



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 311 OF 2013**

**TECHNO TRADE PAVILION LIMITED.....APPELLANT**

**-VERSUS-**

**KATE AZIZA ONG'AYO T/A NJIRAMU'S SMALL EATING HOUSE.....RESPONDENT**

***(Being an appeal against the judgment and decree of Honourable M.W. Wanjala (Mr.) (Resident Magistrate) delivered on 7<sup>th</sup> May, 2013 in Milimani CMCC No. 9552 of 2004)***

**JUDGMENT**

1. At the onset, Kate Aziza Ong'ayo T/A Njiramu's Small Eating House who is the respondent in the present instance, instituted a suit before the Chief Magistrate's Court by way of the plaint dated 27<sup>th</sup> August, 2004 and amended on 19<sup>th</sup> April, 2005 in which she sought for reliefs in the nature of damages for loss of business and damage to her property, injunctive orders, costs of the suit and interest thereon.
2. The respondent averred in her plaint that she was at all material times a tenant in the appellant's premises at Embassy House, Plot Number 209/4864 Door C-3 off Parliament Road in Nairobi ("*the subject premises*"), paying a monthly rental sum of Kshs.15,000/ together with service charge, water and electricity.
3. The respondent pleaded that on the 12<sup>th</sup> day of August, 2004 the appellant without any lawful basis locked the subject premises despite the respondent's continued use of the same for her cooking business, resulting in damage to the respondent's goods.
4. It was also the respondent's averment that upon gaining access to the subject premises on 18<sup>th</sup> August, 2004 she discovered that a few of her items were missing and further, that her water and electricity services had been disconnected.
5. The respondent pleaded that since then she has been unable to carry on with her cooking business, resulting in loss/damage.
6. Upon service of summons, the appellant entered appearance and put in its statement of defence dated 21<sup>st</sup> January, 2005 to deny the respondent's claim.
7. At the hearing of the suit, the respondent testified while the appellant summoned one (1) witness to support the defence case.
8. Upon considering the evidence and the written submissions filed by the parties, the trial court delivered judgment in favour of the respondent by awarding her a sum of Kshs.115,530/ for loss/damage together with costs of the suit and interest thereon.
9. Being aggrieved by the above decision, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated 5<sup>th</sup> June, 2013 the appellant put in the following grounds:
  - (i) ***THAT the learned trial magistrate erred in law and in fact when he allowed an oral amendment to the plaint by inserting a claim for special damages in the sum of Kshs.221,450/ in prayer (a) of the reliefs when the same was not pleaded in the body of the plaint.***
  - (ii) ***THAT the learned trial magistrate erred in law and in fact when he allowed the amendment to be made to prayer (a) of the plaint by inserting a claim for Kshs.221,450/ and proceeded with the suit without first requiring the court fees relating to the claim to be assessed and paid.***
  - (iii) ***THAT the learned trial magistrate erred in law and in fact in awarding the respondent a total sum of Kshs.115,530/ for what he called loss suffered by the respondent when the same was not specifically pleaded or proved.***

(iv) **THAT the learned trial magistrate erred in law in admitting in evidence the receipts dated 13/07/1995; 27/05/1995; 08/07/1995; 20/01/2002; 23/08/1995; 11/09/1999; 26/08/1995; 03/08/1995; 09/08/2011; 27/07/2004; 27/08/2003 and 26/08/1995 basing his award on the said receipts when the same bore no revenue stamps at the time of hearing and when he knew or ought to have known that the same were not admissible and could not form a basis for an award.**

(v) **THAT the learned trial magistrate erred in fact when he awarded the respondent a sum of Kshs.115,530/ calling it loss suffered by the respondent for utensils and foodstuff when there was no evidence to relate the receipts to the items or foodstuffs claimed.**

(vi) **THAT the learned trial magistrate erred in law and in fact when he found for the respondent and awarded her the sum of Kshs.115,530/ against the weight of evidence before him.**

10. This court issued directions to the parties to file written submissions on the appeal. The appellant submitted that the respondent did not satisfy the legal principle that special damages ought to be specifically pleaded and strictly proved. According to the appellant, the special damages awarded by the trial court in the sum of Kshs.115,530/ were neither pleaded nor proved by production of receipts, hence the trial court had no ground on which to award the same.

11. It was the appellant's contention that in any event, the receipts adduced by the respondent in evidence did not specify the items lost/damaged, neither did they bear the relevant revenue stamps to entitle her to an award of special damages and yet the trial court went ahead to award her special damages.

12. The appellant was equally of the view that the trial court ought to have required that the claim for special damages be assessed and paid but it did not do so.

13. In reply, the respondent argued that there was nothing hindering the trial court from allowing an oral amendment to the plaint, and cited the provisions of **Order 8, Rule 5(1)** of the **Civil Procedure Rules** that give courts the power to allow amendments as they deem just and at any point preceding entry of judgment.

14. The respondent also referred this court to the Court of Appeal's analysis in the case of **Mwakio v Kenya Commercial Bank Ltd [1987] eKLR** that:

*"In Tidesley v Harper, 10 ch D 396, Bramwell LJ said:-*

*"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blunder, he had some injury to his opponent which could not be compensated for by costs or otherwise." "*

15. It was the respondent's contention that following the requisite amendments, she availed receipts to quantify the loss suffered.

16. Moreover, according to the respondent, the assessment of court fees is a technicality which cannot and should not hinder the administration of justice and in any case, such fees can always be assessed at the time of issuing the decree.

17. The respondent also submitted that in awarding special damages, the trial court excluded the receipts not bearing revenue stamps hence the appellant's argument is unfounded.

18. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the evidence placed before the trial court. It is clear that the appeal lies against the twin issues of the oral amendment in respect to special damages sought in the plaint and the eventual award of Kshs.115,530/ under the same head. I will therefore deal with the appeal under the two (2) limbs.

19. On the limb to do with the oral amendment made, I note that the amended plaint did not include the particulars of loss of business suffered. The lower court record shows that when the parties attended court for hearing of the suit on 7<sup>th</sup> February, 2013 the advocate for the respondent sought for an adjournment and for leave of the court to amend the plaint to include the particulars of the loss suffered. The application was opposed by the appellant's counsel. Upon hearing the parties, the trial court declined to grant the respondent leave to amend the plaint owing to the age of the suit and the likely prejudice that would befall the appellant.

20. Going by the record, the respondent's advocate proceeded to make an oral amendment to prayer (a) of the amended plaint to include the sum of Kshs.221,450/ as damages for loss and damage to the respondent's property. The trial court allowed the oral amendment and the suit proceeded for hearing.

21. The relevant law on the amendment of pleadings is **Order 8** of the **Civil Procedure Rules**. In particular, **Order 8, Rule 3(1)** of the Rules provides that:

*"...the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."*

22. Moreover, **Rule 8** of the abovementioned Order stipulates that the court may hear and determine an oral application made under that Order.

23. From the foregoing, I am of the view that there was nothing hindering the trial court from exercising its discretion in allowing the respondent's oral amendment to its pleadings and in any event, had the appellant felt aggrieved by the oral amendment, it was at liberty to lodge an appeal against the same but did not. Instead, its advocate participated in the hearing to the end.
24. In relation to the above, I note that it is the appellant's submission that court fees ought to have been assessed as soon as the oral amendment was made.
25. The practice has been that where pleadings are amended, the assessment of court fees is done at the time of extracting the relevant decree and the relevant party is then required to pay such fees before the decree is extracted. It was therefore not necessary for the matter to proceed for assessment of court fees immediately following the oral amendment.
26. From the foregoing, I find no merit in the appellant's appeal touching on the above issues.
27. This brings me to the second limb of the appeal which has to do with the special damages of Kshs.115,530/ awarded to the respondent. In her testimony, the respondent stated that she entered into a license agreement with the appellant in which she would utilize the subject premises to conduct her food business which she bought from a Ms. Mary Kimani.
28. The respondent stated that on the material day, the subject premises was locked by the appellant's caretaker, Peter Ouma and that she lost a number of items as a result.
29. In cross examination, it was the testimony of the respondent that she would cook and sell foodstuff on the subject premises, on a business permit and a license.
30. Peter Ouma in his evidence as DW1 stated that he is one of the directors of the appellant company and further stated that the appellant sublet the subject premises to the respondent and an agreement was executed by the parties.
31. According to the witness, the respondent used to run a snack bar in the beginning but started doing heavy cooking which became hazardous.
32. DW1 testified that he requested the respondent to cease cooking on the subject premises but she did not comply, leading him to lock the subject premises.
33. In cross-examination, the witness gave evidence that based on the agreement, the use of the subject premises was restricted to a snack bar and that he never threw the respondent out of the subject premises as claimed.
34. In re-examination, it was the testimony of DW1 that he never locked the subject premises but stated that he terminated the license and evicted the respondent therefrom since she was a nuisance to other tenants.
35. Upon hearing the parties, the trial court found the termination to be irregular and awarded damages in the sum of Kshs.115,530/ for loss of foodstuff and utensils while disallowing the prayer for damages for loss of business.
36. The rule on special damages is that the same must be specifically pleaded and strictly proved. I have already established that pursuant to the oral amendment, special damages pleaded were in the sum of Kshs.221,450/.
37. I re-examined the receipts produced before the trial court, particularly those which have been brought to question by the appellant. The same were issued on various dates. Contrary to the position taken by the appellant, the receipts issued to the respondent list various items/goods to support the respondent's claim of the items/good missing from the subject premises.
38. The appellant contended that the special damages awarded were not strictly proved since the receipts tendered in evidence did not bear the revenue stamps.
39. It is apparent from the evidence that the receipts were not stamped upon payment. Turning to the Stamp Duty Act, Cap. 480 Laws of Kenya, I note that there is no specific provision requiring the mandatory stamping of receipts for them to be deemed admissible. I further wish to borrow from the court's holding in the case of **Benjamin Muela Kimono v Daniel Kipkirong Tarus & another [2015] eKLR** as follows:
- “Under the Stamp Duty Act, Chapter 480 Laws of Kenya it is not specifically provided that payment receipts in respect of services rendered must be stamped. Section 88 of the Act, in my opinion, it is the duty of the receiver of monies who has a duty to affix revenue stamps, not the payee – who cannot be penalized for omissions of the receiver...”***
40. In view of the foregoing, I am satisfied that the learned trial magistrate was correct in considering the receipts adduced by the respondent notwithstanding the absence of revenue stamps. I therefore find no basis for interfering with the learned trial magistrate's award on special damages and the same is maintained.
41. Consequently, the appeal is found to be without merit and is dismissed with costs to the respondent.

**Dated, signed and delivered at Nairobi online via Microsoft Teams this 6<sup>th</sup> day of May, 2020.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent