

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI

Civil Case 957 of 1999

DAVID C. MWANGIPLAINTIFF

VERSUS

OCCIDENTAL INSURANCE COMPANY LTD DEFENDANT

RULING

PW1 in the course of his testimony on 9th February, 2005 sought to produce evidence on the loss he suffered as a result of burglary that occurred at his business premises. Counsel for the first Defendant Objected to the Plaintiff leading evidence in respect of particulars of loss. The objection was made on the basis that no particulars of special damages had been pleaded. Reliance was placed upon the decision of the Court of Appeal in *Coast Bus Service Ltd –v- Sisco E Murunga Ndanyi and 2 others: Nairobi C.A. No.192 of 1992 (U.R.)* where the Learned Judges of Appeal observed at page 8 of their judgment:

“It is only when the particulars of the Special damages are pleaded in the Plaintiff that a claimant will be allowed to proceed to strict proof of those particulars.”

Counsel argued that the Plaintiff gives a general statement regarding damages without particulars. On the authority of the said Court of Appeal decision he submitted that the Plaintiff (P.W.1) cannot lead evidence of the alleged particulars of Special damage.

Responding to the objection counsel for the Plaintiff submitted that the Plaintiff had properly pleaded the special damage and P.W.1 was entitled to lead evidence on the particulars thereof. He distinguished the decision of the Court of Appeal in *Coast Bus Service Ltd –v- Sisco E. Murunga Ndanyi and 2 others (supra)* on the ground that in that case the Plaintiff had pleaded that “special damages were to be supplied at the time of trial”. In Counsel’s view the position in this case is different as special damages are pleaded and the amount claimed given.

Having considered the rival submissions made I take the following view of the matter. It is settled that special damages must not only be specifically pleaded but they must be strictly proved. In this case special damages are pleaded in paragraphs 9 and 10 of the Plaintiff as follows:-

“9. As a result of the 1st Defendant’s failure, the Plaintiff has suffered loss and damage, lost expected profit and interest to the tune of Kshs 3,182,000/=.

10. The Plaintiff’s claim against the Defendants jointly and severally is for Kshs 3.8 million being the value of the stolen goods and Kshs 3,182,000/= being the loss incurred by the Plaintiff due to the Defendant’s failure to compensate the Plaintiff in time or at all.”

The Defendants in their statements of defence did not admit the loss and damage alleged.

It is plain and obvious to me that the mere quotation of figures in a plaintiff would not normally be adequate where special damages are alleged. The Court of Appeal did not envisage such a pleading when it said in

the case cited above that particulars of special damages should be pleaded.

A casual observation of paragraph 9 of the Plaint shows that no distinction is made between the damages alleged and expected profit and interest and in paragraph 10 of the same plaint the figure of shs 3.8 million appears an omnibus figure. One cannot tell what goods were involved. No difference is made between the goods that belonged to the Plaintiff and the goods that belonged to the tenants or customers.

In the circumstances I find and hold that the objection raised by the 1st Defendant is not frivolous. The special damages alleged are not particularized. It may very well be that if the particulars of the special damages had been given, the Defendants' response would have been different.

In the result the objection raised is sustained and I order that the Plaintiff cannot lead evidence in an attempt to strictly prove alleged special damages that have not been specifically pleaded.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH 2005.

F. AZANGALALA

JUDGE