



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA 13 OF 2020

JOHNSON MAINA T/A DESTINY

TRANSPORTERS LIMITED.....APPELLANT

VS

SIMON MACHARIA KAIRU.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MURANGA..... 2ND RESPONDENT

(Being an Appeal against the Judgement of Hon E J Osoro PM in SPMCC No 138 of 2010 delivered on the 8/2/11).

JUDGEMENT

1. The brief facts of the case are that the 1st Respondent sued the Appellant and 2nd Respondent vide an amended Plaintiff dated 18/10/2010 seeking an injunction restraining the Appellant from dumping, parking or in any way interfering with his business premises situated at PLOT 82 MUKUYU off Murang'a – Nairobi Highway and general damages for loss of business at the rate of Kshs. 3,000/= daily.
2. Additionally, the 1st Respondent applied for temporary injunction against the Appellant vide Chamber Summons application dated 07/05/2010 and obtained interim orders for one month before the orders were vacated by Court's Ruling delivered on 09/10/2010.
3. In his amended Defence dated 03/06/2011 and as a result of the interim injunction in favour of the 1st Respondent, the Appellant raised a counter claim against the 1st Respondent for alleged loss of business of Kshs. 36,000/= per day from 11/05/2010 to 09/06/2010 together with costs. (See Page 38 of the Record of Appeal). The 1st Respondent opposed the Counter claim and insisted that the Appellant had trespassed on his business premises without any legal cause and averred that the Appellant's purported business license was a mockery and obtained after temporary injunction had been issued in his favour.
4. At the hearing of the suit, the Appellant called Johnson Maina Ndungu as DW1 who testified as the Managing Director of Destiny Transporters and stated that he owned lorries which transport sand and denied parking in front of plot No. 82. He equally produced a copy of license issued by the 2nd Respondent to conduct the said business. On cross-exam by both the 1st and 2nd Respondent's Counsel, DW1 was adamant that he had not interfered in any way with the 1st Respondent's business.
5. In rendering its Judgment, the trial Court considered the testimony and evidence of the parties and faulted the Appellant for issuing licenses in respect of the same business area to the detriment of the two businessmen. On the issue of the practicing certificate, the trial Court faulted the Appellant for raising the issue after close of hearing and distinguished various authorities and noted that in the spirit and letter of the Civil procedure rules cases ought not be dismissed on technicalities.
6. On the issue of counter claim, the Learned Magistrate agreed that the interim injunction was in favour of the 2nd Respondent and the same was later vacated and for the Appellant to qualify for such damages, he ought to have shown that the damages were negligently and without right caused by the 1st Respondent. After the hearing and considering the evidence adduced, the Court acknowledged that the neither of the business men were to blame but the 2nd Respondent for issuing competing permits in respect of the disputed premises.
7. The trial Court then held that the 1st Respondent was not to blame and could not be held liable for the loss which ought to be borne by the 2nd Respondent but declined to order as such because the counterclaim was not directed to it.
8. The memorandum of Appeal contains three grounds of Appeal as enumerated at page 1 of the Record of Appeal. It faults the trial Court for erring in law and in fact by; -

- a. Granting a claim of special damages while it was not specifically pleaded and proved.
- b. Dismissing the Appellant's counter claim on the ground that the claim should have been directed to the 2nd Respondent.
- c. Failing to dismiss or strike out the entire suit by the plaintiff whereas the Counsel for the plaintiff did not have a valid practicing certificate.

9. Directions were taken and parties agreed to canvass the Appeal by way of written submissions. The Appellant filed its submissions dated 09/11/2020 whereas the 1st Respondent filed his submissions dated 18/01/2021 and the 2nd Respondent filed theirs dated 04/12/2020 and adopted the Appellant's submissions as well.

10. In summary, the Appellant submitted that the 1st Respondent having failed to prove the loss of income of Kshs. 3,000/= per day, the trial Court then erred in adopting Kshs. 1,000/= that was not proven. On the issue of the counter claim the Appellant was emphatic that the trial Court did not make a determination on the same and the since the claim was not directed to the 2nd Respondent, no orders could have directed to it. He insisted that according to the adduced evidence, he had not interfered in any way with the 1st Respondent's business and thus faulted the Court's finding that the 1st Respondent was not liable. Reliance was placed on the case of **Ongata Works Limited –vs- Tatu City Limited [2020] eKLR**. Lastly the Appellant argued that the 1st Respondent's Counsel lack of legal capacity in failing to take out a practicing certificate was fatal to the latter's case and the trial Court thus misdirected itself for not striking out the suit with costs. He quoted a number of authorities including **Stockman Rozen Kenya Ltd –vs- Da Gama Rose Group of Companies Ltd [2009]eKLR**, **Douglas Kamau Ngotho –vs- Kinoiyo Company Limited & another [2018]eKLR** and **Barbra Georgina Khaemba –vs- Central Bank of Kenya Ltd & 2 others [2019]eKLR**.

11. On the other hand, the 1st Respondent outlined the history of the matter and supported the trial Court judgment and maintained that his prayer in the amended plaint was for general damages for loss of income and there is nowhere in the judgement that an award for special damages was made. In opposing the second ground of Appeal, the 1st Respondent contended that the trial Court acted judiciously in reaching its decision and there was no justification for him to be condemned to pay damages to the Appellant simply because the trial Court had been satisfied that the order of interim injunction was warranted at that time before vacating the same and as a result the counterclaim was not meritorious. On the issue of the practicing certificate it was submitted that there was no formal objection to the Counsel's capacity and the decision to raise the same at the end of trial amounted to ambush and affront to fair hearing. He prayed that the Appeal be dismissed with costs and relied on the Court of Appeal decision in **Independent Electoral and Boundaries Commission & Anor. Vs. Stephen Mutinda Mule & 3 others [2014] eKLR**.

12. The 2nd Respondent fully associated itself with the Appellant's submissions fully.

13. From the case summary and grounds of Appeal above, the following issues in my view arise for determination; -

- a. Did the trial Court err in failing to strike out the suit for lack of practicing certificate by 1st Respondent 's Counsel?
- b. Whether the Appellant proved his counterclaim against the 1st Respondent.
- c. Costs of the Appeal.

14. The issue of an unqualified person to act was first raised after close of the hearing in the Appellant's written submissions dated 04/11/2011 – **See page 41 of the Record of Appeal**. The 1st Respondent in his submissions dated 07/11/2011 – **See page 43-44 of Record of Appeal** responded and explained through a letter thereon that he had fully paid for his practicing fees but the online Law Society of Kenya search engine was not yet updated to reflect his current status.

15. It is noted from the record that save for the alleged online search referred to by the Appellant in the lower Court, there was no other official communication from the Law Society of Kenya to ascertain the allegations put forward. Again as rightly noted by the trial Court, the issue was raised too late in the day by the Appellant.

16. It is my view therefore the trial Court did not err in declining to strike out the suit on account of lack of the Advocates practicing certificate as it was a non issue raised in the pleadings.

17. In his amended defence, the Appellant counter claimed against the 1st Respondent a sum of Kshs. 36,000/= per day for the period from 11/05/2010 to 09/06/2010 being the alleged loss of his business income as a result of the interim Orders issued against him by the trial Court in support of his claim and produced two books as Defence exhibits 4 & 5.

18. In a claim for loss of business income, the Court of Appeal in **Abson Motors Limited –vs- Dominic B. Onyango Konditi [2018] eKLR** overturned the High Court award for loss of business income that was based on invoices alone reiterating that loss of business must be specifically pleaded and proven.

19. Additionally, in the case of **David Njuguna Ngotho –vs- Family Bank Limited & another [2018] eKLR**, the Learned Judge analyzed the standard of proof for proving loss of earning which he noted as a special damage, must be specifically pleaded and proven. In dismissing the claim for loss of daily income for want of proof the Court held; -

“Looking at the evidence again taking into account the facts now found it difficult to conclude that the Plaintiff huge cash flow can be taken on the face value without independent documentary evidence. I have in mind banking slips comprising of daily sales and expenditures. In consequence it has not been demonstrated where opening balance in six digit figures was sourced from for this Court to infer a health balance sheet of the business at the time of attachment. I would hold that with such cash flow most likely the Plaintiff ought to have been a taxpayer but none of it was alluded to in this case. I agree that the burden of proof is on a balance of probabilities but in assuming responsibility it doesn't have to generate into a balance of possibilities”

20. I have perused the said books that are in the nature of copies of cash sale acknowledgements and particularly at page 525 of D. Ex. No. 4, the date indicated is 4/4/2010 for a sale of Kshs. 36,500/=. The next page 526, for 8/6/2010 indicates a sale of Kshs. 58,000/=. Taking into account the period of the pendency of interim orders i.e. 11/05/2010 to 09/06/2010, the preceding month of April specifically 5/4/2010 to 10/5/2010 is missing in the said D. Ex. No. 4.

21. Taking cue from the case of **David Njuguna (supra)** and the income alleged of Kshs. 36,000/= per day in the year 2010, no other form of evidence was adduced to support the Appellant's counter claim to wit original books of account, proof of an active bank account, bank statements, income statements and liabilities of the business, evidence of stock taking. It is trite that a party cannot just “throw figures” at the Judge and ask him to assess such damages – see the case of the case of **Bonham Carter vs Park Ltd. (1948) 647 T.L.R 177.**

22. In the forgoing reasons I am of the view that the Appellant did not prove his counter claim on a balance of probabilities.

23. My analysis of the trial Court's finding on the counterclaim is that the Learned Magistrate found that the 1st Respondent could not be held liable for the Appellant's loss of business as a result of properly issued Court order and instead blamed the 2nd Respondent for the mix up in issuing competing licenses. However, the trial Court declined to issue orders against the 2nd Respondent since the Counter claim as solely directed to the 1st Respondent. Ultimately, even if the trial Court dismissed the counter claim for a different reason, the end result is that the claim cannot stand for want of proof and is thus dismissed. The only error I would point out is the Court failing to address the substantive issue of proof of the counterclaim regardless of who it was raised against.

24. In conclusion the Appeal is not meritorious and it is dismissed.

25. Each party to meet their costs of the Appeal and of the trial in the lower Court.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF FEBRUARY 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mwaniki HB for Mbuthia for the Appellant

1st & 2nd Respondents: Absent

Court Assistants: Kuyiki & Njeri