



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 388 OF 2007

VISHVA STONE SUPPLIERS COMPANY LTD.....PLAINTIFF

-VERSUS-

RSR STONE 2006 LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff through a plaint dated 30th July 2007 sued by the defendant seeking payment of Kshs 5,214,114.40 together with costs and interest.
2. The Defendant filed statement of defence dated 8th October 2007 denying the plaintiff's claim and sought that the same be dismissed with costs.
3. This suit had on 20th April 2015 proceeded to hearing ex-parte; Judgment delivered in favour of the Plaintiff on 19th November 2015; however on 5th July 2018 the parties agreed by consent to set aside the Judgment on condition that the Defendant pays the Plaintiff Kshs 1,656,000/- and the claim for the disputed sum of Kshs 3,558,114.40 to proceed to hearing. This case then proceeded to hearing on 1st and 2nd November 2018 when both parties gave evidence and closed their case.
4. The Plaintiff in support of its claim called one witness and its adopted witness statement (Exhibit P-1) as its evidence in chief and relied on list of bundle of documents (Exhibit P-2).
5. The Defendant in support of its defence called one witness and adopted its witness statement (Exhibit D1) as its evidence in chief and also relied on its bundle of list of documents (Exhibit D- 1, D-2 and D-3).
6. From the evidence from both the Plaintiff and the Defendant there is no dispute that the Plaintiff and the Defendant entered into an agreement on 1st March 2006 for the sub-lease of the property known as L. R. No. 7538 (original L.R. No. 7072) for the purposes of quarrying works together with all quarrying machines, tools and equipment all in good working conditions. The agreement was terminated on the 1st week of August 2006 and the Plaintiff collected its quarrying machinery, tools and equipment from the Defendants premises. There is however dispute as to whether some of the machinery were damaged when they were collected and further there is a dispute as to whether there was unpaid rent due and payable to the Plaintiff for the month of July 2006, and claim for refund of payments allegedly made to KPLC and money claimed for the main switchboard. The Plaintiff claims there is outstanding and unpaid sums for rent, refund of money paid to KPLC switchboard and claim for money for damaged machinery which the Defendant denies.
7. I have very carefully considered the pleadings in this suit, the witness evidence, and counsel respective rival submissions and the issues for consideration arising thereto in my view are briefly as follows:-
 - a) Whether the Plaintiff is entitled to the payment of Kshs 5,214,114.40?
 - b) Whether the Plaintiff is entitled to costs and interest?

A. Whether the Plaintiff is entitled to payment of Kshs. 5,214,114.40?

8. By consent of parties made on 5th July 2018, the Defendant admitted the Plaintiff's claim to the tune of Kshs 1,656,000/- but disputed the balance of Kshs 3,558,114.40; which the Plaintiff avers is partly made up of all the payments made to **KPLC**, being for the main switchboard, the damages incurred for the broken main jack caterpillar and stonecutting machines, the costs of the uncollected rails and uncollected machinery.

9. The Plaintiff in its evidence through Pw1; averred that that it paid Kshs 862,640/- towards the installation of electricity on the premises to KPLC and Kshs 661,200/- for the main switchboard and invoiced the Defendant for a refund but the Defendant declined to refund contrary to clause 9 of the agreement dated 1st March 2006; which switchboard the defendant averred it had been stolen and theft reported to the police station.

10. The Plaintiff further averred the machinery was damaged on collected and the Defendant declined to pay for the damages. The Plaintiff claims it suffered damages as it was forced to sell the machinery at a throw away price and therefore claims the sum of Kshs 1,110,000/- being the cost of the damaged caterpillar and stone cutting machine. The Plaintiff further claims 20 uncollected rails and uncollected machinery at the sum of Kshs 880,709/-; refund of unpaid electricity bills of Kshs 43,565.40; unpaid rent in the tune of Kshs 788, 0000/-. In the view of the Plaintiff's oral evidence and upon admission of balance for Kshs 1,656,000/- by the defence, the Plaintiff avers the Defendant is therefore indebted to the Plaintiff in the sum of Kshs 3,558,114.40

11. The Defendant on it's part averred that after paying the Plaintiff the sum consented to of Kshs 1,656,000/- the remained no other sum due and payable to the Plaintiff by the Defendant. The Defendant further averred as per clause 9 of the agreement dated 1st March 2006 all payments to Kenya Power Lighting Company Limited for the main switchboard were to be reimbursed in respect upon production of a receipt of the respective paid amount. It argued no evidence of payment was availed to it to reimburse to the Plaintiff.

12. The Plaintiff claim is set out under paragraph 4 & 6 of the plaint in which it is pleaded as follows:-

"4. The Defendant has failed, or otherwise neglected to pay all the amounts due and owing from it to the plaintiff, and the sum due and owing to the Plaintiff from the Defendant as at October 2006 stood at Kenya Shillings Five Million, Two Hundred Fourteen Thousand, One hundred and fourteen and Forty cents, which amount continues to accrue.

6. The Plaintiff claims from the Defendant full payment of the said sum of Kenya Shillings Five Million, Two Hundred and Fourteen Thousand One hundred and Fourteen and Forty Cents as at October 2006 with all accrued amount upto the payment plus accrued interest, and bank charges."

13. The plaintiff's claim is for special damages of Kshs 5,214,114.40 as per the plaint under paragraph 4 and 6 of the plaint. The particulars in respect of the aforesaid sum is not specifically pleaded in the plaint which should be noted as wanting.

14. It is trite law a claim for special damages must be specifically pleaded and strictly proved. In capital Fish Kenya Limited –vs- Kenya power & Lighting Company Limited [2016] eKLR the Court of Appeal held as follows;

"Starting with the first issue, it 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. See National Security Fund Board of Trustees –vs – Sifa International Limited (2016) eKLR, Macharia & Waiguru –vs- Muranga Municipal Council & Another (2014) eKLR and Prvincial Insurance Co. EA Ltd –vs- Mordekai mwanga Nandwa, KSM CACA 179 of 1995 (ur). In the later case this court was emphatic 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...."

15. Further in case of Delta Haulage Services Ltd –vs- Complast Industries Limited and Alnasir Hemraj (2015) eKLR, Hon. Justice Mabeya quoted with approval from Sande –vs- Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK) where the Court of Appeal held that:-

"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of the law."

16. What is special damages? Black's law Dictionary Tenth Edition at page 474 defines special damages as follows:-

"Damages that are alleged to have been sustained in the circumstances of a particular wrong."

The special damages are damages in other words which can be ascertained; quantified and proved. The same must be ascertained from the pleadings and proved by supportive documentary evidence.

17. In the instant suit; the Plaintiff did not specifically plead the particulars of the sums claimed in the plaint and by such failure the Defence did not have notice of the exact nature of the Plaintiff's claim against it. The Plaintiff purported to give particulars of its claim through its witness statement. No explanation was given why the Plaintiff could not have given the particulars in its pleadings. Witness statement cannot be substituted for any pleadings nor can it be taken as a pleading. Parties are bound by their pleadings and witness statement however detailed it may be, it cannot be substituted for the pleadings. Pleadings cannot be amended by a witness statement; but remain unchanged unless amended in accordance with the provisions of the Civil Procedure Rules.

18. Further in the instant case, the Plaintiff in its evidence did not produce an inventory showing the machinery, tools and equipment that it had handed over to the Defendant at the time of execution of the agreement and the ones it carried away from its leased premises in June 2006, and in what status they were when they were leased and collected. As regards the claim for rent for the months from March to July 2006; the Defendant averred that the payment of Kshs 1,656,000/- as per witness statement paragraph 19, it was the rent for April to June 2006. The Plaintiff claims rent for July 2006. The plaintiff has not raised an invoice for rent for the month of July 2006 and did not give good reason for failure to do so. The Defendant's 1st witness averred it was not in occupation of the leased property in July 2006; hence no rent

was due and payable. I have considered that the Plaintiff produced no invoice for the rent of July 2006 and it failed to adduce evidence confirming the Defendant was in occupation by July 2006. The claim has not been specifically pleaded and proved. I find that the claim fails.

19. On claim for Kshs 661,200/- for main switchboard, the same was not specifically pleaded, the claim is based on clause 9 of the agreement dated 1st March 2006 which required the Plaintiff to purchase the switchboard and obtain reimbursement from the Defendant. The Plaintiff was required to strictly prove that it incurred expenses which required it to be reimbursed by the Defendant. The Plaintiff produced two invoices but no receipts confirming that it made any payments. Invoices are not proof of any payments but are proof that an order for supply for items has been made. The plaintiff's bundle of documents, in my view, even with an endorsement with the words "paid by cheque" is not a prove that payment was made. The Plaintiff once again failed to specifically plead and prove its claim. This claim fails.

20. On the claim for Kshs 862,640/- as costs of Kenya Power and Lighting Co. Ltd for installation of power in its leased premises. The Defendant was a leasee to the Plaintiff's premises for agreed period. Clause 9 of the agreement provided that the Defendant would pay for costs of installing power in the leased premises; the power had been installed in January 2016 before the execution of the parties agreement, a fact the Plaintiff admitted. That the Plaintiff did not demand the amount till after termination of the lease. The plaintiff did not in its pleadings plead nor strictly prove its claim by production of receipts in support of the claim; limited to the period the Defendant was in occupation. I find that this claim must fail.

21. On claim for alleged broken main jack caterpillar wheel loader 950, rails, one set of box spanner, one set of combine spanner, broken engine oil sump, broken engine manu fault, lost diesel and filter housing, are not part of the plaintiff's pleadings. The same were only raised in the plaintiff's witness statement. Secondly the Plaintiff did not produce an inventory in respect of the aforesaid items nor assessor's report to prove the damages as of the time of collection of the items. There is no evidence of damage of any of items complained of on record. The Defendant witness, who was at the site, when items were collected, was not asked to sign any delivery note. The Plaintiff carried the items without making any inventory and giving the same to the Defendant witness, who was present. There was no complain that any of the items had damages. The Defendant gave evidence that the remaining uncollected items on the first day were subsequently collected in March 2007. I therefore find that this claim was not specifically pleaded nor strictly proved and the same fails.

22. The plaintiff further in its witness statement claims Kshs 43,565.40 being claim for used light bulbs attributed to the Defendant's power consumption for the months it had power in its premises. The plaintiff did not specifically plead nor strictly prove the claim. The Plaintiff did not produce the electricity bills showing in whose name the power bills in question were and the amount of the electricity consumed. The Plaintiff did not produce any receipt showing the bill was paid by it on behalf of the Defendant for power it had consumed. The Defendant averred if a proper bill of power consumed by it, between the months of March to April 2006 was provided, it would have settled the bill. In view of the plaintiff having failed to specifically plead, and strictly prove its claim the same must fail.

23. In view of the foregoing, I find the plaintiff failed in its pleadings to specifically plead and strictly prove its claim. The Plaintiff has attempted to rely on the witness statement with a view to change the nature of its pleadings, which I find to be contrary to the provisions of the Civil procedure. I find the Plaintiff having failed to set out the particulars of its claim in the plaint; it could export the particulars in the witness statements to the un amended plaint. The Plaintiff further failed to strictly prove the claim by failing to produce relevant documentary evidence in support. The plaintiff has failed to prove its claim to the required standard of proof.

B. Who should bear the costs of this suit?

Section 27 of the Civil procedure Act provides that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order. Having found that the Plaintiff has not proved its case to the required standard of proof as against the Defendant, I have no otherwise but order costs to the Defendant.

24. The upshot is that the Plaintiff's suit is dismissed with costs.

Dated, signed and delivered at Nairobi this 20th day of December, 2018.

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J .A. MAKAU

JUDGE