



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA 7 OF 2018

MUNICIPAL COUNCIL OF MURANGA.....APPELLANT

VS

SIMON MACHARIA KAIRU.....1ST RESPONDENT

JOHNSON MAINA.....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. A brief overview of the matter is that the 1st Respondent sued the 2nd Respondent vide a Complaint dated 07/05/2010 alongside a Notice of Motion Application of even date seeking an injunction restraining the 2nd Respondent from dumping, parking or in any way interfering with his business premises situated at PLOT 82 MUKUYU off Murang'a – Nairobi Highway. The said business premise was leased to the 1st Respondent by the Appellant herein who was later enjoined in the trial Court as a 2nd Defendant on 15/10/2010 the period of the lease was for 10 years starting from 01/10/2009 to 30/09/2019 as demonstrated by the Lease Agreement dated 17/08/2009.

2. Later on, the 1st Respondent filed an amended Complaint dated 18/10/2010 and pleaded loss of business against both Defendants jointly and severally as demonstrated in Paragraph 2 of the Amended Complaint. (See Page 33 of the Record of Appeal). The 2nd Respondent contemporaneously filed an amended Defence and Counter claim against the 1st Respondent whereas the Appellant through the firm of Gacheru J. & Co. Advocates filed a memorandum of appearance without a Defence. As a result, the 1st Respondent applied for and Court entered interlocutory judgment against the Appellant on 03/12/2010.

3. A perusal of the trial Court proceedings reveals that the 1st Respondent Simon Macharia Kairu testified as PW1 and gave an account of his hotel business at Mukuyu on plot no. 82 and the continued interference from 2nd Respondent that negatively affected his business and income in general. He produced a number of exhibits to support his case namely Business permit, photos from Plot 82 and a tabulation for his lost income based on the sitting capacity of his hotel which he submitted as Kshs, 3,000 per day.

4. It is imperative to note that despite failing to file a Defence, the Appellant's Counsel was actively involved during the hearing and there is no evidence of any attempt to set aside the interlocutory Judgment already entered against the Appellant by way of Application or consent of the parties.

5. In cross-examination, PW1 blamed the Appellant for authorizing the 2nd Respondent to occupy the space outside his business premise which according to PW1 was a major consideration for investing in the hotel business. The Appellant's Counsel did not proffer any cross-exam on the witness.

6. On the other hand, the 2nd Respondent called Johnson Maina as DW1 who testified as the Managing Director of Destiny Transporters and stated that that he owned lorries which transport sand and denied parking in front of plot no. 82. He equally produced copy of license issued by the Appellant to conduct the said business. In cross-exam by both the Appellant and 1st Respondent's Counsel, DW1 was adamant that he had not interfered in any way with the 1st Respondent's business.

7. 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 and held as follows;

“After analyzing the circumstances to the case I am of the view that both the Plaintiff and the 1st Defendant are running their businesses duly licensed by the 2nd Defendant and neither of the two can blame the other for any inconvenience caused by their premises being situated close to each other if there is any compromising situation affecting either of them the party to resolve such

situation or remedy it is the 2nd Defendant....”

8. The trial Court went ahead to calculate damages for loss of income based on the 1st Respondent’s Exhibit No. 5 and adopted a flat figure of Kshs. 1,000/= per day from 09/06/2010 to the time of trial Court judgement until payment in full. The decretal amount against the Appellant as at 08/02/2012 was Kshs. 607,000/= with costs to both the Respondents herein. On the counterclaim raised by the 2nd Respondent against the 1st Respondent for the one-month period of interim injunction, the Learned Magistrate held that the 1st Respondent was not liable for the alleged loss as the orders were properly issued by the Court even though they were later vacated.

9. It is this impugned Judgement that has necessitated the instant Appeal. The memorandum of Appeal contains nine grounds of Appeal as enumerated at page 1 of the Record of Appeal. in summary the Appellant faults the trial Court for erring in law and in fact by; -

- a. Allowing unqualified party to present the Respondent.
- b. Awarding special damages which had not been specifically pleaded and proven.
- c. Awarding an amount which was excessive of Kshs. 1,000/= per day after the Judgment.
- d. Failing to consider the evidence.
- e. Failing to hold that there was no prayer against the Appellant for payment as amended.
- f. Failing to find that the amended plaint did not raise any cause of action against the Appellant.

10. Directions were taken and parties agreed to canvass the Appeal by way of written submissions. The Appellant filed its submissions dated 04/12/2020 whereas the 1st and 2nd Respondents filed theirs dated 18/01/2021 and 09/11/2020 respectively.

11. The Appellant submitted that in the last paragraph of the amended Plaint, the 1st Respondent did not specifically seek any prayer against it and further disputed the award of Kshs. 1,000/= per day for reason that extraneous dynamics like closure of business was not taken into account. The Appellant also raised issue of the lack of environmental report which according to it, was core in determining a claim based on environmental effects. The order to pay Kshs. 1,000/= per day until relocation is also contested with the Appellant arguing that the order is infinite thus the period for such payment cannot be ascertained. Lastly it is stated that the 1st Respondent submitted that the Appellant had no valid bylaws and the Appellant contends that if that was the case, then the licenses issued by it are not actionable to base the instant claim.

12. On the other hand, the 1st Respondent in response to the Appellant’s grounds of Appeal maintained that there was no such prayer for special damages in their pleadings or award for the same in the Judgment. On the award for loss of income, he reiterated that the Appellant failed to defend the suit in the trial Court. The Court exercised its discretion to uphold the award for loss of income at Kshs. 1,000/= per day in spite of the interlocutory judgment entered against the Appellant. in refuting the claim on unqualified person to act, the 1st Respondent submitted that the same was an afterthought that was introduced too late in the day. Lastly the 1st Respondent urged this Court to dismiss the Appeal with costs as it was incompetent and could not stand in Court. He prayed for Kshs. 90,000/= as fair compensation.

13. Correspondingly, the 2nd Respondent in his brief submissions urged the Court to allow the Appeal and order restitution of any amount paid to the 1st Respondent and condemn him to pay their costs. The 2nd Respondent agreed that 1st Respondent did not plead for any special damages but on loss of income, he was adamant that that the prayer for Kshs. 3,000/= was made but not proven.

14. The main issue for consideration in this Appeal is whether the 1st Respondent proved his claim for loss of income pleaded at Kshs. 3,000/= per day. In his amended Plaint dated 18/10/2010, the 1st Respondent pleaded and prayed for Kshs. 3,000/= as loss of business per day.

15. I reiterate the case law in **ELC Appeal No. 13 of 2020** 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.

16. 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”.

17. I have perused the trial Court record and note that the 1st Respondent testified and prayed for compensation at the rate of Kshs. 3,000/= per day based on the 180 seats in the hotel that earned him a minimum of Kshs. 50 each per day. He produced his calculation as P. Ex. 5 being a bundle of three undated and unsigned tabulations under the heading of Highway View Resort namely; - Income Projection for the

period Nov. 2009 to Dec. 2010, Loss of Income calculation by one S. Kairu and an Income Projection from January 2011 to Sep. 2011.

18. Applying the standard for proving loss of income in the authorities above, it follows that the 1st Respondent did not prove his claim as well and to that extent the trial Court erred in allowing the claim at Kshs. 1,000/= per day for a period of time that the 1st Respondent himself had not specified. It was an open and ambiguous prayer for Kshs. 3,000/= daily for an indefinite period of time and having failed to prove his case, the claim was ripe for dismissal with costs.

19. The provision of Sections 107 and 112 of the Evidence Act Chapter 80 of Laws of Kenya are relevant in this instance and states as follows;

“107 (1) Whoever desires any Court to give judgment as to why any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

20. In the end the Appeal is merited. It is allowed.

21. The Judgement of the lower Court is set aside in its entirety. Each party to bear their costs.

22. 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:

Appellant: Absent

1st Respondent: Absent

Mwaniki Warima HB for Mbutia for the 2nd Respondent

Court Assistants: Kuyiki & Njeri