



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 228 of 2001

JAMES NDICHU WAINAINA.....PLAINTIFF

VERSUS

ROY SPARES & HAULIERS LTD.....1<sup>ST</sup> DEFENDANT

JOHN MBUGUA NDERU.....2<sup>ND</sup> DEFENDANT

JUDGMENT

The plaintiff sued the defendants seeking to be paid compensation in the nature of the cost of rebuilding the premises erected on LR. No. 285 Mau Summit shopping centre, which premises he alleges were damaged by motor vehicle registration number KAG 632T – Trailer No. ZA 5034 (*owned by the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant*). The plaintiff averred that the said motor vehicle was recklessly parked by the 2<sup>nd</sup> defendant on the 20<sup>th</sup> of May 2001 at Mau Summit shopping centre without the hand brakes being applied. The said motor vehicle then lost control and as a result of which it rammed into the plaintiff's premises thereby damaging it. The plaintiff averred that his premises were damaged as a result of the negligence of the defendants. He therefore asked this court to award him the cost of rebuilding the said premises of Kshs 530,000/= and further to be paid *mesne* profits and loss of income at the rate of Kshs 1,000/= per day. The plaintiff further prayed to be paid the sum of Kshs 47,100/= which he claimed was the value of the furniture and stock in trade which were damaged when the said accident occurred. When the defendants were served, they filed a defence denying that they were negligent or that they were liable to meet the cost of rebuilding the said premises. They denied that they were liable to pay any compensation to the plaintiff. They put the plaintiff to strict proof thereof. The defendants further denied that the plaintiff had suffered any loss of income as result of the said accident and put the plaintiff to strict proof thereof.

At the hearing of the case, the plaintiff and the defendants agreed by consent to compromise the suit on the issue of liability. It was agreed that the defendants were to bear 80% liability whereas the plaintiff was to shoulder 20% contributory negligence. The issue of liability having been resolved, the only evidence that was adduced was in respect of what compensation would be paid to the plaintiff. The plaintiff testified that a motor vehicle owned by the defendants crushed into his premises thereby damaging it. He testified that the said premises were situate on parcel number **Kamara/Mau Summit Block 1/538**. The search certificate was produced as *plaintiff's exhibit No. 1*. The plaintiff testified that he used to conduct a hotel business in the said premises and further leased the other part of the premises for a monthly rent of Kshs 2,500/=. He produced the receipts as *plaintiff's exhibit No. 2*. It was his testimony that he used to earn profits of Kshs 1,000/= per day from his hotel business. He produced a book which he used to keep his records as *plaintiff's exhibit No. 3*. After the accident, he made a report to

the police and was issued with a police abstract which he produced as *plaintiff's exhibit No. 4*. He instructed a valuer to prepare a valuation report of the estimates of the costs of repair (*valuation report produced as plaintiff's exhibit No. 5*). He paid the valuer Kshs 10,000/= to prepare the said report (*receipt produced as plaintiff's exhibit No. 6*). He took photographs of the said premises after the accident (*photographs produced as plaintiff's exhibit No. 7 (a)-(e)*).

The plaintiff testified that there were furniture, utensils, a television set, two batteries and a sewing machine in the said premises when the accident occurred, and which items were damaged. He put the value of his properties that were damaged at Kshs 47,100/=. He was however not able to produce the receipts for the said items because he claimed that they were damaged during the accident. He prayed this court therefore to pay him compensation for the damage which was occasioned on his building and his properties and further to be paid Kshs 1,000/= per day being loss of user from the date of the accident to the time of the hearing of the case. He recalled that the defendants' motor vehicle had damaged the entire building which he had built using bush stones. The building had been roofed using G.I iron sheets gauge 30. He had initially built the premises using timber in 1986 but had upgraded it to be a permanent building in 1992. He testified that he did not have the receipts that he used to purchase the materials to build the said premises. He conceded that he had reconstructed the building using partly timber and partly using stone. The reconstruction cost him approximately Kshs 350,000/=. He however did not have any receipts to prove that he had expended the said sum of money.

The plaintiff reiterated that the properties which were inside the premises during the accident and which were damaged cost about Kshs 47,000/=. He testified that there were twenty arm-chairs in the premises each valued at Kshs 400/=. There were five tables each valued at Kshs 800/=. The Singer sewing machine cost him Kshs 13,000/= when he purchased it in 1991. The stock in trade was about Kshs 2,000/=. The Great Wall black and white television cost him Kshs 5,000/=. The two batteries cost him Kshs 12,000/=. He conceded that all the receipts that he had produced did not have revenue stamps save for four receipts. He further conceded that the said receipts were not in his name but in the name of Baraka Hotel. He reiterated that he did not issue customers with receipts when they ate at his premises. He testified that he was able to calculate his profit by deducting the stock and the cost of labour for the day. On average he earned Kshs 1,000/= per day as a profit. He reiterated that he was claiming for the costs of repairs and for his properties which were damaged. He was also claiming the loss of income of Kshs 1,000/= per day. The plaintiff then closed his case. The defendants did not have any evidence to offer. After the conclusion of the case, the parties agreed by consent to file written submissions in support of their respective cases. Both the plaintiff and the defendants filed the written submissions.

I have read the pleadings that were filed by the parties in this case. I have also carefully considered and evaluated the evidence that was adduced by the plaintiff. I have read the written submissions that were filed by the parties to this suit. The issue for determination by this court is what compensation should be paid to the plaintiff as a result of the said accident which damaged his premises. As earlier stated in this judgment, the issue of liability has been compromised. It is trite law that special damages must be specifically pleaded and specifically proved. In the instant case the plaintiff has testified that his permanent building was destroyed by the defendants' motor vehicle. He testified that the said building was built with natural stone and galvanized iron sheets.

According to the valuation report which was prepared by Dr. Mwongela Mwanaa Munyoki, a registered valuation surveyor, the cost of replacing the said building which was destroyed would be Kshs 530,000/=. The said report was prepared on the 25<sup>th</sup> of September 2001, about four months after the said accident. The plaintiff however testified that he reconstructed the said building in the year 2005 at an estimated cost of Kshs 350,000/=. He did not produce any receipts to establish that he actually used the sum of Kshs 350,000/= to reconstruct the said building. I have perused the photographs which were produced in evidence by the plaintiff and marked as *plaintiff's exhibits No. 7(a)-(e)*. In my considered opinion, the said premises which was destroyed could not have cost either the sum of Kshs 530,000/= quoted in the report or the sum of Kshs 350,000/= as testified by the plaintiff to reconstruct.

The building which was destroyed was a simple structure which in my view could not cost more than Kshs 300,000/= to reconstruct. Having carefully evaluated the evidence adduced, it is my view that the

reasonable cost of reconstruction of the said premises would be Kshs 300,000/=. The plaintiff did not produce any documents to establish his averment that the said reconstruction costs would be Kshs 530,000/=. In the circumstances therefore, I will award the plaintiff the sum of Kshs 300,000/= being the cost of reconstruction of the said premises. I will also award the plaintiff the sum of Kshs 10,000/= being the valuation fees he paid to Dr. Munyoki, the receipt of which was produced as *plaintiff's exhibit No. 6*.

The plaintiff has further claimed the sum of Kshs 47,100/= being the value of the items that were in the said premises when it was destroyed by the defendant motor vehicle. The plaintiff did not produce any receipts to establish that he had purchased the said items. In his testimony before court, he testified that there were twenty chairs and five tables at the said premises which he used to operate as a restaurant business. He further testified that there was a Singer sewing machine and a television set which was destroyed in the said accident. He further testified that two batteries worth Kshs 12,000/= was destroyed. Having evaluated the evidence adduced, I do hold that the only amount that can be paid as compensation to the plaintiff is the cost of the furniture and the stock in trade. Under this heading I will award the plaintiff the sum of Kshs 14,000/= being the cost of the said furniture and stock in trade. I did not believe the plaintiff's evidence that there was a television set, two batteries and a sewing machine in the said premises at the time the accident occurred.

As regard the loss of income, the plaintiff testified that he used to earn a profit of Kshs 1,000/= per day in his restaurant business. He further testified that he used to be paid rent of Kshs 2,500/= per month by a tenant who had rented part of the said premises which was destroyed during the accident. Having evaluated the evidence, and particularly the receipts which were produced as plaintiff's *exhibit No. 2 & 3* respectively, on a balance of probabilities, I am satisfied that the plaintiff has established that he lost income as a result of the destruction of the said premises. However, the plaintiff was required in law to mitigate his loss and not wait for this court to award him compensation. I will award the plaintiff loss of income for the period in which he was reasonably expected to have overcome his initial shock at losing his premises and thereafter embarked on picking up the pieces and going on with his life.

In the circumstances of this case, taking into account the evidence that was adduced, and the nature of the business that the plaintiff was undertaking, I will award him loss of income and loss of profits for a period of three months. In the premises therefore the plaintiff shall be paid the sum of Kshs 7,500/= being the loss of rental income that he could have received in respect of the said premises. I further award him the sum of Kshs 90,000/= being the loss of profits on account of his restaurant business for three months.

The upshot of the above is that judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:

**(i) On liability**

Liability was apportioned by consent at the ratio of 80:20 in favour of the plaintiff and as against the defendants.

**(ii) On quantum**

The plaintiff shall be paid:-

- (a) Kshs 300,000/= being the cost of reconstruction of the damaged premises.
- (b) Kshs 10,000/= being the valuation fees paid.
- (c) Kshs 14,000/= being the cost of the furniture and items of trade which were damaged during the accident.
- (d) Kshs 7,500/= being the loss of rental income that the plaintiff received from part of the premises.
- (e) Kshs 90,000/= being the loss of profits from his restaurant business for a period of three months.

(iii) The said sum of Kshs 421,500/= awarded shall be reduced by 20%. The plaintiff shall thus be paid the sum of Kshs 337,200/=.

(iv) The plaintiff shall have the costs of the suit.

(v) Interest on the said amounts awarded shall be paid from the date of filing suit.

**DATED at NAKURU this 14<sup>th</sup> day of July 2006.**

**L. KIMARU**

**JUDGE**