Adwera, Quantity Surveryor dated 10th February 2008 for, *"Proposed Repairs of Premises following Damage by Motor Vehicle on Plot No. 2285 Kisii Municipality."* The report details the cost of superstructure that is the walling, concrete works, reinforcement with steel, details of stonework and finishes, ventilation, doors and accompanying ironmongery, painting and redecorating all amounting to Kshs. 678,943.80.

25. The quantity surveyor, who was an expert and who visited the scene after the accident, was able to assess the entire damage caused by the lorry. His assessment was documented in his report whose contents I have summarized. Since the report covered *"proposed repairs of the premises"*, I consider that the loss assessed would cover the claim for extensive damage to the perimeter wall and building. The quantity surveyor's report was sufficient evidence of the nature and extent of damage and thus proof of loss (see ***Mohammed Ali and Another v Sagoo Radiators Limited*** **NRB CA Civil Appeal No. 231 of 2005 [2013]eKLR** and ***Nkuene Dairy Farmers Co-operative Limited and Another v Ngacha Ndeiya*** **NYR CA Civil Appeal No. 154 of 2005[2010]eKLR**). I would award Kshs. 678,943.80.

26. The defendant submitted that apart from the damages assessed by the quantity surveyor, the plaintiff did not particularise or prove any further loss under the rubric of extensive damage to the perimeter wall, kitchen and kitchen equipment, laundry and executive conference hall. I would have expected an itemized list of specific equipment, furniture and associated items with their prices. The plaintiff nevertheless

produced invoices as evidence of the purchase of those items. In support of the dry cleaning cleaning machine and other laundry equipment, the plaintiff produced an invoice dated 20th March 2006 for Kshs. 2,000,000/- from Tequip Limited. Invoice no. 5628 for March 2006 from Kitchenbenc Limited for Kshs. 2,000,000/- was produced to support the purchase of kitchen equipment including, a refrigerator, gas cookers, microwave oven, cylinders, kitchen utensils and cutlery. An invoice dated 10th February 2006 from Able Furniture for Kshs. 1,000,000/- for purchase of chairs, tables and other furniture was also produced. It is strange that the invoices for such large sums do not contain an itemized list of specific items, their unit price and the Value Added Tax element.

27. The defendant complained that the plaintiff's case was not sustainable as it was grounded on invoices. An invoice is a demand for payment and unless there is evidence of payment, an invoice is not evidence of purchase or other loss. On this issue, the Court of Appeal in ***Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited*** **NRB CA Civil Appeal No. 178 of 2005 [2015]eKLR** observed that:

> From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. 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. We consider that a proforma invoice was not satisfactory proof of the respondent's loss, or the replacement value of the respondent's equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent's equipment supposedly withheld by the appellant.

28. The other claims pleaded are costs of security hire and labour costs. The plaintiff relied on invoices to support these claims. The security for services, the plaintiff relied on an invoice dated August 2009 from Gimo Security Services for Kshs. 1,000,000/- for provision of security upto 31st December 2009. Dormax Holdings Limited submitted two invoices dated 10th December 2009 for labour charges and 30th December 2009 for construction of perimeter wall for Kshs. 1,300,000/- and Kshs. 700,000/- respectively. Once again, these invoices do not contain particulars of the specific services, the unit costs and tax element. For the reasons I have given, I am unable to accept invoices as evidence for proof of loss.

29. The plaintiff claimed damages for loss of business for 2 years and 3 months starting 24th September 2007. The claim for loss of business was based on the fact that the plaintiff's business was a going concern. PW 1 produced Liquor Licences for the year 2009 and 2010 while PW 2 produced in a report titles *"Projected Financial Statements for the Period 1st October 2017 to 31st December 2009."* It is worth noting that the report was prepared for ***Nicholas Angwenyi Siro t/a Riverside Continental Resort***. As I stated earlier in the judgment, the legal entity known by that name was non-existent and it is apparent that the accountant did not conduct due diligence to confirm the legal status of the business he was assessing.

30. As the title of the report suggests, the plaintiff's claim is based on projected income and profit for the period 1st October 2007 to 31st December 2009. The claim pleaded and is for loss of business at Kshs. 96,320/- per day for 2 years and 3 months totaling to Kshs. 78,000,000/-. This is the sum that is reflected as the net profit over the period. When cross-examined about the manner he prepared the accounts, PW 2 admitted that between 2007 and 2010 the business was not operating and that there were no books of account.

31. In my view, the projection relied upon by the plaintiff is not supported by any other business books like audited accounts for the period to show that the business was a going concern, that it had employees and was carrying on business that would produce an income. The law requires that the special damages must be pleaded and proved according to the nature of the claim and in this case a claim for substantial loss of profit cannot stand based on one report whose basis is doubtful. I therefore reject the claim for loss of business.

Disposition

32. Since I have found that the plaintiff lacks capacity to sue for the claim, I must now dismiss the suit.

33. This suit is hereby dismissed with costs to the defendants.

DATED and **DELIVERED** at **KISII** this **20th** day of **FEBRUARY 2019**.

D.S. MAJANJA

JUDGE

Mr Nyambati instructed by G. M. Nyambati and Company Advocates for the plaintiff.

Peter M. Karanja, Advocate for the defendant.