

Respondent's claim was to special damages and that it is a strict requirement of the law that the same be specifically pleaded and strictly proved and his award to the Respondent was contrary to the law and not supported by any evidence or documentary proof.

d) That having stated in his judgment that there was an amount of overpayment, though not clear what the amount was, the learned trial magistrate erred in law and fact in awarding to the Respondent a specific sum of Ksh.100,000/= without showing how the same was arrived at.

e) That having said in his judgment that he agreed with the Appellant's propositions, and in effect cast doubt on the Plaintiff's case, the learned trial magistrate erred in law and fact in holding the Appellant liable to the Respondent.

f) That the trial magistrate's findings and award were biased, unfair and unsupported in evidence and his decision has resulted in a miscarriage of justice.

The Cross Appeal

[4] The Appellant in the cross- appeal filed a Memorandum of Cross-Appeal on 4/5/2001 and placed the following 2 substantive grounds for determination by the court:

1) The learned magistrate misdirected himself when he awarded the Appellant a global Ksh.100,000/= only as the total award when he should have found for the Appellant the pleaded sum of Ksh.209,778 which had been proved on the balance of probabilities by the production of receipts and oral evidence.

2) The learned magistrate misdirected himself when he did not specifically dismiss the Respondent's counter-claim.

EVALUATION OF EVIDENCE

[5] The Appellant in the cross-appeal was the sole witness in his case before the trial court. The Appellant in the Appeal also called only one witness. The Appellant in the cross-Appeal filed a plaint dated 15/3/1999 which was amended on 25/9/1999. He claimed for;

- i. an order for immediate re-connection of power supply on his business premises (Nzoia Tourist Hotel);
- ii. reimbursement of the expenses incurred in establishing alternative energy and sources of light;
- iii. special damages;
- iv. costs of suit;
- v. interest at court rates; and
- vi. any other relief the court may deem fit to grant.

[6] The amended plaint gave particulars of claim in paragraph 7 as follows:

- a) Expenses in establishing alternative source of light ksh.32,590/=
- b) Loss incurred resultant of use of alternative source of light ksh.2,299/=
- c) Loss of income ksh.174,889.

TOTAL.....Ksh.209,778/=

[7] In support of his said claim, he testified that the Appellant in the appeal disconnected power from his premises after he had fully paid all his bills on time. That the Appellant in the appeal never transmitted bills on time. Instead he used to request for the bills. In 1997 there was a change of billing after the Appellant in the Appeal had computerized its systems and the transmission of bills became even more irregular. This lapse caused delay in accounting for payments made. He produced deposit receipts

and bills to show he had paid in full all his bills. He testified that even after compensation, he paid the sum of Ksh.972.95 which was carried out from the old bill. He produced a bank deposit slip dated 21/10/1997 for the sum of Ksh.973. The witness for the Appellant in the appeal also confirmed that the Appellant in the cross-appeal paid the balance of Ksh.972/= on first computerization, and that he owed them nothing as at October 1997.

[8] The Appellant in the appeal produced bills from 29/10/1997 to September 2000. He was the supervisor for disconnection and connection of power in Bungoma region. He was however not the accountant for the Appellant in the appeal. The accountant was not called to testify.

[9] I observe that from the evidence on record, the Appellant in the cross-appeal had paid all his bills including the bill of Ksh.972.95/= which accrued on first computerization. This was confirmed by DW1. On perusal of bill no.0594938-01-16/9/1997, the figure of Ksh.972.95 was still carried forward as outstanding amount although the same had been paid. All subsequent bills carried an item on *balance brought forward*, and the figure increased with the next bill. It is not clear at what point and how the sum of Ksh.9194/94 accrued. DW1 was not useful in clarifying the issue as he was not the accountant. There was sufficient evidence to find that the disconnection was not justified. The magistrate, although did not properly evaluate the evidence, was however, alive that the case was fit for compensation.

Proof of damages

[10] The only question is; did the Appellant in cross-appeal prove his case on balance of probabilities?

[11] This question will be answered once I determine whether or not the following claims are claims for special or general damages:

- a) Expenses for alternation source of light
- b) Loss incurred on the use of alternative source of light, and
- c) Loss of income.

[12] This issue was one of the major issues before the trial court as formulated by the Appellant in the appeal and also in Memorandum of Appeal especially grounds 1, 2 and 3.

Claim for Special Damages

[13] The claims in the plaint are claims for special damages and not for general damages. See the case of **WAWERU V NDIGA [1983] KLR 236** where the Court of Appeal held that:

“Damages for loss of the use of a vehicle can be claimed as special damages and not general damages, and the loss suffered should be proved strictly. The Respondent in his plaint had claimed the damages, as general damages and had set out no particulars of their loss”.

[13] The underpinning of this position of the law is found in the kind of relief special damages really is. In *Clerks and Lind sell on Torts, 13th Edition*:

“It there be special damage, which is attributable to the wrongful act, that special damage must be averred and proved. Special damage on the other hand, means, the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the Plaintiff's claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise of the trial”.

[15] Special damages therefore are particular damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved. See **Black's Law Dictionary 7th Edition**, the case of **Ouma v Nairobi city Council [1976]**

KLR 297, KBS v Mayenda (1991) 2 KAR 242, NBI CA Civil Appeal no.283 of 1996. There are a host of cases which have reinforced the position that special damages must not only be claimed specifically but must also be proved strictly for they are not the direct natural or probable consequences of an act complained of and may not be inferred from the act. I do not however wish to multiply them.

[16] That aspect is settled. I am glad the Appellant in the cross-appeal was alive of the fact that his claim is that of special damages and had specifically pleaded the special damages in paragraph 10 of the amended plaint. He gave particulars of the loss, what is remaining now is the question: Did the Appellant in the cross-petition strictly prove the special claims on establishment of alternative source of light, loss thereof of income as claimed in the amended plaint?

Special damages pleaded were never addressed

[17] The Appellant in the cross-appeal did not address the special damages he claimed to have suffered and particularized in the amended plaint. He did not produce a single receipt to show that he purchased alternative power equipments and fuel, in particular, 3 Optimus lamps, candles and paraffin. He did not also produce any audited accounts, evidence of daily income for the period of the loss he claimed he suffered. Therefore, although the Appellant may have suffered loss, there was no justification, legally or factually, to make an award of Ksh.100,000/= as minimal compensation in the absence of specific proof. The trial magistrate erred in law by attempting to make an award which was not based on specific documentary evidence needed to strictly prove special damages. In law, it was not possible in the circumstances of this case for the trial magistrate to have made an award a kin to general damages where the claim is one for special damages. The award of Ksh.100,000/= made by the trial magistrate is hereby set aside.

[18] Consequently, I find that the Appellant in the cross-appeal did not prove his case on balance of probabilities as required by the law. His cross-appeal therefore fails totally. It is hereby dismissed.

[19] The appeal by the Appellant in the appeal succeeds in *toto* and the entire judgment of the trial court is hereby set aside.

[20] But before I close, let me say one thing. That, the claim for loss of income is a claim for special damages rather than general damages. It must be specifically pleaded and strictly proved.

[21] Further, a claim for loss of income is not unlimited. The claimant must always mitigate his losses by taking such reasonable steps as are appropriate in the circumstances of each case. This rule was formulated by the law in order to prevent unscrupulous claimant who will do nothing but to wait for the loss to continue for as long as possible just because the party on the wrong will compensate them. Such conduct will be tantamount to unjust enrichment, and it is not far-fetched that a victim to a wrongful act may be tempted not to do anything in order to get maximum benefit out of his misfortune.

[22] Connected with the above, a claim for loss of user must be confined to a reasonable period. Further, if alternative power was connected immediately, there would be very minimal loss of income as business will have continued as usual. What would lie perhaps would be the cost of the alternative source.

[23] Each party to bear own costs in the lower court and this appeal.

Dated, signed and delivered in open court at Bungoma this 15th day of April, 2013

F. GIKONYO

JUDGE

In the presence of:

Murunga for Owinyi for Appellant

No appearance for Respondent

Khisa Court Assistant

F. GIKONYO

JUDGE