REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO.51 OF 2013

NDEGWA KAMAU T/A SIDEVIEW GARAGE…….
…….APPELLANT

VERSUS

FREDRICK ISIKA KALUMBO…….……..
….RESPONDENT

(Being an appeal from the judgment and decree in Nanyuki Chief Magistrate's Court Civil Case No. 28 of 2007 (Hon. J.N. Nyaga) delivered on 19th June, 2013)

JUDGMENT

This is a second judgment in this appeal; the first judgment struck out the appeal in the court's mistaken belief that a certified copy of the decree appealed from was omitted from the record of appeal. That document was not among the documents itemised in the index of the documents comprising the record of appeal and therefore the court initially proceeded on the assumption that it was not part of the record. After the delivery of the judgment, the appellant was able to point out to the court that the decree was indeed part of the record despite its omission from the index; he successfully applied for a review of the judgment on the ground there was an error apparent on the face of the record.

The appellant was the defendant in a suit in which the respondent sued him for delivery of his vehicle which he had entrusted the appellant with for body overhaul and repairs; he also sought for the sum of Kshs 110,000/= being the sum allegedly paid to the appellant to cater for the works and Kshs 94,850/= being the cost of parts of the vehicle which he claimed the appellant vandalised. He also asked for the costs of the suit and interest thereof.

The appellant not only denied the respondent's claim but he also lodged a counterclaim against him for the sum of Kshs 63,800/= being the charges for services rendered and storage of the respondent's motor vehicle.

Upon the conclusion of the trial, the magistrates' court held that the respondent did not prove the claim of Kshs 110, 000/= but entered judgment against the appellant for the sum of Kshs 38,000/= which the court held had been proved as the costs of parts vandalised from the respondent's vehicle while it was in the custody of the appellant. The appellant's counterclaim was dismissed. The court also awarded the respondent a half of the costs of the suit and interest thereof.

The appellant was dissatisfied with the decision and therefore appealed against it on 16th July, 2011 when he filed his memorandum of appeal in which he raised several grounds impugning the decision of the lower court; these grounds are as follows:

1. The learned magistrate erred in law and in fact by granting special damages that were not pleaded;

2. The learned magistrate erred in law and in fact by relying on documents that were not stamped or affixed with the revenue stamp as required by law;

3. The learned magistrate erred in law and in fact by dismissing the appellant's counterclaim dated 19th of July 2007;

4. The learned magistrate erred in law and in fact by holding that the respondent proved his claim of Kshs 38,200.00 without evidence to support it;

5. The learned magistrate erred in law and in fact in awarding the respondent Kshs 38,200.00 without sufficient material placed before him for assessing the damages;

6. The learned magistrate erred in law in awarding the respondent the sum of Kshs 38,200.00 as the value for the missing items from the vehicle yet he had rejected the claim for expenses incurred for replacing the vandalised items since they were not specifically pleaded and proved;

7. The learned magistrate erred in law and in fact by holding that the respondent partially proved his claim against the appellant and was entitled to half the costs of the suit and the counterclaim together with interest on the purportedly proved sum;

8. The learned magistrate misdirected himself in both law and in fact in applying an erroneous standard of proof and failed to appreciate that the respondent failed to discharge the burden of proof placed upon him as a matter of law;

9. The learned trial magistrate erred in law and in fact by not taking cognizance of the established principles in proof and award of special damages;

10. The learned magistrate erred in law and in fact in failing to consider fully, adequately and/or at all the evidence placed before him and unduly applying the law to the facts thereof;

11. The learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence before him and the relevant law on the same; and,

12. The learned magistrate failed to appreciate the totality of the evidence before him and in not considering the submissions propounded on behalf of the appellant.

The record from the subordinate court shows that respondent took his motor vehicle registration number KAV 452 M to the appellant's garage for what I understand to be some sort of overhaul in the sense that he wanted it to be converted from its original structure into a pickup or a passenger vehicle. There was evidence that it was initially a fire engine. The cost of the intended alterations was agreed at **Kshs 110,000/=** which he paid the appellant in full. It was the respondent's evidence that the appellant reneged on his obligations under the contract and did not perform it as agreed. In view of this breach, the respondent demanded for the release of the vehicle back to him and a refund of the money paid. The appellant did neither of these things and so the respondent moved to court from where he obtained an order for repossession of the vehicle. With the help of auctioneers, he towed the vehicle from the appellant's garage.

He testified that upon inspection of the vehicle several of its parts were found to be missing; he itemised them as 3 tyres, 3 tubes, 1battery, the ignition key, 2 rear lights, 2 side reflectors, 2 air cleaners, one water container, and one front bumper. Other items were 4 door lock handles, 2 number plates, front and rear lights and 4-door covers. According to his testimony, the respondent replaced these items at a cost of Kshs 94,850/=; the receipts acknowledging payment of these assorted items were admitted in evidence in support of the respondent's claim.

On his part, the appellant admitted that he operated a garage in Nanyuki town and that it was true that sometimes in 2006 the respondent brought his motor vehicle to the garage for fabrication. As noted, the vehicle was initially a fire engine and the respondent wanted it to be converted into a passenger vehicle. He also admitted that the agreed sum for the works which the respondent paid in full was the sum of Kshs 110,000/=. However, while the work was progressing, the respondent asked for further variations which were executed as per his instruction but for which he did not pay. The appellant also admitted that the respondent removed the vehicle from his garage on the authority of a court order. The parts that are alleged to have been missing were in the workshop and had the respondent asked for them he would have been given. According to the appellant, the extra works on the respondent's vehicle cost Kshs 25,000/= while the storage charges amounted to the sum of Kshs 38,000/=. He sought for judgment against the respondent for these sums in his counter-claim.

Upon analysing this evidence, the learned magistrate, as earlier noted, entered judgement for the respondent for the sum of Kshs 38,200/= being the cost of replacement of some of the parts that are alleged to have been vandalised from his motor vehicle. He dismissed the appellant's counterclaim on the ground that there was no proof of any extra works or any basis for claim of storage charges. The bone of contention in this appeal is the sum of Kshs 38,200/= which the trial court awarded the respondent.

I agree with the appellant that the award comprised, for all intents and purposes, special damages. It was an award based on an ascertainable claim whose particulars were well within the knowledge of the respondent from the very beginning; it was, in other words, an ascertained expense which, according to the learned magistrate, was the cost for replacement of the respondent's motor vehicle's wheels, number plates and the ignition key. It has been held by the Court of Appeal in the case of **Siree Limited versus Lake Turkana El Molo Lodges (2000) 2EA 521** that *"when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages"*. There is no doubt therefore that the award of Kshs 38,200/= had every characteristic of a special damage award.

Of all the grounds of appeal that the appellant raised, the only question, in my humble view, which this court has to concern itself with, is whether the trial court was justified in making this award; it is the only question on which this appeal turns. To find the appropriate answer to it one has to go back to the pleadings and in particular, the respondent's amended plaint dated the 2nd day of May, 2008. In that plaint, the sum of Kshs 38,200/= was not pleaded and even if it was to be assumed that it was part of the claim of Kshs 94,850/= no particulars whatsoever were provided for this claim. In **Coast Bus Service versus Murunga & Others (1992) LLR 318 (CAK)** the Court of Appeal stated that if at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars, which were previously missing. The implication of this is that if the particulars are known at the time of filing suit, those particulars must be specifically pleaded. The court added that evidence cannot be led on special damages when they have not been pleaded; it said thus:

> ***It is only when the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars. What amounts to strict proof must of course depend on the circumstances as was stated in Ratcliffe case.***

The case that the court was referring to was **Ratcliffe versus Evans (1892) 2QB 524, where Bowen, L.J** said of these circumstances in the following terms:

> ***The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much as certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.***

The court restated the position that special damages must be pleaded with as much particularity as the

circumstances permit and therefore it is not enough to simply aver in the plaint as was the case before them that the particulars of special damages were to be supplied at the time of the trial.

The same Court in the case of **Charles Sande versus Kenya Cooperative Creameries (1992) LLR 314** stated:

> ***It is now 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 law.***

The court also cited with approval the decision of the Court of Appeal for Eastern Africa in the case of **Captain Harry Gandy versus Caspar Air Charters Limited (1956) 23EACA 139** where it stated at page 140:

The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given. In *Eschenchunder Singh versus Shamachurn Bhutto, 20 E.R. 3,* ***which was an appeal from a decision of the Calcutta High Court, Lord Westbury described it as an*** *"an absolute necessity that the determinations in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case thereby made****". That case was decided in 1866 under the old Indian Civil Procedure Code but the passage I have quoted was cited with approval by the Privy Council in*** *Kanda versus Waghu (1949-50) 77 I.A 15****. The system of pleading prescribed in Kenya by the Civil Procedure Ordinance and Rules is based on the English system and English decisions are a sound guide. As to the English practice Scrutton, L.J said*** *in Blay versus Pollard and Morris (1930) 1KB 682: -*

> ***"cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed in the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending pleadings, and in my opinion he was not entitled to take such a course."***

All these decisions emphasise the point that the court can only determine those issues that have been encapsulated in the pleadings but as far as a claim for special damages is concerned, they must be specifically pleaded with as much particulars as possible and proved; failure either to plead, or prove, or to plead and prove, renders the claim unsustainable. Accordingly, it was not enough that the respondent may have provided evidence for a claim of Kshs 38,200/=; if this claim was not pleaded with the necessary particularity, the purported proof was futile and of no consequence. Inevitably, I am satisfied that the appellant's appeal is meritorious and I hereby allow it with costs.

Signed, dated and delivered in open court this 30th day of January, 2017

Ngaah Jairus

JUDGE