



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 6454 OF 1991

FREDRICK GATHIRWA PLAINTIFF

VERSUS

KIAMBU COUNTY COUNCIL DEFENDANT

J U D G E M E N T

The plaintiff Fredrick Gathirwa brings this suit against the defendant Kiambu County Council to claim from it special and general damages arising from damages to his shop premises caused by the defendants' tree which fell on it on 28th April 1990 at Mukurwe Trading Centre.

The plaintiff owned this shop or plot number 16 and had let it out to Gichuru Kangethe (PW2) at the time of the incident.

The adjacent empty plot, whose number was not given belonged to the defendant. On it were some grown trees.

On 28th April, 1990 one of such trees fell on the plaintiff's shop and damaged it together with some rooms attached thereon.

But before the incident the plaintiff had brought to the attention of his assistant chief one Dominic Ng'ang'a Ndukuyu (PW 3) that one of the trees hang precariously towards his shop.

Dominic told the court that he reported this matter to the area chief and also went with the said chief to the area District Officer where the same report was made.

This report appears to have reached the defendant who, on 8th February, 1989 wrote to the District Officer Gatundu seeking his permission to cut the tree down.

No evidence was adduced if such permission was ever obtained but before the tree was cut, it fell and damaged the plaintiff's shop and rooms as already stated herein, hence this suit.

Though the defendant filed a defence to this suit on 23rd April, 1992 denying all the allegations made in the plaint save to admit ownership of the plot, when the case was called on for hearing on 29th May, 2001, neither the defendant nor counsel was present to put its defence.

The evidence of the plaintiff and his witnesses is on record. It is not challenged by the defence which was not represented at the trial.

Though the defence denied vital portions of the defence which touched on the precarious manner the tree on the defendants plot, the letter of the defendant to the District Officer Gatundu dated 8th February, 1989 seeking permission to cut one tree at Mukurwe Trading Centre one of the three.

“reported to be risky to the public especially when in rain”.

Is clear evidence that it, the said defendant, was alerted over the danger this particular tree posed to the plaintiff’s shop.

The defendant took no further action after writing this letter only to be informed by the plaintiff’s letter dated 8th May, 1990 which of damage done by the falling tree to the shop of the plaintiff. It took no action also, hence this suit.

If the defendant had not been alerted about this matter, I would have feigned at this suit as the defendant’s defence would, in those circumstances, have made sense.

But that it was but took no action to avert the crisis, I take it that the defendant deliberately neglected to carry out its duty for the one and/or welfare of the defendant’s property.

After all, it appears the tree was special and entailed permission being granted by the District Officer of the area before it was cut down.

Even if this was not so, it would be a grave mistake for the plaintiff to venture into the defendant’s plot to cut down that tree.

I therefore find the defendant to blame for the mishap that befell the plaintiff’s property and that he is entitled to damages from the former.

What damages then is the plaintiff entitled to in these circumstances?

Paragraphs 11(a),(b) and (c) and the plaint seek the following prayers namely:-

- (a) Loss of rent from the said premises from 1.5.1990 to 30.11.91 at the rate of Kshs.500/= per month amounting to kshs.9,500/=.
- (b) Further loss of rent till the finalization of this suit at the rate of Kshs.500/= per month.
- (c) Cost of repairing the damage to the premises amounting to Kshs.200,000/=.

Unless I am not mistaken, all these claims are in the nature of special damages; but through out the evidence of the plaintiff he did not tell the court what rents he was getting Kshs.500/= per month. No evidence was adduced to support this income, save for the alleged tenant of the shop Gichuru Kangethe (PW2) who testified that he was paying rent at the rate of Kshs.200/= per month. This was actually in answer to a question by court.

Even then this is no proof that this sum was being paid by Gichuru to the plaintiff.

Clerk & Lindsell on Torts (11th Edition) page 165 says this about special damages:

“if there be any special damage, which is attributable to the wrongful act, that special damage must be averred and proved”.

In the 13th edition of the same text, paragraph 352, page 220 “Measme of Damages – General and Special Damages” the authors say this:-

“Special damage on the other hand means the particular damage (beyond the general damage e) which results from the particular circumstances of the case, and of the plaintiffs’ claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise of the trial”.

In Ouma vs Nairobi City Council [1976] KLR 197 at page 304, the late Honourable Justice Chesoni – as he then was, while discussing the issue of special damages stated thus:-

“Here it simply means that for special damages to be awarded they must be pleaded and proved”.

“Thus for the plaintiff to succeed on a claim of special damages, he must plead it with sufficient particularity and must also prove it by evidence ”. (underlining mine).

In the present case, though the plaintiff gave particulars of special damage as regards loss of rent in the pleadings, certainty and particularity of proof were lacking in the evidence adduced. Here documents or receipts issued in receipt of money for rent were necessary to confirm what was earned from the shop and the rooms; but this was not done.

See also Ratcliff vs Evans (1892) 2 QC 524.

As regards cost of repairing the premises destroyed, the plaintiff and Gichuru Kangethe agreed that the same had not been repaired.

However, while the plaintiff claimed the sum of Kshs.200,000/= in the plaint, a report prepared by a firm of valuers (Dantu Investments) gave a figure of Kshs.391,500/= as a fair assessment of the cost of carrying out the necessary repairs to the building on plot number 16 Mukurwe Trading Centre.

Given that the plaint was drawn on 29th November, 1991 and the report made on 5th October, 2000 and that inflation must have taken its toll in the whole exercise, I am of the view that a sum of Kshs.391,500/= is a fair estimate of repair costs and that Judgement should and is hereby awarded to the plaintiff against the defendant with costs of the suit and interest to accrue from the date of filing suit.

This is the order of the court.

Delivered and dated this 13th day of June, 2001.

D.K.S AGANYANYA

JUDGE