



**Texas Alarms (K) Limited v Darajani Hotel Limited (Civil Appeal E004 of 2023) [2024] KEHC 10306 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 10306 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E004 OF 2023**

**F WANGARI, J  
APRIL 18, 2024**

**BETWEEN**

**TEXAS ALARMS (K) LIMITED ..... APPELLANT**

**AND**

**DARAJANI HOTEL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of the Honourable S. N Gatambia delivered on 31/10/2023 in Mombasa SCCOM No. E315 of 2023.
2. The Appellant is substantially on the grounds that the Learned Trial Court erred in law and fact:
  - a. Not considering the evidence and submissions of the Appellant
  - b. Failing to properly analyze pleadings and evidence
  - c. Failing to determine the Appellant’s counterclaim.
3. The Appellant as such prayed for reliefs that the Judgement be set aside and replaced with an Order dismissing the Claim and allowing the Counterclaim with costs.

**Pleadings**

4. In the Statement of Claim dated 12<sup>th</sup> January 2023, it was pleaded that on 4<sup>th</sup> September 2022, the Respondent had contracted the security services of the Appellant. Thieves entered the Respondent’s premises, where the Appellant’s security guards were stationed and stole electricity conductors worth of Kshs. 959,599. The cost included installation labour charges of Kshs. 182,970. The Respondent thus claimed against the Respondent for damages for vicarious liability for negligence leading to the special loss.



5. The Appellant as Respondent in the Trial Court entered appearance and denied the claim. The Appellant also averred in its Defence that the Appellant's guards confronted the thieves on the material day and recovered the allegedly stolen goods which were handed over to the Respondent.
6. They also averred that they reported the matter to Bamburi Police Station and OB was generated.

### **Evidence**

7. During trial, the Respondent's witness PW1 one Lawrence Karume testified and relied on his witness statement and bundle of documents dated 14<sup>th</sup> September 2022 in evidence.
8. It was his case that the goods were removed and stolen at a time when the Appellant's security guards were on duty and expected to protect the items stolen. He stated that the lost cables were assessed by an electrician.
9. On cross examination, it was his case that the matter was not reported because it was taken over by the Respondent.
10. PW2, one Hassan Ali Jumbe testified and relied on his witness statement. It was his case that he had fixed the cables and so the Respondent instructed him to prepare a report quantifying the losses. That the quantification was based on market value and catalogue obtained from the valuer.
11. On the part of the Appellant, they called DW1, one Robert Chai. He relied on his witness statement and the bundle of documents filed in court by the Appellant. It was his case that the theft happened on several floors and they did not know of the ongoing theft. That he saw some cables left on the floor in a sack.
12. DW2, one Christopher Ngumba testified that he was at the scene of the theft. That the recovered sack was full of wires.
13. The Trial Court considered the case and rendered its Judgement on 31<sup>st</sup> October 2023. The entered Judgement for the Respondent for Kshs. 959,599 with costs and interest.
14. Aggrieved, the Appellant who was the Claimant lodged this Appeal.

### **Submissions**

15. The Appellant reiterated the grounds in the Memorandum of Appeal. It was submitted that the Trial Court misapprehended the pleadings, evidence and submissions of the Appellant.
16. It was also submitted that the Respondent herein never reported the matter to the police because the items were recovered and the suit was thus an attempt to unfairly enrich itself. That it is the Appellant who reported the matter which was still under criminal investigations and as such the trial court assumed jurisdiction to determine the matter where none existed.
17. This court was urged to set aside the Judgement of the Trial Court and allow the Appeal.
18. On the part of the Respondent, it was submitted that the Trial Court was correct in its determination. The court was urged to dismiss the Appeal.

### **Analysis**

19. I have considered the Appeal as well as submissions and authorities filed in court.



20. The issues before this court for determination is whether the Trial Court misapprehended the pleadings and evidence and the Appellant's submissions as to arrived at an erroneous decision.
21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
22. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:
- i. "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
23. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows:-
- ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."
24. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanour and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-
- "Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."
25. Therefore, the Trial Court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
26. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-
- "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."
27. In my re-evaluation, I note that the trial magistrate based his decision on the finding that the Respondent had proved his case to the required standard. It was his finding that the contractual



relationship between the parties conferred an implied term that the Appellant would be liable for acts or omissions that would cause loss to the Respondent.

28. I note that the Respondent pleaded loss of Kshs. 959,599. This constituted charges of Kshs. 182,970 and cost of missing wires worth Kshs. 776,629 and was contained in what was named the breakdown of the missing cables and their respective prices. It was undated and is indicated to have been prepared by one Hassan Jumbe, an electrician.
29. There is also reference to the receipts for the purchase of electricity cables and the price catalogue from Coast Cables Limited. However, the said documents though contained in the list of documents filed by the Respondent in the Trial Court are not traced both in this Record of Appeal.
30. However, on my reference to the testimony of the Respondent's witness, CW1, I deem that the list of documents dated 14<sup>th</sup> September 2022 and filed by the Respondent was adopted in evidence save for documents number 5 and 6. The Appellant was recorded as having no objection to the production. The price catalogue and receipts are part of what was adopted and I consider that they were produced as such.
31. Consequently, I am unable to fault the trial court. What the Respondent was required to do is to prove on a balance of probabilities that the Respondent incurred loss and damages as a result of acts and omissions of the Appellant. The Appellant did not deny liability and except for asserting that the Respondent had failed in its obligation to report the theft incidence to the police, they only asserted without evidence that the stolen cables were recovered.
32. I understand the issue of liability is based on prove on a balance of probabilities. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.

In *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

33. The Respondent in my view proved that the cables were stolen due to negligence and breach of contractual and statutory duty and like the Trial Court, I find for the Respondent. in *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
34. Therefore, it follows that the initial burden of proof lies on the Respondent, but the same may shift to the Appellant herein, depending on the circumstances of the case.



35. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

36. I do not find rebuttal from the Appellant that would have dislodged the evidence tendered by the Respondent to support loss of Kshs. 959,599.

37. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.

38. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court’s task thus entails whether the trial court failed to award special damages that were pleaded and proved.

39. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore, in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally



know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages have become crystallized and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

40. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited* Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, *Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited* Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, *Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others* Civil Appeal No. 192 of 1992
41. The Respondent pleaded loss of Kshs. 959,599 and proved it by way of testimony and the evidence produced in court and I am unable to fault the Trial Court in its finding.
42. I also note the Appellant to content that the Trial Court failed to consider the submissions of the Appellant. In my reevaluation, the Trial Court did not record in the Judgement whether it considered either of the parties’ submissions or not.
43. I have considered both submissions filed by the parties in the Trial Court and note the Appellant’s submissions reiterated that the Respondent had failed to report the theft as a crime, and since no one was arrested, it would be said that the cables were lost. However, the Appellant to take advantage of the evidentiary burden to prove that the goods were recovered or that the costs produced by the Respondent were exaggerated or non-existent.
44. Again, it has been held time and again that submissions are not evidence. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions.
45. The role of legal submissions has been described in a number of judicial authorities. As was held by Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:

“Submissions simply concretize and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
46. From the above analysis, I find no merit in the Appeal. The Respondent being successful in the appeal, it shall have the costs.



## **Determination**

47. In the upshot, I make the following Orders:

- i. The Appeal is dismissed.
- ii. The Respondent shall have the cost of this Appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18<sup>TH</sup> DAY OF APRIL, 2024.**

**F. WANGARI**

**JUDGE**

In the presence of;

M/S Mwangi Advocate for the Appellant

Mugambi Advocate h/b for Kitoo Advocate for the Respondent.

Barile, Court Assistant

