



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

ELDORET

CIVIL SUIT NO. 67 OF 1999

DR. OMAR J. ALY.....PLAINTIFF

VERSUS

UCHUMI SUPERMARKETS LIMITED.....DEFENDANT

JUDGMENT

[1] The Plaintiff, a medical practitioner, then based in Eldoret Town, filed this suit on **1 April 1999** against the Defendant, **Uchumi Supermarkets Limited**, claiming Special Damages, General Damages Costs and interest. He was at all material times operating his medical practice on the 1st Floor of the building then known as **Eldo Centre** in Eldoret Town, below which, on the ground floor, was the Defendant's supermarket. The Plaintiff's cause of action, as pleaded in Paragraph 5 of the Plaint, was that on or about the **11th December 1998**, the Defendant carelessly and negligently, by itself and/or through its servants and/or agents, caused a fire to be lit in the said supermarket and failed to control and/or maintain the said fire, such that it gutted the supermarket premises and spread to the Plaintiff's premises, causing destruction to his clinic together with all the fixtures, fittings and loose assets, documents and all the equipment and tools of trade therein. It was further the contention of the Plaintiff that, on account of the damage, he suffered mental anguish, loss of clientele, goodwill as well as income; and that he is therefore entitled to recover Special and General Damages from the Defendant on account of his loss.

[2] The Defendant filed its Defence dated **20 July 1999**, admitting that both the Plaintiff and the Defendant were tenants at **Eldo Centre**; and that a fire occurred thereat on **11 December 1998** that burnt up the premises, leaving a trail of destruction in its wake. The Defendant however denied that it was in any way negligent or that it was liable for the ensuing loss. According to the Defendant, the fire was accidental and therefore the doctrine of *Res Ipsa Loquitur* had no application to the facts of the case. It further invoked the provisions of **The Fires Prevention (Metropolis) Act, 1774**, a statute of general application, applicable to Kenya by virtue of **Section 3** of the **Judicature Act, Chapter 8** of the **Laws of Kenya**. The Defendant, thus, denied that it had kept combustible or hazardous material on the premises or that it failed to take adequate precaution as alleged or at all.

[3] The Plaintiff thereafter sought leave and was allowed to amend his Plaint on the **30 October 2000**. The effect of the amendment was to explicitly set out the particulars of Special Damages claimed by the Plaintiff to include loss of office fittings and furniture; loss of office reception, clinical partitioning and painting thereto; and loss of equipment and the Plaintiff's tools of trade, all amounting to **Kshs. 291,200/=**. The suit was thereafter fixed for hearing before **Hon. Nambuye, J.** (as she then was) and was part-heard between **11 July 2001** and **24 March 2004**, when it was taken over by **Hon. Dulu, J.** and an order made for a *de novo* hearing.

[4] Hearing commenced in earnest on **25 January 2006** before **Hon. Ibrahim, J.** (as he then was) but stalled in **2013** to await the decision of an appeal to the Court of Appeal in a case arising from the same fire incident that had been determined by **Hon. Ibrahim, J.** in the interim; being **Eldoret Civil Appeal No. 318 of 2013: Uchumi Supermarket Limited vs. Toigoi Investment Limited**. The said appeal was determined on **29 July 2016**; thereby settling the issue of the Defendant's liability in negligence for the fire. The Court of Appeal held, at paragraphs 46 and 47 of the Judgment, that:

“Based on our own review of the evidence, we think the Judge was right in taking the view that the respondent had discharged its burden of proof. Based on the testimony of Joseph Ouma Olweny (PW1), Kamal Mansukhlal Manek (PW2), Robert Ochieng Odiwouri (PW4), Keith Ormand (PW12), and Henry Kiprono Kosgey (PW10) “we think it more probable than not”, to borrow the words of Lord Denning in Miller vs. Minister of Pensions, [1947] 2 All ER 372 that the cause of the fire was attributable to the cooking stove found in the store area where the fire extinguisher belonging to Kamal Mansukhlal Manek, (PW2), had initially been used to extinguish a fire that, as it turned out, was not in fact extinguished. We cannot therefore say that the finding by the Judge as to the cause of the fire is perverse as not being supported by evidence. In our judgment therefore, the finding on liability for negligence on the part of the appellant is well founded as there was sufficient evidence, on a balance of probabilities, to support the conclusion reached regarding the cause of the fire.”

In the premises, what remains, and what I was asked to tackle, is a determination on the quantum of damages payable.

[5] Regarding his loss, the Plaintiff testified that, on the date in question, he had left the mosque at about 1.30 p.m. after prayers on a Friday, and that as he was walking to his clinic at **Eldo Centre**, he saw the building ablaze. He rushed in with his secretary to see what they could salvage but were turned away by the police for their own safety. He thereafter prepared a list of the items which were in the office which he produced as **Exhibit 1**. He also produced a Pro Forma Invoice in respect of the office fittings and furniture supplied by **Kamili Crafts and Designers**. In total, the Plaintiff produced 15 documents to prove its claim. Of these, only five related to the Special Damage component of his claim; namely **Exhibits 1, 4, 6, 7 and 14**. Those exhibits are in proof of the following claims, which were specifically pleaded in the Amended Plaintiff:

- [a] Loss of office fittings and furniture - Kshs. 178,000/=
 - [b] Loss of office partitions and painting - Kshs.61,200/=
 - [c] Loss of equipment and tools of trade - Kshs. 52,000/=
- Total - Kshs. 291,200/=**

[6] Accordingly, on the basis of the Plaintiff's uncontroverted evidence herein, it is my finding that the Plaintiff is entitled to the Special Damages of **Kshs. 291,200/=** only; there being no basis laid in the Plaintiff for his claim to Special Damages for loss of income in the sum of **Kshs. 167,786/=**; Purchase from **Eldochem** of **Kshs. 51,900/=** and the claims for **Kshs. 128,000/=** and **Kshs. 61,200/=** allegedly paid to **Kamili Crafts and Designers**; for they were never specifically pleaded in the Amended Plaintiff. Needless to say, that it is a cardinal principle that special damages must be specifically pleaded. In **Hahn vs. Singh [1985] KLR 716**, this principle was restated thus:

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves...”

[7] In terms of General Damages, Counsel for the Plaintiff proposed an award of **Kshs. 5,000,000/=**, submitting that the said amount would suffice to compensate the Plaintiff for his loss and suffering, including loss of his tools of trade, documents and loss of goodwill. He conceded that **“...it might be difficult to quantify the damages in monetary terms...”** He referred the Court to the following authorities:

- [a] **Daniel Paul Onkangi & 3 Others vs. Kenya Power & Lighting Company Limited;**
- [b] **Toiyo Investments Limited vs. Uchumi Supermarkets Limited [2012] eKLR;**
- [c] **Rosemary Vassaux vs. Kenya Power & Lighting Company Limited [2014] eKLR.**

[8] However, all the three authorities seem to support the position that where specific claims are made by way of special damages in respect of the damage arising from the fire, no claim for general damages is tenable in respect of the same loss. I note however that in this instance, not all the losses were quantified or specified by the Plaintiff in the Amended Plaintiff. For instance, he adduced evidence to support his contention that his tools of trade, valued at **Kshs. 51,900/=** got destroyed in the fire along with his certificates, books and documents, including patients' records. Though the Plaintiff was unable to quantify their worth in monetary terms, there is no dispute that the documents, some of which are irreplaceable, were of value to him. He also testified that he had miscellaneous items worth about **Kshs.20,000/=** in the clinic which were all destroyed.

[9] The Plaintiff also adduced uncontroverted evidence to prove that he had to relocate to other premises, which relocation was not immediate; and that in the meantime, he lost income, clients and goodwill in respect of the **Eldo Centre** clinic. His evidence was that he used to earn **Kshs. 167,786/15** per month and in proof thereof, he exhibited his bank statements and a worksheet, indicating how he arrived at that figure. The Plaintiff also testified as to the mental anguish and suffering he experienced as a result of the damage to his clinic. Thus, taking all these into account, I would award the Plaintiff **Kshs. 2,000,000/=** as General Damages for his loss and suffering.

[10] In the result, Judgment is hereby entered for the Plaintiff in the total sum of **Kshs. 2, 291,200/=** together with costs of this suit and interest thereon at the applicable court rates from the date of Judgment till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF JULY, 2019

OLGA SEWE

JUDGE