



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 167 of 2008

KENYA POWER & LIGHTING CO. LTD APPELLANT

-VERSUS-

DIANA ACHIENG OGUNYO RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Migori, Hon. Kibet Sambu in SPMCC No. 152 of 2008 dated 22nd July, 2009)

This appeal and sister appeal no. 168 of 2008 emanate from the judgment and decree of the **RM, Migori Hon. K. Sambu** delivered on 22nd July, 2009 in which he entered judgment for the respondent in each case in the sum of kshs. 75,000 in special damages. The facts of the two cases were the same and so were the judgments. The decision in this judgment will therefore apply to file no. 168 of 2008.

In both cases, each respective respondent had sued the appellant for the loss of her sugarcane crop which she alleged was burnt as a result of fire resulting from a faulty electrical cable owned by the appellant and situate along Gogo-Kisii Power line. It was stated in the plaint that the incident occurred on 29th May 2008 destroying the crop which was due for harvesting. The respondent purported to have suffered financial loss which was computed as follows:-

i. 1 Ha of plant crop – 150 tons yield

ii. 0.2 Ha crop destroyed – 30 tons

Cost of 1 ton of sugar case = 2,500.00

Thus damage and loss suffered = 30 x 2,500.00 = 75,000/=

After trying the suit, the lower court entered judgment in favour of the plaintiff in the sum of kshs. 75,000 as special damages and also awarded costs and interest. The appellant was aggrieved by the decision of the trial magistrate and has appealed to this court. He has set out the following grounds:-

1. *The learned trial magistrate erred in fact and law in failing to appreciate that the plaintiff's claim was a claim for special damages by nature which not only required specific pleadings, but strict proof as well.*

2. *The learned trial magistrate erred in law and in principle by awarding the plaintiff the sum of kshs.*

75,000 notwithstanding the admission by the plaintiff that the said amount in ordinary circumstances was subject to deduction of production cost in the nature of firm inputs supplied by South Nyanza Sugar Company Limited in the nature of transport, fertilizer, pesticide, cultivating costs interlia.

3. The learned trial magistrate erred both in law and in facts in failing to hold that the plaintiff lacked the requisite *locus standi* to initiate the suit before the subordinate court.

4. The learned magistrate erred in law and in fact by proceeding to base his judgment on the assumption that the sugarcane was fetching market price of kshs 2500 per ton and using the said figure as the base value per ton to compute the value of the loss alleged to have been suffered by the plaintiff without any proof that the said amount was payable by South Nyanza Sugar Company Ltd as base rate per ton, thereby arriving at erroneous decision.

5. The learned trial magistrate erred in law and in fact by admitting and relying on the sugarcane contract agreement which offended the mandatory provisions of the stamp Duty Act thereby arriving at erroneous decision.

6. The learned trial magistrate erred in law and in fact in arriving at a finding that the plaintiff had proved the case on the balance of probability or at all, contrary to the evidence on record.

7. The learned trial magistrate erred in law and in fact in disregarding and/or failing to take into account the appellant's written submission which had articulated weighty and relevant issues of law and facts thereby arriving at erroneous decision both in law and in principle.

8. The learned trial magistrate erred in law by delivering judgment which did not accord with the mandatory provisions of Order XX rule 4 of the Civil Procedure Rules.

From the grounds of appeal and the appellant's submissions, three issues lend themselves to my determination. These are whether or not the respondent proved her case in the lower court; whether she had *locus standi*; and whether the quantum was proved and justifiable.

To determine these issues, I must, as is required of a first appellate court, subject the evidence tendered in the trial court to a fresh and exhaustive evaluation. See **Selle & Anor –vs- Associated Motors Boat Co. Ltd & Anor (1968) E.A 123**.

In bringing the action, the respondent had claimed that her crop was destroyed by fire caused by the electric cable owned by the appellant. The respondent led evidence to the existence of the crop and the incident of fire. The appellant denied that it owned power cables in question and that even if it did own the cables then the respondent must have assumed risk by planting her crop on the way leave.

The respondent called evidence from an agricultural officer who assessed damage to the crop and produced photographs. The court believed the testimony of the respondent and found that indeed there was a fire that destroyed the respondent's crop. I am inclined, after evaluating the evidence, to find as the trial court did, that indeed there was an incident of fire that destroyed the appellant's crop.

The appellant raised a defence on the basis that the respondent had planted her crop on the way leave. It was the appellant's duty having stated that the farm was within the way leave to prove the same. Whereas strictly the burden of proof lay with the respondent, the appellant also bore the evidential burden to show that the said cables were indeed on the way leave for which compensation had been made to the land owner by the appellant company. Having alleged, it was his duty to prove. The appellant would have assisted the court by providing evidence to that effect.

I therefore find that the issue was properly determined by the court and further that there was no voluntary assumption of risk by the respondent.

The appellant has also raised as it did in the lower court, the issue of ownership of the land and by

extension the crop. My view of the matter is that the claim was limited to damage to the crop which the respondent successfully proved to be hers and not damage to land, which legally belonged to her husband. There was no dispute as to whether she was the owner of the crop requiring the court's investigation of the land ownership. The cane growers contract signed between her and the South Nyanza Sugar Company Ltd, was sufficient proof of ownership of the crop. This ground of appeal therefore fails.

The final issue for my determination is quantum. The appellant submitted that the respondent ought to have specifically pleaded and proven the claim. It was stated that the respondent claimed that she was entitled to an award of kshs. 75,000 as special damages but the evidence adduced by the respondent revealed that she was not aware of the exact amount that she would ultimately receive after deduction of the cost and attendant input.

The respondent relied on a contract executed by the respondent and the Sony Sugar Company Limited which was produced as Exhibit P1 in trial. The contract revealed that Sony Sugar Company is entitled to deduct the input supplied to the farmer while the sugarcane is ultimately harvested and sold to the company. It is the appellant's case that the respondent failed to prove the exact sum which would have been paid to her as net income from the proceeds of her cane.

It is trite law that special damages must not only be particularly pleaded, but must be specifically proved. In the case of **Savannah Development Company Limited –vs- Posts and Telecommunication employees, Housing Co-operative Society Limited, Civil Appeal Number 160 of 1991 (UR)** the Court of Appeal observed thus:

“Having considered judicial pronouncements on the subject of special damages including the decisions of this court, we can confidently state that the requirements that special damages must be explicitly pleaded and proved is not merely a procedural necessity but is a mandatory legal requirement going to jurisdiction on the specific issue and an objection by a defendant that a plaintiff has violated this rule may be taken at any time and even on appeal”.

My perusal of the record shows that the respondent pleaded and proved the specific damages. In the plaint dated 30th September, 2012 paragraph 6 states:

“Thus damage and loss suffered = 30 x 2,500 = 75,000/=”. See page 16 of the record of appeal.

During the trial, the respondent stated that an agricultural officer assessed the damage caused at kshs. 75,000. The agriculture report was produced in court as Exhibit PMFI 3. See page 9 of the Record of Appeal. The same was accepted by the court. An issue which the trial court overlooked however was the testimony of both the respondent and the agriculture officer. Both admitted that the amount was subject to deductions by the company for inputs and other administrative costs. I find that it was erroneous of the court to award the whole sum to the respondent.

Having so found, I however also find that the appellant has not provided any guidance on the amount by which the damages would have been reduced. In the premises, and this being a special damages claim, I am unable to interfere with the award.

For all the foregoing reasons, I find the appeal unmerited. It is dismissed with costs to the respondent. This judgment shall apply *mutatis mutandis* to file no. HCCA No. 168 of 2009.

Judgment dated, signed and delivered at Kisii this 21st day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

..... for applicant

..... for respondent

..... court clerk

R. LAGAT-KORIR
JUDGE