REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MURANG'A

CIVIL APPEAL CASE NO.133 OF 2013

THE COUNTY COUNCIL OF MURANG'A....APPLICANT

-VERSUS -

PHILIP W. KIMANI WAIGANJO.....RESPONDENT

(*Being an appeal from original conviction and sentence in* ***Civil Case No.319 of 2005 by Hon. Gathuku, Resident Magistrate on 28th November, 2011)***

JUDGEMENT

1. Phillip Waiganjo Kimani, the Respondent, sued the Appellant. The County Council of Murang'a, in its various capacities, seeking a declaration that its action of towing and detaining his motor-vehicle registration number KAJ 203J was unlawful and irregular. He claimed: loss of business profits at Kshs. 6,300/= per day from the 23rd July 2005 to a duration that was to be determined by the Court, costs and interests.

2. It was averred that the motor vehicle was being driven along Othaya - Nyeri route when the employees of the Appellant, while devoid of any legality, right or any reason stopped it and caused it to be towed to the County Council of Murang'a compound, and after that made the Respondent suffer loss of business earnings.

3. In its defence, the Appellant averred that its employees impounded the subject motor vehicle for violating by-laws therefore their action could not have been illegal or activated by malice. It denied the alleged loss suffered.

4. In its finding the Trial Court opined that the case was proved on a balance of probabilities therefore awarded the Respondent Kshs36,000/= being loss of business, costs and interest.

5. Aggrieved, the Appellant appeals on grounds that; -

> (i) The learned magistrate erred in law and fact when he purported to award damages that were neither specifically pleaded nor strictly proved.
>
> (ii) The learned magistrate erred in law and principle in holding that the consent orders had the effect of making the Appellant's action illegal.
>
> (iii) The learned magistrate erred in law and fact when he sought to quantify loss of user as if he were a party in the proceedings.

6. The appeal was canvassed by way of written submissions.

7. It was argued by the Appellant that the Respondent not only failed to specifically plead the damages but also failed to specifically prove the same having produced unaudited accounts that were pieces of paper that could not be relied upon.

8. In that regard; he relied on the case **of Bonham Carter -vs- Hyde Park Hotel Limited (1948) 64 T.L.R. 177 where Lord Goddard** stated thus;-

> ***"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the Court, saying "This is what I have lost, I ask you to give me these damages'. They have to prove it."***

And Ryce Motors Limited & Another –vs- Muriuki (1995 - 1992) 2 EA 363 where it was stated thus; -

> *"The Learned Judge had before him by way of the Plaintiff's evidence exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the Court to say these are the accounts upon which the Court can act…"*

9. The Respondent on his part relying on the same authorities argued that special damages were pleaded and proved and since at the inception of the suit the subject motor vehicle was still detained a fixed total sum claimed could not be fixed. That, the documents produced termed as "mere piece of papers" were not disputed during the cross-examination and it was not challenged. That, their validity as evidence was not in question and production in evidence was not opposed and/or challenged.

10. This being the first appellate Court, I am duty bound to re-examine afresh evidence and material tendered before the trial Court and draw my own conclusion, but I must be slow in overturning the decision of the trial Court bearing in mind that I neither saw nor heard witnesses who testified to be able to assess their credibility (**See Selle –vs- Associated Motor Boat Company Limited (1968) E.A 123).**

11. The gravamen of the Appellant is that the learned trial magistrate awarded special damages that were not specifically pleaded and/or proved. In the case of **Hahn -vs- Singh Civil Appeal No. 42 of 1983 (1985) KLR 216, the Court of Appeal held that:**

> *"Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."*

12. It is argued that in paragraph 6 of the plaint, it is pleaded that the plaintiff suffered loss of business earning at the rate of Kshs. 6,300/= per day from 23/7/2005 till release of the motor vehicle or as the Court would order.

13. It is further contented that at the inception of the suit the Respondent could not put a fixed total sum to be claimed as total damages but no explanation was given why the plaint was not amended to reflect what specific sum was being claimed after the motor vehicle was released 2-3 days later. There was no precision as to the exact special damages that were being claimed.

14. On the issue of the damages claimed being specifically proved, the Respondent had the duty of adducing credible evidence to the satisfaction of the Court of proof of the same. It is submitted for the Respondent as follows; -

> **"Since we were not the advocates on the record during the prosecution as up to its conclusion, we are inclined to agree with the learned magistrate that the documents produced in support of the daily earnings of the motor vehicle in question despite being termed as "merely pieces of paper" by the defendant/ Appellant were not disputed during cross examination…… or opposed and/ or challenged……"**

15. It was further argued that the documents were sufficient proof of specific damages

16. The Appellant however contends that what was produced did not prove loss of earnings as the papers adduced were not authored by an expert in a field of accounting

17. The Respondent adduced in evidence what he referred to as worksheets authored by the conductor. According to him he lost Kshs. 6,300 per day making it a total of Kshs. 36,800/= for the six (6) days that the motor vehicle remained impounded after the driver was charged in a Court of law, for contravening By-laws

18. It was the duty of Court to analyze evidence adduced and come up with the decision as to whether or not it was sufficiently useful to prove the fact before it. Indolence on the part of the party to let evidence that should have been challenged to be produced without any challenge does not bar the Court from having an in-depth look at the evidence and ultimately interpreting it. An expert witness may have been necessary for purposes of proving the alleged loss of earnings. The five (5) leaves of what was referred to as "P.S.V. daily worksheet" dated 20th, 21st, 22nd, 29th and 30th July 2005 with different figures ranging from Kshs. 5815/= to Kshs. 6300/= was not sufficient evidence to prove purported loss of income. In the Ryce Motor Case (Supra) it was observed thus

> *"The piece of paper produced as evidence of income could not be accepted as content accounting procedure. They did not constitute proof of special damages"*

19. From the foregoing. I am of the view that without evidence of some accounting history and generally, process, the Court fell into error in relying on the worksheets adduced in evidence as correct and as having proved the claim.

20. Therefore, I allow the appeal by setting aside the order of the trial Court which I substitute with an order dismissing the suit with costs at the lower Court. The Appellant shall have costs of this appeal in any event.

21. **It is so ordered.**

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 10TH DAY OF SEPTEMBER, 2019

L. MUTENDE

JUDGE