



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 40 of 2000

ARKEY INDUSTRIES APPELLANT

VERSUS

SAMSON NGUTU NYONGI RESPONDENT

JUDGEMENT

This is an Appeal from the Judgment of the Honourable Mr. Gladys Ndeda, Chief Magistrate (as then she was) delivered on 3rd March, 2000 in Eldoret SPMCC. No. 2329 of 1995.

In the said Judgement the Learned Chief Magistrate entered Judgement for the sum of Kshs. 496,000/= being the cost of repairs of the Respondent's building together with costs of the suit. The Plaintiff had filed suit for a sum of Kshs. 496,000/= being special damages for the repair of his building which had been damaged by the Appellant's motor vehicle when it veered from the road and ran into the Plaintiff's building on Plot No. Huruma/444 in Huruma Estate, Eldoret. The Respondent had also claimed general and special damages for loss of user of the building.

After the hearing the Court allowed the claim for the costs of repairs and costs only. The Appellant abandoned Grounds 1, 3 and 4 of the Memorandum of Appeal and prosecuted Grounds Nos. 2 and 5 which read as follows:-

"1.

2. The Learned trial Magistrate erred in law and in fact in failing to find that the claim for Special Damages was not specifically proven.

3.

4.

5. The Learned trial Magistrate erred in law and in fact in finding that the cost of repairing the building would amount to Kshs. 496,000/= against the weight of the evidence tendered by defence."

In his testimony, the Plaintiff (Respondent herein) testified that he came to Court so that he could be paid damages

" so that I can repair the house. The Assessment was draws at Kshs. 496,000/=."

The Plaintiff called his architect as witness. The architect had been retained by the Plaintiff to give him professional advice on the effect of the lorry having crashed onto his building and the remedies that would be required to restore the building to original state and what would be a fair compensation of the damaged sections of the building. He gave his report and findings which he produced in Court. This Court carefully perused the said Report. In conclusion the architect opined:-

“ In conclusion the fair value to be claimed as compensation in respect of the damaged part of the building caused by the said lorry crash is Kshs. 496,000/=”

The architect was not retained to carry out any repair works. The Plaintiff did not call any contractor to prove any repairs or restoration works were carried out. In fact, the evidence before the Court was clear, no repair works ever took place.

The Plaintiff had not paid out or incurred the sum of Kshs. 496,000/= for the cost of repairs. The architect's report was only an estimate or opinion of the likely cost of repairs.

The Law on special damages is very clear. Special damages must not only be pleaded but also strictly and specifically proven: See – Court of Appeal Civil Appeal No. 283 of 1996 DAVID BAGEINE –V- MARTIN BUNDI.

In this case, the Plaintiff had claimed Special Damages being cost of repairs. He did not however prove that any repairs were carried out and that he paid out Shs. 496,000/= to any contractor or any person for the purchase of materials etc. The Plaintiff's witness the architect only gave an opinion as to the estimated cost of repairs which would be required to restore the building.

It is my view that the said report could only have been useful to assist the Court in assessing general damages. In this case, it was produced to support the claim for special damages. The Court awarded Shs. 496,000/= as cost of repairs. These costs were not incurred and no repairs had taken place.

The Respondent has taken issue with the Record of Appeal. He submitted that the Appeal was incompetent as the record did not contain the decree as required by Order 41 Rule 8 (b) (4) Civil Procedure Rules and Section 79 (b) of the Civil Procedure Act.

I perused the Record of Appeal. It contains a copy of the Judgement. This meets the requirement of Order 41, Rule 8 (b) (4). It is not mandatory that both the judgment and decree must be in the record. In my view a copy of the judgement is sufficient and is of the more important of the documents. The authority referred to relates to appeals to the Court of Appeal which have different rules.

I hold that the appeal was properly admitted and is competent.

In the light of the findings regarding special damages, I do hold that learned Trial Magistrate erred in law and fact in awarding the Respondent the special damages.

I do hereby allow the Appeal and set aside the judgement of the Subordinate Court. The suit in Eldoret SPMCC No. 2329 of 1995 is hereby dismissed with costs to the Defendant therein.

The Respondent shall pay the Appellant's costs in this Appeal.

DATED AND DELIVERED AT ELDORET ON THIS 14TH MARCH, 2007.

M. K. IBRAHIM

JUDGE