



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL CASE NO. 20 OF 2015

ALEX GICHIRA MWATHA.....APPELLANT

VERSUS

JOSHUA M. MAINA.....RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (E. H. Keago) Civil Case Number 24 of 2013 delivered on

28th May, 2014 at Baricho)

JUDGMENT

1. **Alex Gichira Mwatha** the appellant herein had filed a suit against his erstwhile counsel Mr. Joshua M. Maina vide **Baricho Principal Magistrate's Court No. 24 of 2013** for professional negligence. The honourable Principal Magistrate Mr. E. H. Keago after trial dismissed the suit holding that the appellant had not proved his claims to the required standard. Aggrieved by the said decision rendered on 28th May, 2014, the appellant appealed to this honourable Court citing twenty grounds in his Memorandum of Appeal dated 26th June, 2014.
2. The grounds of appeal are summarized and paraphrased as follows:
 - i. ***That the learned magistrate erred in law by departing from the ruling of hon. Lady Justice Ongundi on the competence of the appeal which ruling was binding on him.***
 - ii. ***That the trial magistrate erred in law by relying heavily on the provisions of the section 1A and 1B of the Civil Procedure Act when the sections were not in force at the time.***
 - iii. ***That the trial magistrate erred in law and fact by holding that the appellant did not disclose the instructions given to the respondents in the two cases yet the pleadings were self explanatory.***
 - iv. ***That the learned trial magistrate erred in law and fact by placing weight on the respondent's defence without evidence.***
 - v. ***That the learned trial magistrate erred in law and fact by failing to note that the respondent's conduct at the trial amounted to admission of his negligence.***
 - vi. ***That the learned trial magistrate failed to protect him yet he was a layman facing a senior advocate represented by another advocate.***
 - vii. ***That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the material placed before him proved his case on a balance of probabilities.***

- viii. *That the learned magistrate erred in law by failing to appreciate that the ruling giving rise to this appeal was on a preliminary objection that required leave to appeal.*
 - ix. *That the learned trial magistrate erred in law and fact in failing to ascertain whether the acts of omission and commission by the respondent constituted professional negligence.*
 - x. *That the learned trial magistrate erred in law by questioning the decision of the High Court.*
 - xi. *That the learned trial magistrate misdirected himself on the issues of law before him and arrived at the wrong decision.*
 - xii. *That the learned magistrate erred in law and fact by putting weight on the respondent's allegations that he had not produced receipts of payments and the agricultural report which issue had not been raised at the trial though the evidence were available.*
 - xiii. *That the learned trial magistrate erred by not considering the fact that the respondent owed him a duty of care whose breach resulted in the appellant's suffering damages.*
 - xiv. *That the learned trial magistrate erred in law by failing to give reasons for dismissing his suit.*
 - xv. *That the learned magistrate erred in law by rendering a decision that was defective and contrary to law.*
3. In his written submissions the appellant, though a little bit vague and difficult to follow appears to fault the trial magistrate for relying heavily on technicalities at the trial which led him to make a wrong judgment. In his view his suit was not fit to be dismissed. He contended that the trial court should have considered **Embu H.C.C.A. No. 39 of 2005** which indicated that the respondent was negligent in representing the appellant.
 4. The appellant has argued in his submissions that he was forced to meet costs of two cases – **Baricho Senior Resident Magistrate's Court Case No. 6 of 2005 and Embu HCCA No. 39 of 2005** after losing the two cases and that demonstrated that he had suffered special damage and that the trial court needed no further evidence of production of receipts or certificate of costs to establish the fact. In his view the trial court erred by finding that non production of receipts to prove payments of costs in the suits was fatal to the appellant's suit. He has urged this court to overlook the omission to produce receipts at the trial for the interest of substantial justice as opposed to technicalities which he opines the trial court relied on in dismissing his suit.
 5. The appellant also argued that he produced Agro Factory report at trial court to prove that he suffered damage of Kshs.122,600. He reiterated that he proved that respondent was negligent in representing him.
 6. He urged this Court to disregard issues raised by the respondent terming them as technicalities which should not be given weight as per **Article 159 (2)** of the **Constitution**. He has faulted the trial court for not according him his constitutional rights and protection as provided under **Article 47(1), 237(1)** and **27(5)** of the **Constitution** in order to decide the case in the interest of justice and fairness.
 7. The appellant's contention is that the documents cited by the trial court namely the receipts in prove of payment was not necessary to prove negligence by the respondent and cited the incident where the respondent failed to seek leave to appeal against a decision that was not favourable to him.
 8. In his additional written submissions, the appellant delved much on irrelevant issues in this appeal but what can be discerned from the said submissions is the contention by the appellant that his appeal should be viewed from a broader sense of justice and fairness rather than technicalities. He has urged this Court to invoke the provisions of **Section 3A of C.P.A. (Civil Procedure Act Cap 21 Laws of Kenya)** and dispense substantial justice in this appeal for the ends of justice to be met and prevent abuse of court process. He has urged this Court to take judicial notice of the fact that no suit can be filed, heard and determined without full payments of legal fees and make the assumption that the respondent was fully paid despite not producing receipts in that respect at the

- trial.
9. Finally the appellant has urged this Court to find that the respondent was favoured by the trial court for being an advocate of this Court. He has also made a startling allegation that courts are only for the rich and powerful and appeared to suggest that he lost his case at trial court because he was not rich and powerful.
 10. The respondent has opposed this appeal through written submissions dated 30th November, 2015. The respondent has countered the assertion by the appellant that his case (**Baricho P.M.C.C. No. 24 of 2013**) was struck out by pointing out that the case was actually dismissed after both parties had been heard. He reiterated that a party is bound by his pleadings and that the appellant's suit was properly dismissed by the trial court for want of proof.
 11. The respondent has further distanced himself from blame in failure by the appellant to file an appeal against the decision of the court in **Embu H.C.C.A. No. 39 of 2005** stating that he had advised the appellant to proceed on appeal.
 12. The respondent has faulted the appellant in this appeal for trying to seek for sympathy arguing that he had a right of representation at the lower court but he chose to represent himself. He denied that the trial court favoured him insisting that the law was rather on his side.
 13. On the issue of ***Order 45 Rule 9(2)*** of the ***Civil Procedure Rules*** quoted by the appellant in his written submissions, the respondent has answered that the cited provisions do not exist in law and that ***Order 2(1) (2) and (3)*** are totally irrelevant in this appeal.
 14. The respondent has supported the finding of the trial court on the question of special damages pointing out that the same was not proved as there were no documents produced to support the claim that is why the claim failed in his opinion.
 15. The respondent has also contended that he was not bound by law to help the appellant prove his case against him by producing receipts to show that the appellant had paid. He submitted that no constitutional right of the appellant was breached at the trial as both parties had their day in court.
 16. The respondent has faulted the appellant for trying to introduce new documents in the record of appeal without leave of this Court and which documents never formed part of the proceedings in the lower court. He has pointed out that documents marked on page 6 to 24 in the record of appeal and the amendment of pleadings at page 32 were not stamped at the trial court as they were not part of the proceedings and that inclusion of the documents without leave offends the provisions of ***Order 42 rule 13*** of the ***Civil Procedure Rules***.
 17. The respondent has faulted the appellant suit at the trial saying that the reliefs sought at that court had nothing to do with professional negligence and having failed to seek for damages for professional negligence at the trial court, the respondent is arguing that the appellant cannot prefer an appeal and seek for what was not sought at the trial.
 18. On the issue of costs the respondent has contended that as an advocate he cannot be made to pay for his client's costs when a case does not go as expected.
 19. I have considered this appeal and the submissions made by both parties in this appeal. The appeal itself is fairly simple but the appellant perhaps due to the fact that he is in person has really complicated it with all manner of claims and submissions most of which are not relevant to the core issues in the appeal.
 20. The appellant had instructed the respondent herein as his advocate to represent him in **Baricho Senior Resident Magistrate's Court case No. 6 of 2005**. He lost the suit and his attempt to appeal in **Embu HCCA No. 39 of 2005** equally came to naught. In both cases he was ordered to pay costs. He filed a suit against his advocate vide **Baricho SRMCC No. 24 of 2013** claiming that he lost the two cases owing to the respondent's professional negligence. He sought the following prayers in his plaint dated 29th April, 2013;
 - a. ***Costs of the Baricho civil suit and Appeal.***
 - b. ***Substantive claim at Baricho Court (Agricultural crops, Agro Forest trees and food crops maliciously damaged)***
 - c. ***Costs of the suit.***
 - d. ***Interests.***

At the trial the appellant told the court that he had incurred costs of Kshs.130,997/= in both **Baricho PMCC No. 6 of 2005** and **Embu HCCA No. 39 of 2005** and that the cost or value of his damaged

crops was Kshs.122,600/=. The trial court dismissed the appellant's case finding that the appellant had not proved his case to the required standard and that special damages were not specifically pleaded and proved. The appellant felt aggrieved and preferred this appeal.

21. I have looked at the suit filed by the appellant at the lower court and though I appreciate the fact that it was drawn by the appellant in person as a layman, I must say that he did himself no favours from the beginning. The plaint was poorly drafted and contrary to the laid down rules of procedure. The provisions of **Order 2 rule 4** of the **Civil Procedure Rules** required the appellant to specifically list down the particulars of negligence which he was attributing to his advocate – the respondent herein. He was also required by law to specifically plead the particulars of the amounts he was claiming from the respondent if his suit was based on negligence and the fact that he had suffered special damages. This is the position in law.

22. In the case of **ZACHARIA WAWERU THUMBI –VS- SAMUEL NJOROGE THUKU [2006] eKLR**, the court made the following observations which I agree with and consider relevant in this appeal;

“The law is clear on the head of damages called special damages. Special damages must be both pleaded and proved before they can be awarded by the court. Law Reports and text books on torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in HAHN –VS- SINGH, Civil Appeal No. 42 of 1983 [1985] KLR 716 at page 717 and 721 where the learned judges of appeal – Kneller, Nyarangi JJA and Chesoni Ag. J.A. held that special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. If I was to explain or define special damages to a layman, I would say “they are reimbursement to the plaintiff/victim of tort for what he has actually spent as a consequence of the tortious acts complained of.” This point cannot be overstressed. A claimant of special damages must not only plead the claim but also go further and strictly prove, usually by documentary evidence that he actually spent the sum claimed.” (Emphasis added)

23. Now turning on the ground 7 of Memorandum of Appeal and paragraph (b), (h) and (i) of the appellant's submissions the appellant faulted the trial court by taking the position that a party claiming special damages must prove the same and that the appellant had failed to prove. A look at the plaint filed before the lower court shows that the appellant made attempts to specifically plead that he suffered special damages as a result of the negligence from the respondent under paragraph 14 of the plaint. However the amount pleaded is Kshs.127,477 and at the trial he failed to tender evidence in support of the claim. It is important to note first that the appellant was required by law (**Order 4 rule 2 and 7**) to precisely state the nature of his claim and file documents to accompany the plaint as provided under the provisions of **Order 3 rule 2** of the **Civil Procedure Rules**. The argument that the appellant is a layman pitted against a senior advocate who was represented by another advocate is not an excuse to disregard the law. The **Civil Procedure Rules** are rules that guide litigants and the courts for purposes of having some order in the manner in which disputes can be properly ventilated and determined. Parties are required to comply with all the procedures laid out and they cannot necessarily be termed as technicalities unless a party can be able to prove that the procedures are standing in the way of substantial justice. The appellant has not proved that in this appeal.

24. Secondly the appellant did not seek any relief in his prayers before the trial court on account of the alleged damages which were not ascertained in the pleadings. It is correct therefore for the respondent to term this appeal as a non starter because the appellant cannot fault the decision of the trial court for not granting what was not prayed for in the first place. A trial court cannot make assumptions on the reliefs being sought. It has to be moved specifically to grant a certain relief. A defendant also deserves to know what reliefs a plaintiff seeks to enforce against him so that he can defend himself if the relief is contested.

25. This Court finds that the trial court was correct in its judgment. In a claim for special damages as

illustrated above one is required to plead and specifically lead evidence to prove the same. One cannot lead special damages where non has been pleaded like what the appellant attempted at the trial albeit without success because the proceedings clearly show that he failed to tender any evidence in proof. The grounds of appeal and his written submissions on this issue holds no water and must fail. In the case of **DOUGLAS ODHIAMBO APEL & ANOR –VS- TELKOM (K) LTD (C.A. NO. 115 OF 2006)** the Court of Appeal while rejecting a claim for special damages had this to say;

“Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved.....The only way the receipts would have been produced and acted upon by the court would have been by the plaintiff taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur.....”

26. The appellant has argued that the receipts were with the respondents and faulted the trial court for not taking judicial notice of the fact that payment of legal fees and assessed costs must have been done. This argument does not hold either. The onus is on whoever alleges. **Section 107** of the **Evidence Act Cap 80 Laws of Kenya** placed the burden of proof on the plaintiff to prove his claim. I have considered the appellant’s claim against the respondent in totality not just on the question of special damages (costs incurred as result of the purported professional negligence) but on the question of liability of the respondent for the professional negligence and I must say that on the evidence tendered before the trial court, the learned trial magistrate was correct in dismissing the appellant’s case. There was no material that even suggested that the respondent acted improperly in his professional duty to his client. An advocate cannot be held to account just because of losing a case in court. Cases are won or lost on merit unless of course a litigant can prove that his/her advocate failed in his duty through specified acts of omission or commission due to negligence on his part. The appellant did not establish this fact at the trial and I find that the learned trial magistrate correctly assessed the facts and evidence presented before it and arrived at the correct decision. The appellant could not possibly expect the respondent to assist him in proving his case against him.
27. I must also point out that the appellant perhaps in his enthusiasm for justice coupled with limited knowledge on matters of law slid and went off course in his submissions and missed on the real issues in his appeal and instead embarked on a fruitless journey of making what I consider irrelevancies to his appeal and at times wild allegations against courts of law. He has also cited numerous authorities all of which have no relevance to the issues in this appeal. It is important to note that courts of law are considered as such because they simply apply the written laws and the Constitution irrespective of the status of litigants that appear before it. The appellant has no basis to allege that the trial court favoured the respondent against him because of might or anything of that sort. The appellant has no facts to base his allegations and this court finds that either the same is made in bad taste or in an attempt to draw sympathy from this court. Either way the same is wrong and untenable. He had an option to legal representation. He also had a right to represent himself and having chosen the latter he cannot turn back and say he was prejudiced.
28. I also find that the appellant has cited a number of his constitutional rights which he is entitled but he has failed to show how any of his rights were breached at the trial and I agree with the respondent that each party in this appeal had his day in court which was commendable.
29. It is also true that an appellant cannot raise new grounds in his appeal at the hearing or in his submissions without leave of court. He cannot also enclose new documents or evidence in a record of appeal which were not the subject of trial unless when he is seeking for a retrial and is seeking leave to introduce new evidence.

In conclusion I find no merit in this appeal. The same is dismissed with costs to the respondent.

Dated and delivered at Kerugoya this 17th day of March, 2016.

R. K. LIMO

JUDGE

17.3.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Appellant present

Interpretation English/Kikuyu

Ngangah holding brief for Munene for the Respondent present

Alex Gichira Mwatha applicant in person

COURT: Judgment signed, dated and delivered in open court in the presence of appellant in person and Mr. Ngangah holding brief for Munene for the respondent.

R. K. LIMO

JUDGE

17.3.2016