REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Case 1323 of 1993

JOSEPH NDIRANGU WAWERU

t/a MOORELAND MERCANTILE CO. LTD……………………….1ST PLAINTIFF

HILLWORKS FURNITURE LTD………………………………....2ND PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL (SOMETIME KNOWN AS NAIROBI CITY COMMISSION)……..…………………………………………………DEFENDANT

RULING

The Plaintiffs' suit was dated *19th March, 1993*; and the defendant's statement of defence was dated *8th June, 1993.* Then the plaintiffs moved the Court by Chamber Summons dated *25th April, 1996* for orders as follows:

(i) that, the defendant's defence dated 8th June, 1993 be struck out, the defendant having failed to comply with the orders of the Court dated 14th February, 1996 to supply particulars to the plaintiff within 45 days;

(ii) that, judgment be entered for the plaintiff against the defendant as prayed in the plaint;

(iii) that, the costs of the application be provided for.

On *14th February,* 1996 Aganyanya, J had made the order:

"That the defendant do supply the plaintiff with particulars of defence as per plaintiff's request dated the 19th September, 1995 within 45 days of service of this order."

That is the background to the ruling made by *Mbogholi Msagha, J on 18th March, 1997.* The learned Judge began from the provisions of Order X, rule 20 of the Civil Procedure Rules: where any party fails to comply with any order to answer interrogatories etc he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended.

Msagha, J thus held:

> ***"In the end the position is as follows. The defendant has failed to comply with a court order. The rules provide that non-compliance on the part of the defendant calls for the striking" out of the defence. The word "shall" has been used in the rule. So it is mandatory. I have no hesitation in observing that the defence is merely intended to delay fair trial and therefore is an abuse of the process of the court. I order that it must {be} and is hereby struck out."***
>
> ***"Consequently there shall be judgment for the plaintiffs against the defendant as prayed in the plaint."***

On the basis of the above ruling the Deputy Registrar, on 3rd March, 2005 set this matter down fo*r formal proof*: and when the matter came up before me on 15th November, 2005 there was first a *preliminary objection* by the defendant to be heard.

The notice of preliminary objection had been dated and filed on 23rd September, 2004. Its content was as follows:

> (a) general damages (and any relief prayed for) cannot issue in vacuo considering, inter alia, the unchanged form of the plaint dated 19th March 1993, in the light of the judgment of 18th March, 1997
>
> (b) the plaintiff's claim as pleaded and granted, is spent.

The preliminary objection came up before me on 15th December, 2005 when learned counsel *Mr. Keyonzo* and *Mr. Njagi r*espectively, represented the plaintiffs and the defendant.

It was Mr. Njagi's Submission that formal proof as directed to be undertaken by the plaintiff, was incompetent. His reason was that following the decision of Msagha, J on 18th March, 1997 a preliminary decree in favour of the plaintiffs had been drawn and issued by the Deputy Registrar, on 18th April, 2005 and the same had been fully executed against the defendant. The said decree was to the effect that:

> *"the defendant do pay to the plaintiff the sum of Kshs. 43,014,736/30 as more particularly set forth hereunder with interest at the rate of 12 per cent per annum from 19th march, 1993 until payment in full –*

· Principal amount - Kshs 29,064,011.00

· Interest thereon at the

Rate of 12% per annum

from 19th March, 1993 to

18th March, 1997 - Kshs 13,950,725/30

Total - Kshs. 43,014,736/30

> *"the defendant to pay the plaintiff the costs of this suit to be taxed by the taxing offi*cer *of this court."*

Learned Counsel submitted that since the decretal sum had been paid and judgment was fully satisfied, the plaintiffs' cause of action was spent. This, however, is an intriguing point, considering that the defendant was arguing a preliminary objection. I think it is now well understood within the legal fraternity, that a true preliminary objection which can properly engage the time and attention of the Court, in that capacity, is a pure point of law, on which it is being contended the respondent has faltered, and that he ought not to be heard but instead, he should be non-suited in limine. When learned counsel urges that

the plaintiffs (respondents in this instance) be not heard because they have already been paid under Court decree, he is endeavouring to dispose of the matter on the basis of evidence. This would by itself disqualify the objection as a preliminary objection.

It is a more legitimate point being made by Mr. Njagi, that_______

> *"Judgment having been entered; the defence having been struck out, nothing remains in the plaint to be prosecuted. The entire cause of action of the plaintiff had been duly considered and determined … [A]ll the doors were shut, upon the issuance of the decree."*

Learned counsel also questioned the rationale of the intended formal proof, in which general damages were being sought. He contended that the entire plaint disclosed no basis for seeking general damages; so that, had any damages in this category been granted by the Court, upon the striking out of the defence, they would have been granted in vain; such damages would be hanging on nothing; it would be impossible at this stage to amend the plaint, so as to create a new opening for granting general damages. In the words of counsel: *"The plaint no longer exists; we no longer have a plaintiff; there is only a judgment creditor. Even if the plaintiff wanted to prosecute a prayer for general damages, it cannot be done – because there is a judgment."* In these circumstances, learned counsel contended that it would be a waste of time to go back to formal proof, for there was no longer a plaint or indeed a plaintiff.

Learned Counsel contended that the motion to proceed to formal proof, as advanced by the plaintiff, would amount to coming to the judgment seat through the back door, and the judgement creditor should not be allowed to do it. He prayed that the intended formal proof proceedings be disallowed.

Mr. Keyonzo on the other hand urged that the plaintiffs be allowed to proceed to formal proof for general damages, in addition to the gains contained in the decision of 18th March, 1997 (Msagha, J).

Learned counsel's justification was that the injury the basis of the earlier judgment and decree, was the destruction of a building which housed on-going business.The full extent of the plaintiffs' loss, therefore, covered both the loss of the building and of the running business. The plaintiffs were seeking damages for the destroyed physical structure, and damages as compensation for lost business. He invoked the contents of paragraph 10 of the plaint dated 19th March, 1993:

> *"10. The first plaintiff by a letter dated 2nd September, 1991 to the defendant listed their expenses relating to the plot, in all amounting to Kshs 29,064,011/=………".*

At the very end of the said plaint the plaintiffs prayed for-

(a) general damages,

(b) Kshs. 29,064,011 in special damages;

(c) Interest on (a) and (b);

(d) Costs of the suit.

Learned Counsel invoked the words of *Msagha*, J in the decision of 18th March, 1997:

> *"Consequently there shall be judgment for the plaintiffs against the defendant as prayed in the plaint."*

The decree, however, had not included the element of general damages. But subsequently the decree was amended and issued by the Deputy Registrar on 18th April, 2005. The second numbered item in the "preliminary decree" sets out the order (as issued by Msagha, J on 18th March, 1997) – "That the defendant do pay to the plaintiff general damages". Learned counsel urged that as the plaintiffs had prayed for general damages, they be given a chance to come and prove the general damages. On this

account, counsel urged, it was proper in all respects to proceed to formal proof.

Learned counsel cited authority to buttress the contention that the plaintiffs had suffered loss to both real property and to their business operations, as a consequence of one primary injury – and so they were entitled to prove for business losses. Halsbury's Laws of England, 4th ed. (Vol. 12) (London: Butterworths, 1975) thus states (para. 1168 on p. 458):

> **"Injury to land: general principles. The prima facie measure of damages for all torts affecting land is the diminution in value to the plaintiff or, in the case of a plaintiff in possession with full ownership, the costs of reasonable reinstatement. In the latter case no deduction falls to be made merely because the plaintiff gets 'new for old', that is to say a betterment which is the necessary result of reinstatement. In addition,** ***Consequential loss of profits may be recovered in accordance with general principles and, in the case of a private individual, such consequential loss as a necessary stay in a hotel, and general damages for inconvenience."***

Learned counsel submitted that a person in the position of the plaintiffs herein, would be entitled to recover for consequential loss of profits, and even for other losses ensuing from the injury to proprietary rights. Learned Counsel Mr. Njagi submitted in his rejoinder, that as it was apparent that the plaintiffs were seeking compensation for loss of business, it was right to remark the inappropriateness of general damages for losses of such a kind. Counsel urged that the Court not entertain claims of general damages, since business losses must be special damages; and besides, it was not possible for the Court to make the orders such as were being sought since the Court does not act in vain. The cause of action, counsel urged, had not been properly pleaded; the plaintiffs had not pleaded loss of business and if they had done so, the same would have been described as special damages. Therefore, counsel urged, there was no basis for seeking general damages by way of formal proof.

Learned counsel contended further that since the defendants' defence had been struck out, no framework of defence now remained in place, on the basis of which a defence could be prosecuted against the intended claim of general damages. Therefore, counsel urged, this case had closed and could no longer be reopened.

I have considered the merits of the submissions, and come to the conclusion that I must arrive at my decision by first adverting to the vital legal instruments on record. The first such instrument is the decision of Msagha, J rendered on 18th March, 1997. And the most crucial element in that judgment is contained in the following passage:

> *"Consequently there shall be judgment for the plaintiffs against the defendant as prayed in the plaint."*

The second crucial instrument is the plaint dated 19th March, 1993. This contains a prayer for general damages. As always, general damages are awarded at the discretion of the Court, based on the merits of proof laid out at the hearing.

Such merits of proof can only become apparent during the proof itself, and it is not possible to foreclose the plaintiff's liberty of proof by merely looking at the manner in which the prayers have been formulated. If the mode of formulation of the prayers is in some concealed manner defective, this will come out during the inter partes hearing of the proof itself; the proof stage cannot be prevented in advance because it is suspected that the plaintiff is likely to experience difficulties in conducting his proof.

The third crucial instrument is the amended preliminary decree issued by the Deputy Registrar on 18th April, 2005. This restates the Judge's Order: "That the defendant do pay to the Plaintiff general damages."

From the three vital documents, I have to conclude not only that there was a setting in the pleadings for

proof of general damages, but also that the Court itself had consistently acted on the basis that there would be general damages to be proved in the normal manner. I do not believe that the Court could have set in motion a process leading to proof of general damages for nothing; the Court could not have been acting in vain; the Court must have been guided by its permanent and ultimate object, to do justice. I would, therefore, as is to be expected, uphold that setting for the proof of general damages.

I would not, therefore, agree with the several ingenious technicalities which have been raised by learned counsel Mr. Njagi, such as:

> (i) that the striking out of the statement of defence wholly vacated the same as a possible basis of defence against the plaintiffs when they would prove general damages;
>
> (ii) that general damages could only be proved if it was possible – which it is not – to amend the plaint at this stage;
>
> (iii) that because there was a decree of the Court already issued, neither plaint nor plaintiff any longer existed, and there was only a judgment –creditor and a judgment-debtor;
>
> (iv) that the moment any form of judgment was on the record, the plaintiff had been fully transformed into a judgment-debtor and could not possibly re-constitute himself as the original party;
>
> (v) that by seeking to prove general damages, the plaintiff was seeking to return to the judgment seat by the back door;
>
> (vi) that because the plaintiffs are suspected to be seeking only compensation for business losses which ought to be expressed as special damages, it is improper for them to seek to prove general damages.

All these concerns of the defendant, or some of them, may very well carry elements of merit; but I would hold that the substantive legal position is one that allows the plaintiffs to proceed to the proof of general damages, and, during that process of proof, the defendant will have the right to challenge the mode of proof, and to canvass its alternative position.

I would, therefore, dismiss the defendant's preliminary objection, with costs to the plaintiffs.

The Deputy Registrar shall set a date for formal proof, on the basis of priority, before a Judge in the Civil Division of the High Court.

Orders accordingly

. Dated and Delivered at Nairobi this 3rd day of February, 2006,

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiffs: Mr. Keyonzo, instructed by M/s S.M. Keyonzo Advocate.

For the Defendant: Mr. Njagi Wanjeru, instructed by M/s Njagi Wanjeru & Co. Advocates.