



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL DIVISION**

**CIVIL CASE NO. 1058 OF 2006**

**DELTA HAULAGE SERVICES LTD..... PLAINTIFF**

**VERSUS**

**COMPLAST INDUSTRIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**ALNASIR HEMRAJ .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff was the owner of motor vehicle Registration No.545 UBA/533 UBA Mercedes Benz Trailer. It was alleged that on the night of 29<sup>th</sup> and 30<sup>th</sup> June, 2004, when the said vehicle was being driven along Mombasa-Nairobi highway, the said vehicle was involved in an accident at Mariakani with motor vehicle Registration NO. TZQ 8498, Mitsubishi Pajero alleged to belong to the 1<sup>st</sup> Defendant. The Plaintiff alleged, that the 1<sup>st</sup> Defendant's alleged motor vehicle was being negligently driven at the time of the accident and blamed the 1<sup>st</sup> Defendant for the occurrence of the accident. The said vehicle was at the time being driven by the 2<sup>nd</sup> Defendant.

2. In a Plaint dated 22<sup>nd</sup> July, 2005, the Plaintiff set out what it considered to be the particulars of negligence on the part of the Defendants and particularized its special damages as being Kshs.5,849,858/=. The Plaintiff also prayed for interest on the said amount as well as costs.

3. The Defendants filed a defence denying the Plaintiff's claim in total. They denied being the owners or driver or in control of the Motor vehicle registration NO. TZQ 8498. They also denied the occurrence of the accident as well as the particulars of negligence alleged by the Plaintiff. They pleaded in the alternative that if the accident occurred, the Plaintiff was the author thereof and was to blame for the same. They set out a total of 14 particulars of negligence against the Plaintiff. They also invoked the doctrine of *res ipsa loquitur* and denied that the Plaintiff had suffered any loss and damage. They put the Plaintiff into strict proof of its claim.

4. At the trial, three (3) witnesses testified on behalf of the Plaintiff while the Defendants called no evidence. The parties filed six (6) issues for determination which can be summarized as follows; who was the owner, and under whose control was Motor vehicle Registration No.TZQ 8498? Whether the Plaintiff owned Motor vehicle Registration No. 545 UBA/533. Was there an accident on 30/06/04 involving the two vehicles and if so, who is to blame? Whether the Plaintiff suffered any special

damage as a consequence thereof? And, what reliefs are to be granted? I propose to answer these issues on the basis of the evidence on record and submissions filed and made by learned counsel.

5. PW1 Ahmed Nur Ali told the court that in 2004 he was in the employment of the Plaintiff as a driver. That on 29<sup>th</sup> June, 2004, he was driving motor vehicle registration No. UBA 545/UBA 533, make Mercedes Benz from Mombasa towards Nairobi enroute to Kasase Uganda. On reaching Samburu, a small town after Mariakani, an oncoming small vehicle tried to squeeze itself between his vehicle and another stationery lorry. Since there was no enough space, that small vehicle hit his lorry on the right hand side as a result of which his lorry overturned. The small vehicle was on its 4 wheels when it finally landed after the accident. That the driver of that small vehicle appeared to be drunk. The vehicles were removed from the site the following day and towed to Mariakani Police Station. His vehicle was inspected and found to have had no pre-accident defects. He was not charged in connection with the accident. He blamed the driver of the small vehicle as he was driving too fast and appeared to be drunk.

6. PW2 No.50860 Sgt. Jackson Musera was the Deputy Base Commander of Mariakani Traffic Base. He told the court that from the records held at the station, file No. IAR 50 of 2004 was in respect of an accident that occurred on 29/06/2004 at about 9.40 a.m. at Samburu area along Mombasa-Nairobi highway. The accident involved two motor vehicles Reg. No. TZQ 8498 make Mitsubishi Pajero driven by one Alnasir Himraj and 545 UBA/533 UBA Mercedes Benz Tanker driven by PW1. That the accident occurred as a result of the driver of Motor vehicle Reg. No. TZQ 8498 trying to overtake a stationary vehicle whereby it collided with Motor vehicle Reg. No. 545 UBA/533 UBA. That both motor vehicles were extensively damaged as a result of the accident.

7. PW2 told the court that police investigations concluded that the driver of TZQ 8498 was to blame. That driver was summoned to appear in SRM Court Traffic Case No.3631 of 2004 Kaloleni but he did not appear. A warrant for his arrest (PEXh6) was issued and it is still in force. The witness produced PEXh1 Police Abstract No. A62 7900 to prove the occurrence of the accident; PEXh 2, 3 and 4 being the certificates of examination which showed the extent of the damage sustained by the said vehicles. He also produced PEXh5 being a report dated 20/6/08 by the Commissioner of Customs and Excise –Tanzania showing that MV. Reg. No. TZQ 8498 was owned by the 1<sup>st</sup> Defendant. On his part PW3 Ali Mohamed Egal, a director of the Plaintiff told the court that the motor vehicle registration No. 545 UBA Trailer 533 UBA belonged to the Plaintiff.

8. The Defendant did not call any evidence to controvert this evidence by the Plaintiff. In my view, the testimonies of PW1, PW2 and PW3 were unshaken. They established that motor vehicle registration No. 545 UBA/533 UBA belonged to the Plaintiff; that the said vehicle was involved in an accident along Mombasa-Nairobi Highway at Samburu on the night of 29<sup>th</sup>/30<sup>th</sup> June, 2004 with motor vehicle registration No. TZQ 8498 which was owned by the 1<sup>st</sup> Defendant at the time but being driven by or under the control of the 2<sup>nd</sup> Defendant. The evidence established that the 2<sup>nd</sup> Defendant was at the time the agent of the 1<sup>st</sup> Defendant and that he was the one to blame for the accident as he tried to overtake when it was unsafe to do so. A traffic case RMCC Traffic case No. 3631 of 2004 (Kaloleni) was opened against the 2<sup>nd</sup> Defendant but he failed to appear and a warrant for his arrest was issued against him; which warrant is still in force to date.

9. The Defendants' Advocates submitted that the 2<sup>nd</sup> Defendant was now deceased but there was no evidence that was tendered to prove that fact. Accordingly, I make a finding that the Plaintiff was the owner of motor vehicle registration No. 545 UBA/533 UBA which was involved in an accident on 29<sup>th</sup>/30<sup>th</sup> June, 2004 with the 1<sup>st</sup> Defendant's motor vehicle registration No.TZQ 8489 along Mombasa-Nairobi Highway at Samburu near Mariakani and the Defendants were liable therefor.

10. At to the damage suffered by the Plaintiff, PW2 and PW3 testified that motor vehicle registration No. 545/UBA and 533 UBA sustained slight damage. PW2 produced PEXh 3 and PEXh4, Certificate of Examination and Test of Vehicle VT Nos. 764183 and 764186, respectively. The prime mover had its windscreen glass, rear side window glasses and mirror smashed, the front bumper bar,

off side body panel, cabin front pillars, rear side door, body panel and cabin roof were also damaged. The trailer only had its rear side body panel damaged.

11. PW3 on his part testified that it cost the Plaintiff a sum of Kshs.2,400,000/- and Kshs.750,000/- to repair the prime mover and the trailer respectively. He also testified that the Plaintiff paid Kshs.247,000/- as towing charges. That the fuel amounting to 37,000 litres which the said vehicle was carrying spilled for which the Plaintiff paid a sum of US\$6,753/38. He also told the court that as a result of the accident, the said vehicle was grounded for two (2) months for which the Plaintiff lost income. PW3 referred to the bundle of documents filed in court on 11<sup>th</sup> May, 2006 in support of his testimony.

12. The Plaintiff's Counsel submitted that the Plaintiff was entitled to the following amounts

(i) Kshs.3,153,920/- being the cost of repairs of the prime mover and trailer. In his view, on the authority of **Nkuene Dairy Farmers Co-operative Society Ltd & James Kimathi Vs Ngacha Ndeiya (2010) eKLR** the repair costs constituted the material damage claim and should be awarded.

(ii) Special damages of US\$6753/38 for lost oil and Kshs.515,950/- for towing charges, cost of cleaning the scene of accident and the Assessor's fees.

13. On his part, Counsel for the Defendants submitted that the claim for special damages failed as the same was not proved. He relied on various authorities in support of his submissions including **Douglas Odhiambo Apel & Anor Vs Telkom Kenya Ltd CA No.115 of 2006 Hahn Vs Sign (195) KLR 716 and Watson Vs Rodwell (1878) II Ch. D 150 Ca.** As to the claim for loss of user, the Defendants Counsel referred to the case of **Waweru Vs Ndiga (1983) KLR 236** and submitted that the same was in the nature of special damage claim and had neither been specifically pleaded nor strictly proved.

14. In **Sande Vs Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)** 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 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 the law.”*

15. In this regard, a claim for special damages must not only be pleaded, but must be strictly proved. How then are these special damages to be proved? In the case cited by Counsel for the Defendants of **Douglas Odhiambo Apel & Anor Vs Telkom Kenya Ltd (Supra)**, the Court of Appeal held that:-

*“..... a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court..... unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed.....*

*Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs 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.”*

16. In **Halsbury's Laws of England, 4<sup>th</sup> Edn. Vol. 17, Butterworth's 1976 at paragraph 136**, it is observed that:-

***“The mere admission of documents does not make them evidence. They must be formally put in at the trial and in the Chancery division must be marked by the registrar.”***

17. In **Hodge Industrial Securities Ltd Vs Cooper (1962) 1 All ER 403, Lord Evershed**, M.R held that:-

***“.....it is important that the court which tries the case should have the actual contract properly produced and exhibited and marked as such, so that this court will know precisely what the document was that was before the trial courts. .... the case has shown the difficulty that can arise where the practice is not followed, and the document sued on is not produced and marked as an exhibit.” (Emphasis provided)***

18. Sections 64 and 65 (1) of the Evidence Act Cap 80 Laws of Kenya provides as follows:-

***“64. The contents of documents may be proved either by primary or by secondary evidence.***

***65(1) Primary evidence means the document produced for the inspection of the court.”***

19. From the foregoing, it is clear and I so hold that for a document to be said to form part of evidence at a trial, the same must be availed at the trial, a witness should testify on it by identifying the same and thereupon produce the same as evidence. A witness produces a document by stating that he wishes to produce it as evidence or exhibit or rely on it as his evidence. Upon such production, it is then marked as an exhibit. It is only then that a document can be said to have been proved at a trial.

20. In the present case, PW3 testified on special damages. He referred to the documents contained in the Plaintiff’s list of documents filed on 11<sup>th</sup> May, 2006. These included a tax debit note from Total Uganda for US\$ 6,753.38, copies of receipts for repairs as well as an assessor’s report. I agree with the submissions of the Counsel for the Plaintiff that special damages in a material damage claim need not be shown to have been incurred. What is important is to show the extent of damage through the Assessor’s report. The holding of the Court of Appeal in **Nkuene Dairy Farmers Co-op Society Ltd & Anor Vs Ngacha Ndeiya (2010) eKLR** is instructive. In that case, the court delivered itself thus:-

***“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent’s vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”***

21. In the present case, those documents that allegedly showed the extent of damage and the value of repairs were not produced. PW3 only referred to them but did not produce them. It is not in dispute that they were contained in the Plaintiff’s bundle of documents filed on 11<sup>th</sup> May, 2006 but they were not produced and marked as an exhibit in this case. PW3 could only be cross examined on them and his evidence therein tested if he sought to rely on them as an exhibit. This he did not. That being the case, the said documents remained that, mere documents in the Court record of no probative value whatsoever. Documents become evidence when they are testified on and produced by a witness and marked by the Court accordingly. In this regard, I am of the view and so hold that, by failing to produce the documents it was relying on as evidence in this case, the Plaintiff had failed to strictly prove the special damages it was claiming.

22. That being the case, I find that the Plaintiff did not prove its claim to the standard required, and its claim therefore fails. Accordingly, the suit is hereby dismissed with costs.

23. It is so decreed.

DATED and DELIVERED at Nairobi this 22<sup>nd</sup> day of May, 2015.

.....

**A. MABEYA**

**JUDGE**