REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 169 OF 2001

MASTERMIND TOBACCO (K) LTD….....APPELLANT

-VERSUS-

SAMWEL KERIOBAL MOSETI…….....RESPONDENT

JUDGMENT

(***Being appeal from the judgment and decree of N.O.ATEYA SPM at Migori in Migori SRMCCC.No. 60 of 1998)***

This is an appeal from the judgment and decree of the Senior Resident Magistrate's Court at Migori in which the appellant was the defendant and the respondent was the plaintiff in Civil Case no. 60 of 1998.

The brief facts of the respondent's claim were that sometimes in April, 1997, he leased to the appellant a weighing scale valued at Kshs. 85,000/= at Kshs. 500 per week and a store at Kshs. 1,800/= per month. However it would appear that the appellant reneged on the lease agreement. On 4th February, 1998, the respondent filed a plaint dated 15th January, 1998 which was subsequently amended on 25th November,1999 in which he claimed for:-

"a) Return of the weighing scale or its value of Kshs. 85,000/=.
b) Rent arrears for the weighing scale at Kshs. 500/= per week to date
c) Rent arrears for 18th months at Kshs. 1800/= per month
d) Costs of the suit.
e) Interest of a, b, c and d at court rates
f) Any other relief this honourable court may deem fit to grant in the circumstances……"

The appellant denied the respondent's claim through its statement of defence dated 14th April, 1998 and filed in court on 17th April, 1998.

The learned magistrate after careful evaluation of the evidence from both sides delivered his judgment on 17th July, 2001 in favour of the respondent and ordered the appellant to:-

"return his Avery weighing machine or its monetary value of Kshs. 85,000/=, rent arrears of Kshs 7,200/= and assess loss of user in the sum of Kshs. 50,000/= plus costs and interest at court rates"

The appellant being aggrieved and dissatisfied by the above judgment and decree of the trial magistrate filed this appeal through **Messers Nyagesoa & Co. Advocates.** It impugned the judgment and decree aforesaid on the grounds that:-

"1. The learned trial Senior Principal Magistrate erred in law and fact when he established that the plaintiff had proved his case on a balance of probability as required by the law wherein(sic) there was no enough evidence in support.

2. The learned trial Senior Principal Magistrate erred in law and fact when he relied on the evidence of the plaintiff and his witnesses which was not collaborated and without any basis at law.
3. The learned trial Senior Principal Magistrate erred in law and fact when he admitted and relied on the lease agreement which was produced by the plaintiff as an evidence and/or exhibit without taking into consideration that the lease agreement did not bear the stamp and company seal of the appellant.
4. The learned trial Senior Principal Magistrate erred in law and fact when he awarded a sum of Kshs. 50,000/= being loss of user which was not prayed for in the amended plaint in the circumstances.
5. The learned trial Senior Principal Magistrate erred in law and fact when he held that there was lease agreement between the appellant and the respondent wherein the said lease agreement were signed by one Gabriel Mwita and Paul Muiruri Chege who were not authorized agents by the appellant.
6. The learned trial senior principal magistrate erred in law and fact in disregarding the appellant's evidence and allowed the respondent's claim without giving any sufficient reasons at all.
7. The learned trial Senior Principal Magistrate erred in law and fact when he acted on a wrong principal of the law in allowing the respondent's suit."

In reality the above grounds of appeal may be summarized into three broad ones, to wit,

"1. whether the respondent had proved his case on a balance of probability and/or whether the trial principal magistrate acted on a wrong principle of the law in allowing the respondents case.

2. Whether the said learned trial senior principal magistrate was justified in the award of Kshs. 50,000/= for loss of user and or whether there was any evidence to justify the same award.

3. Whether the lease agreement entered into between the appellant and the respondent was valid or whether the exhibits produced by the respondent were relevant to the claim.

When the appeal came up for directions, the appellant proposed and I agreed that the appeal be canvassed by way of written submissions. The respondent was absent though. I therefore directed that he be served. This was duly done going by the affidavit of service on record dated 28th May, 2010 and filed in court the same day. Still the respondent did not appear to respond to the appeal. As it is therefore this appeal is uncontested.

From the evidence adduced by the respondent it is clear that the respondent failed to tender sufficient evidence in support of his claim with regard to the 1st broad ground of appeal. In that regard, the respondent failed to establish his claim as per the required standard of proof in the civil claims.

Secondly, the respondent did not tender any evidence in support of the amount claimed in the amended plaint as in his evidence he claimed that the weighing scale was leased for a sum of Kshs, 1,800 per month and Kshs. 250 per day for two days in a week. However in the amended plaint the rent claimed was Kshs. 500 per week.

It is trite law that a party is bound by the pleadings. In any event the respondent did not produce any receipts and/or invoices in support of this claim. The respondent's claim was in the nature of special damages which required specific proof. The respondent failed to discharge that burden.

Therefore, the trial magistrate acted on a wrong principle of the law when awarding the damages for loss of user which were neither specifically pleaded nor proved by the respondent. The trial magistrate must therefore have taken into account extraneous consideration in allowing the respondent's claim. It is not even clear from the evidence on record and the pleadings where the claim for an amount of loss of user came from. There was absolutely no evidence in that regard from the respondent. Failure to mitigate such loss on the respondent is also consideration. A party is bound to mitigate his loss. He should have taken steps to reposses the weighing scale and terminate the lease much earlier than he did. The breach of the alleged agreement if at all had gone on for a while. However the learned magistrate did not remotely consider that aspect of the matter.

With regard to the 2nd broad ground of appeal there is nowhere in the respondent's claim that he had pleaded for a sum of Kshs. 50,000/= being loss of user. Nor was there oral evidence in that regard. Hence the trial magistrate's award was erroneous in law. In light of the above, the trial magistrate erred in law and fact in awarding Kshs. 50,000/= for alleged loss of user without any basis in law or at all. The trial magistrate was not entitled to quantify the same unless pleaded for and proved by credible evidence.

With regard to the last broad ground of appeal, the lease agreement tendered in evidence was not valid in law in so far as the same was not executed by the respondent as alleged in his evidence since his signature does not appear anywhere in the said agreement. Further the said agreement were in admissible in

evidence in so far as no stamp duty had been paid on the same. Besides even if the lease agreement was valid there was again material departure from the pleadings and the evidence tendered in support thereof by the respondent. Whereas in the plaint, the respondent pleaded that the weighing scale was to be hired at Kshs. 500/= per week, in his evidence he stated the weighing scale was hired at Kshs. 250/= per day. There was no explanation given for variations in the amount claimed.

The complaint by the appellant that its evidence on this issue was not taken into account and that the same was disregarded by the trial magistrate is not therefore without merit. The magistrate did not carefully evaluate the evidence tendered by both sides, hence he reached a wrong decision. In a nutshell the respondent did not prove his case against the appellant on a balance of probability as required in law

The appeal is thus meritorious and is allowed. The judgment and decree of the trial magistrate is set aside and I substitute thereof, an order dismissing the respondent's suit with costs. The appellant too shall have the costs of this appeal.

Judgment dated, signed and delivered at Kisii this 30th June, 2010.

ASIKE-MAKHANDIA
JUDGE