

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL 547 OF 2014

DELUXE FOOD INDUSTRIES LIMITED.....APPELLANT

VERSUS

BURHANI DECORATORS AND

CONTRACTORS LIMITED.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment delivered on the 21st November, 2014 by the Honourable Chief Magistrate C. Obulutsa in Nairobi, Milimani CMCC No. 4219 of 2009)

This appeal arises from the decision of the lower court made on 21st November, 2014 whereby the lower court found in favour of the respondent in the sum of Kshs. 901, 041/25. The appellant was aggrieved by the said decision and lodged this appeal. The plaintiff in the lower court was also aggrieved by that decision and filed a memorandum of cross appeal, in that the lower court erred in law and fact in dismissing the plaintiff's claim for Kshs. 223,608/=.

The trial magistrate was also faulted for dismissing the plaintiff's claim for Kshs. 1,594,835.55. The plaint dated 18th April, 2001 is based on a relationship by way of a tenancy agreement between the parties herein whereby the respondent offered the appellant who accepted a godown at a monthly rent of Kshs. 15,000/= payable quarterly in advance for a term of five years with annual increase of 7.5%.

The terms are set out therein and it is not necessary for me to set them out in full except to state that the tenant was obligated to pay water, electricity and conservancy charges in respect of the said premises. Service charges for security, outside lighting and cleaning services were to be determined later and payable by the tenant.

It was the respondent's case that the appellant breached the terms of agreement and moved out without giving notice to the respondent but after committing extensive damage to the leased premises. It was also alleged that there was no handing over of the premises. The particulars of loss are set out in the plaint which were denied by the appellant. In particular the appellant stated in its defence the respondent terminated the tenancy agreement and the appellant mutually agreed to move out and therefore was not in breach as alleged. Any loss was also denied and the defence added that the tenancy agreement was subject to arbitration and the jurisdiction the court was not admitted. The appellant undertook to raise a preliminary point of objection at the hearing. I observe at this early stage that both parties participated in the trial and that no objection to jurisdiction was raised in the proceedings.

The learned trial magistrate in his judgment analysed the evidence of the parties relating to all the claims raised by the respondent and arrived at the decision now appealed. As require of me I have considered the evidence adduced before the lower court. This was essentially a claim for special damages. It is a cardinal principle that special damages must be specifically pleaded and strictly proved.

I have looked at the evidence in relation to the pleadings and the Memorandum of Appeal. The substrum of the suit was the tenancy agreement. All other issues must therefore revolve around that agreement. Anything outside that agreement cannot be admitted in evidence. I have been asked to delve into matters of fact because the trial court did not allegedly analyse the facts and make any findings thereon. With respect I am unable to do so because a careful reading of the lower court judgment demonstrates that indeed the trial court addressed the facts in arriving at its determination. Proof in civil proceedings is on a balance of probability and it is my considered view that the trial court in arriving at its determination was satisfied the respondent had met that threshold.

My own assessment is that the trial court properly analysed the evidence guided by the agreement and arrived at the decision that he did and I find no reason whatsoever to fault him. The appeal I find cannot be sustained in the circumstances.

On the other hand the cross appeal has also to have a direct reference to the agreement and the evidence adduced. I am equally unable to assign any error on the part of the trial court in relation to the issues raised. The cross appeal is also dismissed. I order that both parties shall bear their own costs.

Dated, signed and delivered at Nairobi this 31st day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE