REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 75 OF 2011

EQUITY BANK LIMITED.....1ST APPELLANT

JOSEPH MURIUKI T/A AJOWARD ENTERPRISES.....2ND APPELLANT

JIBS ENTERPRISES.....3RD APPELLANT

VERSUS

PERPETUA MUTHONI NDUMA.....RESPONDENT

(Being an appeal from the judgment and decree in the Chief Magistrates' Court

Civil Case No. 613 of 2009 (Hon. J. Kiarie, Senior Principal Magistrate)

delivered on 24th May, 2011)

JUDGMENT

The respondent sued and obtained judgment against the appellants in the magistrates' court for a declaration that the appellant's seizure of the respondent's motor vehicle registration number KAS 943N (Toyota Hiace Matatu) (herein "the vehicle") was illegal and unlawful; he also got a permanent injunction restraining the appellants or their agents from selling, disposing or in any other way wasting the vehicle. The court also awarded the respondent damages for what I suppose was loss of user at the rate of Kshs 80,000/= per month from the 12th October, 2009 till such a time that the motor vehicle would be released to the respondent. She also got the costs of the suit and interest thereof.

As far as I can gather from the respondent's statement of claim, the genesis of the respondent's suit against the appellants was the seizure of the respondent's vehicle by the 2nd appellant at the instance of the 1st appellant apparently in exercise of its power of sale to recover a loan due to it. It was the respondent's case that she was not privy to any loan agreement with the 1st appellant and therefore the attachment of her vehicle was unlawful. The 3rd defendant was sued because the vehicle was held in its yard after it had been seized.

The respondent pleaded that prior to its seizure, the vehicle was engaged in transport business earning her a daily income of Kshs. 10,000/= from the general passenger transport and Kshs. 5,000/= from transport of children to and from school. It also earned her a weekly income of Kshs. 5,000/= from hire services. It is for this reason that she successfully prayed for loss of user, amongst other prayers.

The appellants contested the respondent's claim and filed a joint defence in that regard. However, none of them testified when the respondent's suit came up for hearing. As a matter of fact, one of the reasons given by the learned magistrate for the success of the respondent's suit was failure by the defence to provide evidence to controvert the respondent's claim.

Be that as it may, the appellants appealed against the decision of the lower court and filed a memorandum of appeal on 24th June, 2011. They raised the following grounds:

1. The learned magistrate erred in law and in fact by holding that the respondent had proved her case on a balance of probabilities.

2. The learned trial magistrate erred in law and in fact by holding that the respondent had proved damages for loss of user at the rate of Kshs.80,000/= per month.

3. The learned magistrate misdirected himself by failing to take into account that damages for loss of user are in the nature of special

damages and must be specifically pleaded and strictly proved.

4. The learned magistrate erred in law and in fact by taking into account evidence that was not adduced at the hearing by assuming that the respondent's vehicle earned him a monthly income Kshs. 50,000/= from passenger transport business and Kshs. 30,000/= from school transport yet there was no documentary proof of either of these incomes.

5. The learned magistrate award was manifestly high in the circumstances as to amount to an erroneous estimate of any loss or damage suffered by the respondent.

6. The learned magistrate misdirected himself in both law and in fact by reaching a decision that was against the weight of the evidence.

As noted, only the respondent and her two witnesses testified. According to the respondent's testimony, her vehicle was seized at Nanyuki by the appellants or their agents on allegations that the vehicle had been offered as security for a sum of money borrowed from the 1st appellant by one Francis Ndichu. She testified that she neither knew nor was she related to the purported borrower in any way.

It was also her evidence that prior to the attachment of the vehicle, it earned her the sum of Kshs. 15,000/=; however, she was not specific when this money was earned or how often it was earned. One of her witnesses, Lawrence Mugambi Rutere (PW2) confirmed that the respondent's vehicle had been auctioned to one Charles Nyaga Njoroge in execution of a court decree before the respondent bought it.

The respondent's final witness was the motor vehicle driver (PW3) employed in that capacity by the respondent. He was driving the vehicle when it was attached. He testified that on average, the income from the vehicle was Kshs. 12,000/= per day but part of that income was spent on daily expenses.

In his assessment of the evidence, particularly as far as proof of the respondent's claim for loss of user was concerned, the learned magistrate had this to say:

> ***PW2 said he used to drive it (that is, the respondent's vehicle). From matatu business the matatu brought in over Kshs. 12,000/= a day he said. He said on Sundays it did extra business and school children transport raked in extra income. They made payments for stage and fuel as well as his wages. His exhibits the deliveries do not come out clearly how the earnings are shared out between motor vehicle owner, and the sacco for stage and office expenses. Taxes paid, if any, have not been accounted for either. At some days, a figure of Shs. 8000/= is shown. There are gross figures. Wear and tear expenses not factored either.***
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> ***It would be reasonable to assume the net earnings in a day would be Shs. 2000/=. Nature is unpredictable. Earnings at Shs. 50,000/= a month from Matatu business, and Shs. 30,000/ a month from school transport during school months. Nothing to prove transport alleged on Sundays. It is not enough to say motor vehicle used to bring in these earnings. You have to tender prove of that.***

A casual perusal of this statement shows that in effect, the learned magistrate was satisfied that the respondent had not proved her claim on a balance of probability. This is clear from his doubts on the veracity of the exhibits produced in support of the claim, and which I note were purportedly produced by the respondent's driver rather than the respondent herself. It is also clear from this statement that he also doubted the respondent's net income. He concluded, rightly in my view, that a mere claim of income without proof was not sufficient.

Yet despite these factual findings, the learned magistrate curiously proceeded to hold that the respondent had proved her claim on a balance of probability and granted all her prayers except the one for general damages. This resolve by the learned magistrate was not only inexplicable but was also obviously irreconcilable with his previous findings. He could not doubt the basis of the respondent's claim and, in the same breath, find that the claim had been proved to the required standard.

If I have to say anything more on this issue, particularly on the claim for loss of user, I can only reiterate that any amount due to a claimant under the head of loss of user is ascertainable and quantifiable; it is in the nature of special damages which must be specifically pleaded and proved. It is not an award that is left for conjecture and neither can the court assume the award as the learned magistrate purported to do. In his own words, he stated "i***t would be reasonable to assume the net earnings in a day would be Shs. 2000/=."*** This was obviously wrong and untenable in law, and, in any event, assuming the learned magistrate was right, it is not clear how he ended up with a figure of Kshs. 80,000/= as the monthly income if the daily income was Kshs. 2000/=.

Order 2 rule 10 of the **Civil Procedure Rules** makes reference to such claims that must be specifically pleaded or particularised; it says:

> ***10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.***

In **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288** at page 291 the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus: -

> ***"It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."***

And the same Court in **Civil Appeal No. 25 of 2013 Macharia Waiguru versus Murang'a Municipal Council & Another (2014) eKLR** in which the question of a claim for loss of user was addressed, stated as follows:

> ***"On the issue relating to the claim of Kshs. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended plaint indicates that this is a claim for Kshs. 300,000/= and loss of user which is a claim for special damages.***

The Court then cited with approval its earlier decision in the case of **Siree –v- Lake Turkana El Molo Lodges (2002) 2EA 521** where it had said:

> ***"This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages"***

It was the court's view that damages for loss of user are quantifiable meaning that they can only be pleaded as special damages and failure to plead them as such is fatal to a claimant's claim under this head; in this regard the court relied on its decision in ***Maritim & Another –v- Anjere (1990-1994) EA 312 at 316,*** where it was emphasised:

> ***"In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."***

Having made references to its earlier decisions on the question of special damages and in particular damages for loss of user the Court came to the conclusion that:

> ***"It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given."***

In the respondent's case, reference was made to loss of user but the particulars were, in my humble view, vague. However, even if damages under loss of user had been specifically pleaded and particularised, they were not proved. The learned magistrate fell into error and misapprehended the law by acting on his own assumptions of what he supposed to be the respondent's income instead of insisting on evidence or proof of loss of user.

For the reasons I have given, I am persuaded that the appellants' appeal is meritorious and it is hereby allowed with costs.

Dated, signed and delivered in open court this 18th day of January, 2019

Ngaah Jairus

JUDGE