



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 66 OF 2019

(CORAM: F. GIKONYO J.)

RUTH WACHERA KARANJA.....APPELLANT

Versus

JAMES MIRURI NGANGA.....1ST RESPONDENT

JOSEPHINE WAITHERA NGANGA.....2ND RESPONDENT

VALPRO TOOLS & GENERAL SUPPLIERS LTD.....3RD RESPONDENT

EQUITY BANK LIMITED.....4TH RESPONDENT

(Appeal from the judgement of the Hon. Mrs. A. M. Obura, SPM in Nairobi in CMCC No. 1054 of 2015 delivered on 18/1/2019)

JUDGMENT

1. The trial court in the judgment delivered on 18.1.2019 in Nairobi in CMCC No. 1054 of 2015, found that the respondents may have acted fraudulently and the 4th defendant bank was negligent thus aiding in the loss of funds in issue. Further the trial court found that the appellant did not substantiate how the entire sum should be paid by the 4th respondent. In addition, the trial court found that there was no computation of the plaintiffs input in the business and prayer to recover the said sum from the 1st defendant who withdrew the money. In the end the court awarded general damages of Kshs. 500,000 against the 4th defendant. The appellant's case therefore partly succeeded.

2. The appellant was aggrieved by part of the said judgement and filed this appeal citing six (6) grounds in the memorandum of appeal filed on 12/2/2019. The grounds may be collapsed into one: ***That the learned magistrate erred in law and in fact by failing to order for the refund of Kshs. 3,727,500/=***

ANALYSIS AND DETERMINATION

3. I will now perform the duty of first appellate court; re-evaluate the material before court and make own decision on the issue at hand.

4. It was the appellant case that in May 2010 the appellant joined the 1st and 2nd respondent as a partner in their business, VALPRO TOOLS & GENERAL SUPPLIES. In June 2010 she was made a signatory to their account held at Equity Bank, Tea Room branch. It was her case that she gave instructions to the bank that either of the 1st or 2nd defendant could sign for any transactions with the Plaintiff being the mandatory signatory. However, between 2010 and 2014 the 1st, 2nd and 4th Defendants fraudulently transacted upon the said account in the sum of Kshs 3,807,500.

5. The appellant submitted that under the principle of damages encapsulated in “*restitution in integrum*” the court was obligated to order the return of the monies irregularly withdrawn back to the appellant in order to reinstate her to the position she was prior to the wrong committed. She cited the ***Halbury's laws of England*** Volume 12 Para 1174 where it states: -

‘In cases of breach of contract the contract breaker is responsible and responsible only for resultant damage which he ought to have foreseen or contemplated when the contract was made as being not unlikely, or liable to result from his breach or of which there was a serious possibility of real danger.’

6. Therefore, she concluded that, since the loss of funds was an event naturally flowing from the 4th appellant's negligence and/or breach of trust then the 4th respondent ought to be ordered to refund the money.

7. The appellant further contended on computation; that the trial court having found that the 4th respondent through its negligence allowed the loss of funds and having found that the appellant was a bona fide signatory of the account then the court should have proceeded to order for refund of the funds lost. She argued that in any event, the issue of computation was not raised by any of the parties thus the trial court overstepped its mandate by framing a new issue for determination yet it was not pleaded. In support she relied on the case of **Independent Electrol and Boundaries Commission & Anor v. Stephen Mutinda Mule & 3 others (2014) eKLR**

8. The appellant in her witness statement and evidence in chief confirmed that she would source funds for the business and had invested a lot in it, evidence which was uncontroverted.

9. The 4th Respondents took a different view of the matter. It argued that the learned magistrate did not err by refusing to grant the said sum as the appellant failed to give notice to the 4th respondent of the cessation of business of the 3rd respondent and also failed to give notice to the 4th respondent of the incorporation of Valpro Tools and General Supplies Ltd. They urged that a customer owes a duty of disclosure to the bank which the appellant failed to exercise. Additionally, the appellant was aware of the withdrawals done by the 1st and 2nd respondents as it is known that they are relatives of the appellants and only seeks to use this as an opportunity to defraud the 4th respondent.

10. I have examined the facts and the record. The refund of Kshs. 3,727,500/= is the major point in controversy. Such item is categorized as Special Damages. I find support in **Siree -v- Lake Turkana El Molo Lodges (2002) 2EA 521** where the court stated:

“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”

11. Such special damages must not only be specifically pleaded but also so proved. See **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288** at page 291 where the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated in the following manner: -

“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.”

12. The Appellant made a general prayer that she wanted a refund of Kshs. 3,727,500/=, monies which were in the account held by the 4th respondent. She ought to have specifically proved the loss of the fraud or breach of duty in the sum of Kshs. 3,727,500. The appellant herein stated that she was one of the partners of VALPRO TOOLS & GENERAL SUPPLIES. She never said how much she had invested in the said company nor plead to recover her investment. Her case particularly on refund required strict proof of the stated sum. Therefore, given due to the nature of her claim, computation of loss is inherent to the claim and became necessary in the evaluation of the evidence adduced. Accordingly, computation was not an invention of the trial court as it has been claimed by the Appellant. Proof of special damages depends on the nature and circumstances of the case. See the case of **ZACHARIA WAWERU THUMBI -VS- SAMUEL NJOROGI THUKU [2006] eKLR**, where the court made the following observations which are relevant in this appeal;

“The law is clear on the head of damages called special damages. Special damages must be both pleaded and proved before they can be awarded by the court. Law Reports and text books on torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in HAHN -VS- SINGH, Civil Appeal No. 42 of 1983 [1985] KLR 716 at page 717 and 721 where the learned judges of appeal – Kneller, Nyarangi JJA and Chesoni Ag. J.A. held that special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequences 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. If I was to explain or define special damages to a layman, I would say “they are reimbursement to the plaintiff/victim of tort for what he has actually spent as a consequence of the tortious acts complained of.” This point cannot be overstressed. A claimant of special damages must not only plead the claim but also go further and strictly prove, usually by documentary evidence that he actually spent the sum claimed.” (Emphasis mine)

13. I therefore do not find anything on which to disturb the finding of the lower court in this respect.

14. But before I close, I should address one disturbing submission by the Bank. The Bank is bound by signing instructions given by the customer. The Bank cannot alter the instructions merely because its employees know the signatories are related or are close or blood relatives.

15. Having said that, the consequence of my analysis herein is, that the appeal is not merited and is dismissed. Each party to bearing its own costs.

16. It is so ordered.

Dated and signed at Meru this 20th day of November 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 4th day of December, 2019

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L. NJUGUNA

JUDGE