



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 16 OF 2016

JOHANNES MBUGUA MUCHUKU.....APPELLANT

VERSUS

CHINA JIANGXI INTERNATIONAL (K) LIMITED....RESPONDENT

(Being an appeal from the Judgment of A.P, Ndege in Nyahururu CMCC No.20 of 2014 dated 29th January 2015)

JUDGMENT

1. This appeal is against the trial court's Judgment delivered on the 29th January 2015 in which the appellant's suit, then the plaintiff was dismissed with costs.

Being dissatisfied, he lodged this appeal and preferred six grounds thus:

- (1) The learned Magistrate erred in law and in fact in disregarding the issues framed by the parties.*
- (2) The learned magistrate erred in law and in fact finding that the plaintiff had not pleaded specifically for damages.*
- (3) The learned magistrate erred in law and in fact in ruling that the plaintiff has not proved claims for special damages.*
- (4) The learned Magistrate erred in fact in disregarding the evidence of the plaintiff's witnesses.*
- (5) The learned Magistrate erred in law and in fact in disregarding the plaintiff's exhibits.*
- (6) The learned Magistrate erred in law and in fact in ruling that the plaintiff had not proved his case on a balance of probability.*

He has urged the court to set aside the said judgment and allow the appeal.

2. In is plaint dated 28th January 2014 and filed on the 6th January 2014, the appellant sued the Respondent for blocking the Dundori-Oljoro Orok road in Nyandarua County with its trucks and excavators from the 29th August 2013 upto the 9th September 2013 and by the said blockage preventing him from delivering his 148 bags of potato produce to the market following which the said potatoes were damaged.

Due to the respondents commissions and omissions, he alleged to have suffered loss in the sum of Kshs.399,960/=. He claimed the same as a special damage together with general and punitive damages. The Respondent denied the claim in its totality.

3. Upon hearing the case, the trial magistrate made findings that the appellant had not proved his case on a balance of probability and dismissed the same with costs.

As the first appellate court, I am obligated to reconsider and re-evaluate the evidence adduced before the trial court and come up with my own findings and conclusions.

See **Mwanasokoni -vs- KBS Ltd & Others (1982-88) I KAR 278.**

4. **The plaintiff testified as PW1** before the trial court, and called three witnesses in support of his case.

He testified that he was a potato farmer and also keeps dairy cows at Matindiri. That at the material time in August 2013 the defendant company was constructing the Oljoro-Orok Ndundori road and that on 29th August 2013 the road was blocked by its tractors and excavators and despite requests, the defendant failed to unblock it by removing the tractors, even after reports were made to the police. It was his evidence that the farmers including himself could not transport their harvest, that he had harvested 148 bags of produce that went to waste. He blamed the defendant for negligence. He sought compensation for loss of his potatoes, cost of packing materials at Kshs.370,000/=, cost of sisal bags at Kshs.9,360/= and plastic bags damage of Kshs.2,000/= together with general damages.

5. Upon cross examination, the plaintiff confirmed that he did not produce any exhibits of either the damaged bags of potatoes or anything else to show that he indeed planted or harvested the potatoes, nor any receipts to show the market price of the potatoes. He however produced photographs of the excavator trucks that had blocked the road. It was his testimony that there were no other roads he could have used to take the potatoes to the market. He produced a demand letter to the defendant PExt.1, and photographs PExt.4 to show how bad the blockage was as a donkey cart could not pass, in his estimation.

6. **PW2 was George Mwangi**, also a farmer in potatoes and vegetables in the same area. He testified that the material road was completely blocked by the respondents excavators. He testified that he could however transport his produce using motorbikes. He confirmed that it was harvesting season and farmers were using women to carry their produce for the small farmers but large scale farmers like the appellant could not. It was his evidence that the trucks got stuck because the road was bad. He knew the plaintiff and stated that the plaintiff lost 148 bags of potatoes, but he did not call any Agricultural officers to assess and adjust the losses.

7. **PW3 and PW4 were neighbours of the plaintiff.** They too confirmed that the road was blocked by the defendants tractors, and that no vehicle could passby, but that they used a neighbours vehicle to transport their milk to the market and others used people to transport their produce. They blamed the defendant stating that the company had many other tractors that they would have used to remove the stuck ones from the road but they failed to do so for the period, and to repair the same after the damage.

8. **In its defence, the Defendant called one witness, DW1, Haniel Kirithi Njagi, a construction supervisor then working for the defendant.** He confirmed having been on site during the construction of the road, and that their tractors got stuck for 6 days as it was during the rainy season. He denied that the tractors blocked the entire road and stated that a vehicle could pass by as there was sufficient space. He testified that there was an alternative road that farmers could use. He further testified that the road was not closed and further that the other roads including the blocked one were impassable because of the rainy and that it took 2 weeks for the roads to be passable.

9. **Analysis of evidence and findings**

Upon the above evidence, the parties filed their submissions which I have perused and considered alongside the trial court's judgment.

The issues that arise for consideration in my view are:

(1) Whether the defendant was negligent by its tractors blocking the relevant road for 6 days.

(2) Whether the plaintiff suffered loss and damage as a result of the road blockage.

(3) Whether the plaintiff pleaded and proved his loss as stated in the plaint and if so, whether he is entitled to the reliefs sought.

10. The appellants claim was a liquidated claim for Kshs.399,960/= besides the general damages claim.

The plaintiff did not produce any exhibits or evidence in court of the alleged damage and loss. He no doubt, together with his witnesses PW2, 3 and 4 and which evidence was supported by DW1, that indeed the relevant road was blocked by the respondents tractors that had fallen into a ditch and upon being lifted blocked the road for a period of six days.

11. The defence witness, its supervisor was categorised that the entire road was not blocked and vehicles could pass through. PW3 testified that motorbikes too could pass and that other farmers used donkeys, motor bikes and human beings to transport their produce to the market. He attributed the unpassability of the road to the rains and not the blockage. He stated that there was an alternative road that could be used save that it was longer, and that the plaintiff was therefore not without an alternative way of transporting his bags of potatoes to the market. He denied that the company was to blame for the alleged loss.

12. It is evident that the defendant failed to remove its trucks from the road within a reasonable time. Six days could not be reasonable time taking into account the plaintiff and other residents were using the road to transport their farm produce to the market, yet it was stated it had the necessary equipment to clear the said road.

13. I agree with the appellant that the trial Magistrate erred by failing to interrogate and give reasons for his findings on liability and by failing to consider the plaintiffs evidence in that regard. He stated:

“My judgment and decision herein is mainly based on the impressive submissions and authorities on point no (d) of the defendants written submissions that I have referred the plaintiff to.”

That statement clearly confirms the magistrates failure to consider the plaintiffs evidence, as no findings were stated.

14. I have as mandated, reconsidered and analysed the said evidence. My findings are that the appellant's alleged loss was partially caused by the respondent's negligence by an act that could have been avoided or mitigated by removal of the trucks that had blocked the road within

reasonable time, six days not being reasonable in the circumstances.

15. I also come to a finding that the plaintiff ought to have mitigated the loss by using the alternative road or other methods of transporting his produce during the period. I have taken into account that it was during the rain season and roads were impassable due to the rains, evidence having been adduced in that regard. I therefore apportion liability to the appellant at 20% and to the respondent at 80%.

The appeal succeeds partially on the matter of liability.

That settles issue No.1.

16. On the claim for loss and damages as pleaded in the plaint, the trial magistrate determined the same in a sweeping statement without any reasons for the findings. He stated:

“Special damages need to be specifically pleaded, and during hearing specifically proved. There was no proof of the sum incurred ----I find that to be sufficient to dispose off the entire claim herein.”

17. It is trite that a claim for special damages must be pleaded and strictly proved. See Court of Appeal decision in **Capital Fish Kenya Limited -vs- KPLC (2016) e KLR** the claim was pleaded in the plaint paragraphs 19(a), (c) (d).

I observed that the appellant produced no evidence of his potato harvest, loss of the alleged damaged 148 bags of potatoes, prices of the same and other items. The plaintiff did not attempt to prove any of the losses. None of the appellants witness were of any help in this regard. No agricultural officer testified to having assessed and adjusted the loss. The amounts stated were plunged from the air and thrown to the court, with a plea to award the same.

18. The appellant was required to strictly prove to the court the amount he lost by production of relevant receipts or an agricultural loss and adjustment report of the damage of the crop (potatoes). It cannot to be taken at face value that he had harvested 148 bags of potatoes and that the price of each bag, the plastic bags and sisal threads are as stated/pleaded. It is trite law that he who asserts must prove. See **Sections 107 and 108 of the Evidence Act**. See also **Francis Muchee Nthiga -vs- David N. Waweru (2014) e KLR**.

19. I have stated that the best evidence of the alleged loss would have been proved by an adjustment of the loss by a report of an Agricultural officer.

The appellant did not find it necessary to engage the said officer to adjust the loss. He only has himself to blame for his failure. See **David Bagine -vs- Martin Bundi (1997) e KLR**.

As the losses were not proved to the required standards, the trial court could not have awarded the special damages as pleaded. This court too has no basis upon which to allow the said loss.

The trial magistrate cited and relied on the case **Zacharia Waweru Thumbi -vs- Samuel Njoroge Thuku (2006) e KLR** where J. Mutungi stated:

“If I were to explain or define special damages to a layman,I would say they are a reimbursement to the plaintiff/victim of the tort, for what he has actually spent as s consequence of the tortious acts complained of.”

20. It was upon the appellant to strictly prove the damages he pleaded. The nature of the claim demanded documentary proof. The number of potato bags, the cost of purchase price of each, and cost of purchase of the other items. The trial court had no option but to dismiss the claim. I uphold the dismissal. This is not to say that the appellant may not have suffered loss but that such loss was subject to prove as required under the law.

The court can only award that which has been proved. See the above **Court of Appeal decisions**.

21. For the above reasons, I find the appeal on the matter of special damages without merit. That settles issues **No. 2 and 3**.

Likewise, I am unable to award the appellant general and punitive damages as the alleged damages and losses were not sufficiently proved.

Indeed neither of the parties urged or submitted on the said damages and issues at large.

Had the appellant proved the special and general damages, I would have awarded the same less the contributory negligence I have apportioned to him. That being the case, I have no option but to dismiss the appeal.

22. **Section 27(1) of the Civil Procedure Act** gives the Court discretion on the award of costs. The circumstances obtaining to the appeal are such that no costs ought to be awarded to either party, each having succeed partially on the appeal on the matter of liability and the Respondent on the matter of damages.

The result is that each party shall bear own costs of the appeal as well as the trial court's costs.

Dated, Signed and Delivered this 21st Day of September 2017.

J.N. MULWA

JUDGE