REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 171 of 1995

DAVID ONDIEKI MOSETI

CAROLINE N. KOMBO.....PLAINTIFFS

-versus-

LOCHAB TRANSPORTERS LTD.....DEFENDANT

JUDGMENT

The plaintiffs herein namely David Ondieki Moseti and Caroline N Kombo sued the defendant Lochab Transporters Ltd claiming Kshs 705,800/- being the value of their damaged 3 roomed shop, loss of rent at Kshs 7,000/- per month from the date of the accident till the time the building could be re-occupied, costs, interest and any other relief that the court may deem fit to grant.

The sum total of the plaintiffs evidence is that they owned shop building on plot 25 at Kipkaren which was crashed by the defendants motor vehicle between 24-25.5.95 at night. The accident motor vehicle was Reg No KUC 655 pulling trailer No ZA 6413. The building comprised 3 shops at the front which we rented at 3,000/-, 1,700/-, 1,100/- and 3 rear rooms rented at Kshs 600.00 each making the total come to Kshs 7,000/-.

There were no lease agreements in written, they made oral agreements and when rent was paid he just issued receipts as per exhibit 3. PW1 added that we had not repaired the building from the time of the accident and in September 1998 the same building was condemned as being unfit for human habitation. Photographs of the building were taken and were produced at exhibit 5a-d and the receipt book as exhibit 3 and abstract as exhibit 1. He further added that we could not avail the tenants for testimony as they had left and he does not know where they were.

When cross examined he stated that the building was put up in the 1970's but he purchased it in 1983 through auction, that he had leased it out, the photographs were taken in 1995, that the transactions between him and the tenants were done on Kienyezi style and on mutual trust, he has tenants records from 2.11.94 to 5.5.95 and does not have the earlier records; there are no bank books kept as he received the money and used it, he did not keep the earlier receipt books and he discarded them as soon as they were finished, that as far as he is concerned there were tenants in the building when the accident happened, but nobody came to complain that their properties had been damaged, he agreed that he took 3 years before asking for the valuation report and a report from the public health.

PW2 confirmed that there were tenants in the building and it was in good condition before the accident, that they did not do any improvements on the building from the time of the purchase to the time of the accident, that it has not been rented since the accident.

PW3 a public health officer inspected the building on 28.9.98 and his findings are that one door had completely been smashed another had vertical cracks at the corner showing detachment of the walls. At the time he did the inspection one room of the building was being used for selling diesel, the other rooms were being used as stores for market traders. According to him the place was not fit for human habitation and he condemned it.

When cross examined he stated that he had not inspected the building prior to the accident or immediately after the accident.

PW4 a valuer by profession inspected the suit premises on 3.7.95 following instructions from the first plaintiff and his findings are as per the report exhibit 2. When cross examined he stated that he inspected the building personally, it was in very poor state structurally because one side of the wall had collapsed while there were severe cracks on the remainder of the walls, he did not determine the age of the building but it was relatively new, we agreed the painting is old and the iron sheets are rusty, that he does not know the state of the building prior to the accident, that he only assessed the structural part of the building only and did not do the decorative part or its age, that in his opinion you have to pull down the building and build afresh in order to be sure of the safety of the building due to the impact of the lorry, that costs of replacement depends on the costs of materials and not on the age of the building.

The defence herein after being served entered appearance and then filed a defence and denied that an accident ever occurred as alleged and shall invite strict proof, denied that it caused the plaintiff any harm loss injury or suffering and it shall invite strict proof. In consequence thereof prayed for the suit to be dismissed with costs.

In their evidence they called DW1 also a valuer which he produced as exhibit D1. He recalls going to the scene and inspecting a commercial building part of which had been demolished. He did not see the building itself but a foundation slab showing that there had been a building standing thereon. They were assigned to work out the value of the property the cost of replacing the same. Probably rental market value and reinstatement cost of the building.

From his observation the part knocked down was not there and the part standing had a few cracks. They were informed that the removal of the building was as a result of the accident but due to neglect on inquiries they were told it was put up in the 70’s and pegged its year of birth as 1975 and then gave it a 2% depreciation per year bearing in mind 50 years as its life span and arrived at 350,000/- or as its current value.

Commenting on exhibit 2 the witness stated that depreciation was not taken into account because they were not asked to consider the same. It is their view that the damaged part can be repaired without touching the standing one despite the isolated cracks in the building. That it is difficult to determine the cause of the cracks. They could have been due to the accident or poor workmanship. That the decorative part of the building was in a very poor state of affairs. They assessed the rental value of the shops as 1,056/-, 660.00, 690/- while the rear rooms were going for Kshs 200/- each. That one shop was occupied while the rear rooms were all vacant. He agrees that cost of putting up a new building is 670,000/-.

When cross examined he stated that he did not visit the building before the accident occurred or shortly thereafter and only visited it in February, 1999 while the accident took place in May 1995, he was not able to identity the plot number of the building he visited, nor the plot numbers of the plots used to assess rent. He agrees rent depends on the agreement between the tenant and the landlord and it is normal to get similar buildings fetching different rents. They did not interview the tenant in the shop to know how much he was paying but based their calculations on what the others were paying in the neighbourhood. He agrees the foundation was in a bad shape but said that it can be repaired. He concedes his report is not a structural survey and he cannot guarantee that, that the assessment does not reflect the actual rent, they did not say anything about the conditions of the roof.

In his reexamination he agreed that the condition of the building was in a bad state, there were pot holes on the floor but he cannot know when they came to be there. But he still maintains that the damaged part

can be put up without interfering with the parts still standing.

Neither party filed submissions in the courts assessment of the evidence adduced as well as the photographs produced it is clear that despite the pleadings in the defence the plaintiff has not been challenged in his testimony as confirmed by PW2 that the building was damaged by a trailer belonging to the defendant. It has not been suggested that the plaintiffs did anything to occasion the accident. They pleaded that the accident was due to the negligence of the defendants, their agents or servants and gave particulars of the same. The defendants merely denied them but did not bring the driver to controvert them through evidence. In the absence of evidence to the contrary the particulars stand unchallenged and the defence to them as a mere denial. I find negligence proved more so when the defendants do not deny the ownership of the vehicle involved in the accident.

They are 100% liable to make good the damage caused by their vehicle. The driver was in the cause of his employment and so he binds his masters the defendants.

Having established liability I now come to the assessment of damages. These must be proved. The plaintiffs stand is that the whole building has to be pulled down and a new one put up. They rely on the valuation report exhibit 3. This was produced by PW4 who said that he was only asked to estimate the cost of putting up a new building and not repairs if any, the value of the building or the age or depreciation.

According to him the lorry impact was great and in order for the building to be safe it just has to be pulled down and put up a fresh one as there were cracks on the wall. His report was 2 months after the accident. He is supported by PW3 who visited the place in 1998 and condemned it. He also noticed one shop demolished and 2 others had cracks thus weakening the walls calling for their being pulled down and built afresh.

The defence rely on exhibit D1 by DW1 which is of the view that the building can be repaired at a cost of Kshs 125,000/- and that cost of putting up a new building will be Kshs 670,000/-. DW1 further agrees that the building is in a poor state of disrepair. It is in a bad shape. The question as to whether the building was to be repaired or pulled down was not one of the issues agreed upon. That not withstanding this court is not prohibited from drawing up issues for determination at the time of writing of the judgment in answer to the issues raised I have already ruled that the accident occurred, the plaintiffs shop was damaged by the defendants motor vehicle driven by their agent in the cause of his employment and so the defendants are liable to make good the loss. Having said so the key issue now is to determine whether the plaintiff is to get the cost of putting up a new building or gets the value of repairs.

In the courts opinion since both reports agree that the building was in a bad shape and that the walls have cracks, the most appropriate solution is to pull down the standing structure and then put up a new one. This is so because the defence witness admitted that he did not do the structural survey. It is the structural survey which determines the strength and the safety of the building. This is what PW4 did in exhibit 2.

I therefore rule that a new building has to be put up. The next question to be determined is whether the plaintiff is to get the full cost of a new building or not. Although he did not occasion the accident he should not be enriched by this fact. The court has to consider the value of the building, its age and the fact that the plaintiff is going to get anew building thus appreciating its value. PW4 did not value the same but PW1 said he had information it was put up in the 1970's and it was therefore an old building. An old building is not necessarily of low value depending on its structural strength. In our case I will peg the cost of putting up a new building at Kshs 700,000/- and then reflect into that an element of depreciation which the plaintiff has to share as his contribution which I will assess at 20%. The amount of compensation will work out as Kshs 700,000/- less 20% depreciation which comes to Kshs 140,000/- leaving a balance of Kshs 560,000/- which I award to the plaintiff.

The plaintiff also claimed loss of income of 7,000/- per month. His stand is that the was leasing out the premises verbally and he cannot procure the tenants to testify and confirm the rental value. He relies on the receipts produced as exhibit 3. There were no bank statements to back up that receipt. PW4 did not

determine the rental value while DW1 determined it but it cannot be relied upon as he did not give the plot number of the premises rented. He alleges there was one shop which was operational and yet he did not find out from the incumbent tenant how much he was paying as rent, they allege to have based the assessment or rent payable on the basis of the rent paid in the neighbouring premises and yet they did not give their number or the names of the tenants and so their estimate is not of much help to the court.

It is however not in dispute that there were shops plus 3 rear rooms. The shops were going for 3,000/-, 1,700/- and 1,100/- while the rear rooms were going for 600/- each making a total of 7,000/-. There is no evidence to show that the premises were not rented neither is there evidence that the receipt books have been forged although presence of statements would have added weight. There is no other contrary evidence to show that rent charge. The assessment of the defence as to the rent payable has been displaced because DW1 did not name the plot he was assessing did not name the neighbouring plots he used in his assessment, he did not name those who gave him information neither did he ask the tenant allegedly found in the plaintiffs premises how much he was paying as rent. I have no alternative but to go by the rent given by the plaintiff and shown in the receipts exhibit 3.

Having established the rent payable the court has to bear in mind the fact that this compensation does not continue indefinitely. The plaintiff should have mitigated his loss. He has not stated why he did not commence putting up a new building within a reasonable time in order to mitigate loss. He did not say that he had no finances or property to enable him raise a loan to put up a new building or take other measures to minimize loss. He has claimed loss of income from the date of accident till the time the building will be re-occupied again. We have been told that the building is a write off and it will have to be put up afresh. No specific period has been put forward as the time during which the new building will be completed and started being operated again for profit. Annoted this cannot be given out indefinitely. In this courts opinion since the plaintiff has conceded that they would have to pull down the damaged building and put a new one and since this court was not told of their financial capabilities save for a mention that they had no money the court was not told that they were incapable of securing a loan even against the title of the same plot. Had they done so they would have put up a new building long time ago this minimizing loss. In the courts opinion of period of 9 years would have been sufficient to enable the plaintiffs acquire a loan put a new building repay off that loan and start earning profit again.

Turning to the loss of profit amount the plaintiffs did not keep all the amount to himself. They were obligated to pay for water service charge, electricity rates, VAT etc and in the absence of evidence to show how much was being spent on these items I will assess Kshs 4,000.00 as their net value of the profit after deductions. So loss of income would work out as Kshs 4,000 x 12 x 9 which comes to Kshs 412,000/- which I allow.

I therefore enter judgment for the plaintiff against the defendant on the following terms:

1. Cost of putting up a new structure Kshs 700,000.00 less 20% depreciation of Kshs. 140,000.00 leaving a balance of Kshs. 560,000.00 with interest at court rates from the date of judgment until payment in full. Interest is from the date of judgment because the plaintiff has not yet spent this money.

2. Damages for loss of income being Kshs. 4,000.00 x 12 x 9 which comes to Kshs. 412,000.00 with interest at court rates from the date of filing until payment in full.

3. Costs of the suit.

Dated at Eldoret this 13th day of September 1999.

R NAMBUYE

JUDGE.

Read and delivered at Eldoret this 7th day of February 1999.

R NAMBUYE

JUDGE.

7.2.2000

Present: R Nambuye J

c.c. Birgen

Mrs Nyaundi for AGN

Kamau present

Mr Momanyi for the plaintiff present.

R. NAMBUYE

JUDGE

7.2.2000

Further order; stay of execution for 30 days granted from today.

R. NAMBUYE

JUDGE