REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 93 OF 2012

COASTAL BOTTLERS LIMITED.....APPEALLANTS

VERSUS

CHRISPINUS OMONDI.....RESPONDENT

J U D G M E N T

1. Before the trial court was a suit for general damages by the Respondent on account of damage and injury allegedly suffered by the said respondent as a result of having bought soda bottles, produced by the Appellant and discovered that the same had foreign objects in the drink.

2. The said bottles of soda having been bought from a distributor in Changamwe, the respondent made a complaint to the said distributor who then offered to compensate the respondent with three crates of soda provided that the bottles containing foreign materials were surrendered back a condition the respondent rejected.

3. As a consequence of the foreign objects being found in the bottles, the plaintiff pleaded that he lost most of his customers who concluded that the sodas he sold were not clean and therefore he asserted to have suffered loss and damages for which he sought to be awarded general damages costs and interests.

4. The suit was resisted by the Appellant who filed a statement of defence in which all allegations, save for the description assigned to the appellant, jurisdiction of the court and there being no previous suit, were denied and strict proof invited from the respondent.

5. As pleaded therefore, the respondents cause was for loss of business by customers deserting associated with what he called unwholesome products by the defendant. That to me was the cause the respondent was obligated and enjoined to prove before the trial court.

6. When parties got the chance to lead evidence, the respondent gave his evidence then called PW 2 a food analyst who tested the soda bottles to establish if the same were wholesome. On their side, the defense called one witness, the quality Assurance Manager.

7. In his evidence, the respondent said that on that 7/5/2005 he made an order for sodas at a depot in Changamwe, was supplied with sodas and while arranging them in the refrigerator, he noticed that 4 bottles had foreign particles inside. He then instructed a lawyer who made a demand and the bottles were subjected to physical analysis which revealed the existence of foreign particles inside the drink. He said that his claim was for damages for lost customers because he ended up closing the shop on that account.

8. In cross-examination, the witness said that he and the wife used to operate the shop and that he had nothing to show that he operated any shop and that he never kept any records of his purchases of the appellant's products. He said he was alone while arranging the sodas in the refrigerator and that the bottles with impurities were kept aside and not displayed to the customers to see. He confirmed having nothing to show tempering with the bottles. He said as a consequence of loss of customers he changed from selling sodas to selling cloths. He said he would earn 15,000 per month from the soda business but closed the shop at own pleasure.

9. The evidence by PW 2 was to the effect that being the director of Polucon Kenya Ltd, a company which undertakes laboratory testing and specializing in food analysis for the chemical and physical state, he was instructed by the respondent's counsel to analyses what was in the four soda bottles presented to him. He denied having interfered with the bottles and carried out his physical analysis and prepared a report at a fees of Kshs.6,960/= and Kshs.3,000 for court attendance. He produced the report and the receipts for his fees.

10. In cross examination, he said that he conducted physical analysis but could not know what was inside the bottles because he did not open them and advised that the liquids should have gone for the chemical analysis.

11. For the Appellant, DW 1, gave evidence to the effect that his duty at the company was to ensure that the products are compliant before

the same is released to the public for consumption. When shown the report and the bottles produced as exhibits he said that there must have been tempering with the bottles and that he could not confirm if the same were fit for human consumption. He then added that the Appellant did request for the bottles to be analyzed by the company but the respondent flatly refused. He said the report presented to court did not identify and explain the nature of the substances said to have been in the bottles and the contents of the products because it was a physical observation recommending further analysis.

12. In cross examination, the witness said he was a holder of a higher diploma in food technology. He said their products are made by a combination of water, sugar preservatives and gas sweeteners. He said machines are used to coke the bottles and that a bottle with foreign body will not be allowed to pass.

13. After evidence was closed and submissions invited, the plaintiffs' counsel made submissions in which he identified to court three issues for determination. One of the issues being whether the plaintiff had lost his business and proposed Kshs.150,000/= for compensation for loss of business, Kshs.350,000/= for general damages for breach of duty of care and negligence and special damages in the sum of Kshs.9,960/= giving an aggregate of Kshs.509,960/=.

14. For the defendant, it was submitted that the plaintiff was bound by his pleadings just like the court and that only the prayer sought could be considered for the determination. it was added that no injury had been proved as the plaintiff had not consumed the product said to have been adulterated with impurities.

15. For the loss of business it was submitted that no evidence was availed at all to show that the plaintiff indeed engaged in the business as alleged and how much was his income therefrom. It was underscored that negligence had not been proved without any conclusive expert report. A submission was made that the burden of proof had not been discharged and therefore that the suit was fit for dismissal.

16. In her judgement, the trial court after setting out the respective case, and without identifying any issues for determination and without finding any fault upon the appellant, awarded to the respondent general damages for breach of duty of care and negligence. That is the decision now challenged by the Appellant by the seven (7) grounds of appeal set out in the memorandum filed on the 29/5/2012.

17. Even when set out into seven grounds, I do consider the appeal to fault the judgement for having been contrary to the pleadings, evidence and therefore contrary to the law.

18. There is however ground 5 which I find not to be pertinent to this appeal when it challenges a finding on claim for damages for loss of business when no finding was made in that regard.

19. The law is that a prayer made and not specifically granted is deemed dismissed[1]. In this matter therefore whereas the respondent pleaded loss of customers and business and general damages without specifics of such damages, when no award was made in that regard that prayer by law, stood dismissed.

20. The crux of the appeal therefore remains to gravitate around grounds 1, 2, 3, 4, 6 & 7. I will deal with grounds 1, 2, 3, 4 & 6 together and then handle ground 7 separately.

21. I take the view that grounds 1, 2, 3, 4 and 6, calls upon the court in its mandate, as a first appellate court, to re-evaluate and re-examine the entire evidence, by way of a rehearsing, and to make on determination without having to agree with the decision of the trial court.

22. As said before, the respondent brought out a claim for loss of business and made a prayer for damages. When evidence was led nothing was availed to show that the respondent indeed undertook a business of selling the Appellants products or indeed any other business not even a basic requirement of the law of operating any business being business permit was produced in evidence. This court takes the view that for one to maintain and succeeded in a claim for loss of business, such litigant has an obligation and onus to prove the engagement in such a business. Without the proof of that rudimentary requirement, the very foundation of the claim is lost and the same thus cannot be maintained.

23. It is thus no surprise that the trial court did not find it worth of considering or commenting upon that aspect of the case. But, in doing that, the trial court committed a fundamental error. It was the court's duty to not only analysis the evidence given on the pleadings filed, but to additionally identify the issues for determination, give determination on the issue identified and reasons for such determination. That is when a court decision passes as a judgment as dictated by the provisions of Order 21 Rule 4 of Civil Procedure Rules. That, the trial court did not do and I believe the failure to isolate issue blurred the courts vision on the pleadings before it thus leading it to make an award on a cause not pleaded and prayers not made. That is one reason the judgment cannot be upheld but must be set aside.

24. The second reason the judgement cannot stand is the fact that a court of law is obligated to adjudicate only dispute placed before it by parties and not to imagine what the parties could have intended. What is not pleaded is a no-go-zone for the court. That is the only way to ensure that the court remain impartial and the right to a fair hearing bereft of ambush is achieved.

25. In the judgement appealed from, the court's determination is expressed in the following words:-

> **"I have considered both the Plaintiff's and the Defendant's evidence plus submissions by Counsel and the authorities cited in support thereof and would award the Plaintiff the sum of Kshs.50,000/= as cited General damages for breach of duty of care and negligence plus the sum of Kshs.9,960/- as Special damages being proved plus Costs and Interests".**

26. I have said that the cause pleaded was never proved. If not proved, it was due for dismissal on that account. That appears to have been

done inexplicitly. However, the award made for general damages for breach of duty of care and negligence was not pleaded and no particulars were given as is mandatory under Order 2 Rules 10. Having not been so pleaded there was no jurisdiction upon the court to make any determination or an award on it.

27. In ***GALAXY PAINTS LTD VS FALCON GUARDS LTD [200] eKLR***, the Court of Appeal reiterated the position of the law in this area and cited with approval the decision in ***Farnandes vs People Newspapers Ltd [1972] EA 63*** where the court held:-

> **"A civil case is decided on the issues arising out of the pleadings. No allegation of negligence against the appellant has ever been made and it was not open to the court to find negligence on his part"**

28. The decision before me merely makes an award without a finding of fault and cannot be upheld. I set it aside in entirety.

29. on ground 7, having found that the cause pleaded was not proved, it follows that no liability rests on the shoulders of the Appellant and therefore even the special damages which were proved could only be available for award upon some finding on liability. Without such a finding, there was no basis to award the special damages.

30. In the end, I do find the appeal wholly merited and I thus allow it in whole, set aside the entire decision by the trial court with cost thereof being awarded to the Appellant against the respondent.

Dated and delivered at Mombasa this 7th day of February 2020.

P.J.O. OTIENO

JUDGE

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[1] Section 7,explanation 5, civil Procedure Act