



REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

HIGH COURT CIVIL APPEAL CASE NO. 37 OF 2015

JOSEPHAT MALONDO MBANGU.....APPELLANT

VERSUS

ALEXANDER KALUYU MWOVE.....RESPONDENT

(Being an Appeal from the original Judgment in Kitui Chief Magistrate's Court Civil Case No. 202 of 2006 by Hon. A. G. Kibiru P M on 27/09/11)

J U D G M E N T

1. **Josphat Malondo Mbang**, the Appellant herein sued **Alexander Kaluyu Mwove**, Respondent, seeking recovery of a liquidated sum of **Kshs. 476,000/=**, cost and interest. It was pleaded that the Respondent installed a cereals grinding machine (Posho Mill) and carried out all business of grinding cereals. Over the years the vibrations emanating from the Posho Mill affected the walls of the Appellant's building on **Plot Number 229, Kabati Market** to crack leading to infirmity of the building; damage that was assessed at the sum claimed.

2. In his statement of defence the Respondent denied liability.

3. The learned trial Magistrate considered evidence adduced and reached a finding that the claim was for special damages which were not pleaded and that the Appellant had not incurred the damage as he failed to prove existence of cracks and that they were exclusively caused by the defendant's Posho Mill.

He concluded by stating that having consented to the installation of the Posho Mill he was stopped from turning back on his word consequently he dismissed the claim.

4. Being aggrieved by the Judgment of the Court, the Appellant Appeals on grounds that: The finding that the sum claimed was special damages which required specific proof was erroneous; the Appellant was entitled to get back his premises in the condition and state it were at the beginning of the lease and that its state having been affected and destroyed by the Respondents Posho Mill entitles him to the value of the repairs of the premises and that the findings of the learned Magistrate were against the weight of evidence.

5. Directions were given in the matter where the Appeal was to be canvassed by way of written submissions. Only the Appellant filed written submissions through the firm of **Kalili & Company Advocates** where he urged that the claim by the Appellant was not for an expense already incurred by a claim that was occasioned to his property in order to restore it to its original state. The value of the damage was assessed and a report produced in Evidence. The claim was for material damage and not special damages. He relied on the case of **Nkuene Dairy Farmers Co-operative Society Limited vs. Ngacha Ndeiya (2010) eKLR** where the Court Stated as follows;

“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged items to as near possible condition as it was before the damage complained of. An accident assessor gave details of the parts of the respondents vehicle which were damaged. Against each of them, he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”

That the Appellant did prove that the cracks in the shop were caused by vibrations of the Respondents Posho Mill;

6. This being the first Appellate Court, I am duty bound to re-evaluate the evidence, assess it and come to my own conclusion bearing in mind the fact that I did not have the opportunity of seeing or hearing witnesses who testified at trial. (**See Peter vs. Sunday Posts Limited (1958) EA 424**).

7. Looking at the plaint the liquidated claim was pleaded in paragraph 7 and 8 at a sum for assessed damage. It was not considered as special damages. In dismissing the claim, the trial Magistrate was of the view that the claim was for special damages which must have been pleaded

and specifically proved. He further argued that there was no proof of existence of the walls and cracks therein but contradicted himself by stating that the installation of the Posho Mill was with the consent of the Appellant. It was in doubt that the Respondent occupied the Appellants building and he installed a Posho Mill that he operated.

8. Evidence was tendered of an assessor's report of the repair works done to the building by the **Nyangamy Limited Contractors**. In the case of **Nkuene Dairy Farmers Co-operative Society Limited vs. Ngacha Ndeiya (2010) eKLR** the Court of Appeal stated that:

“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged items to as near possible condition as it was before the damage complained of. An accident assessor gave details of the parts of the respondents' vehicle which were damaged. Against each of them, he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty.”

9. This having been a material damages claim it was not necessary to demonstrate that indeed the costs were incurred, the report was sufficient proof on a balance of probabilities. The Appellant was not required to specifically prove the claim by production of receipts like in the case of special damages.

10. In the premises the Appeal succeeds. The Judgment of the Lower Court is set aside. In the result, Judgment is entered for the Appellant in the sum of **Kshs. 476,000/=** plus costs of the suit in the Lower Court and on Appeal.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2019.

L. N. MUTENDE

JUDGE