



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC. COMM. 170 OF 2002

FRANK M. NGWATU.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANTS

J U D G M E N T

1. The plaintiff sued the defendant by a plaint dated 24/4/2002 and later amended on the 27/11/2015 and claimed from the defendant damages expressed as:-

- a. Principal damage done by the inferno in the fateful day Ksh.4.5 million shillings.**
- b. General damages to date Kshs.125,000,000**
- c. General damages and interest thereon**
- d. Costs of the suit and interest at court rates**

2. The facts, the plaintiff claims to lead to the defendant's liability are that on or about the 20/8/2001 at about 1.00pm there occurred an abrupt power surge which was caused by an electric fault on a nearby pole that caused an inferno that completely destroyed the plaintiff's business described as firms named; Image Investments, Image tours, curio shop, clothes boutique, jewellery shop and Tours and Safari Office, property and real estate office and Jewellery/Gemstone broker and others assets.

3. It was further pleaded that the fire was wholly caused by negligence of the defendant, its agents and or servants. The particulars of such negligence were given as:-

- a. Permitting a high voltage current to flow and to cause an inferno within the said premises.**
- b. Permitting the voltage/electric current to surge to cause the said damage.**
- c. Failing to provide any or safe system of electric voltage to pass through pole line serving the plaintiff's said premises.**
- d. Failing to remedy the electric power fault in time even after repeated calls to do the same.**
- e. Allowing the faulty electric power voltage to cause the inferno that gutted down the shopping mall.**

4. In support of such claim the plaintiff did file a list of documents and witness statements by the plaintiff himself, Elizabeth Musembi and Peter Nzeke Munyao and Joseph Muindi. The documents filed included photographs of the plaintiffs business and staff, a loose leaf from a cheque book, claim forms for plaintiff dormant accounts at Kenya Commercial Bank, patient card from Kwale District Eye Clinic as well as Lighthouse for Christ Eye Centre and Silanga dispensary and police abstract from Pangani Police Station indicating loss of documents and another from Tanzania Police Force, statement of accounts dated 4.12.2014 and Telephone bills for the year 2004.

5. To the plaintiff the defendant filed a statement of defence dated 17/5/2002 and later amended on 18/12/2015. In that defence the defendant denied all the allegations by the plaintiff against the defendant and in particular the occurrence of any accident or a power fault occasioned by any negligence on its part or on the part of its agents or servants and in fact denied all the particulars of negligence pleaded.

6. In the alternative and without prejudice the defendant pleaded that if any accident ever occurred which, in any event was denied, then such was substantially contributed to and or voluntarily assumed by the plaintiff. Particulars of such contributory negligence or voluntary assumption of risk were given. The defendant further pleaded inevitable accident and then denied all the particulars of loss pleaded, put the plaintiff to strict proof of the claim as well as notice of intention to sue. The defendant however did not file any witness statements nor documents despite having been given leave to do so.

7. Although the plaintiff filed a list of 11 issues for determination and this court taking notice that the plaintiff choose to act in person after having been represented by counsel and despite hints by the court to consider engaging an advocate, to the court the issues that present themselves for resolution by the court are as follows:-

- i. Whether or not the plaintiffs premises were destroyed by fire on the 20/8/2001.**
- ii. Whether that fire was occasioned by any negligence for which the defendant is liable.**
- iii. Whether the plaintiff suffered any loss as a result of such fire.**
- iv. What is the quantum of such loss?**
- v. Who should bear the costs of this suit?**

Evidence by the plaintiff

8. At trial, although the plaintiff had filed witness statements of some 4 witnesses, he chose not to call any other witness other than himself.

9. In his evidence, the plaintiff described himself as the first African to register a tour company called FRANK SPECIAL SAFARIES which was then a licensed tour operator till 2009 when the name was changed to IMAGE INVESTMENTS.

10. On the merits of the case he stated that the damages he seeks are for the losses occasioned to him when fire destroyed his premises and business upon premises leased from one DIANI HOMES LTD who he alleged sued the defendant in HCC 292 of 2001 and obtained a judgment. He went on to state that there was also HCCC No. 123 of 2002 in which some 16 people also sued and were equally compensated for the fire. In his evidence his claim in the suit is special damages (he calls it principal damages) in the sum of Kshs.4,500,000 and general damages in the sum of Kshs.125,000,000/= being loss of business for a period after the fire.

11. Without giving particulars of the lost items, in evidence the plaintiff stated that the sum of Kshs.4,500,000 was made up of stock in trade as follows:-

Currior shop

- 2,000,000

Clothes Boutique & tailoring machine - 1,000,000

Gemstones and Jewellery - 1,000,000

Office equipment - 2,000,000

This figure would give a total of 6,000,000 and note 4,500,000 but without any evidence that such stock were ever in the premises.

12. On special damages, he gave his approximated income from the various business as follows:-

Image investments Kshs.300,000pm

Clothes & boutique Kshs. 30,000pm

Wood carving shop Kshs. 40,000pm

Safaries & Travels Kshs.20,000pm

Jewellery & Gemstone slip Kshs.150,000pm

TOTAL Kshs.720,000pm

13. He however conceded not to have any document to support such income. On cross examination, the plaintiff admitted that he had no proof that his landlord was compensated in the sum of Kshs.150,000,000 as he was not a party to the proceedings and that the certificate of registration of image investments was issued in 2009 just as much as the certificate of incorporation of ABC Investments Ltd. He admitted not being in possession of any document to show that he was licensed to trade in Ukunda nor bank statement to demonstrate the financial health of the business.

14. He however asserted that he banked the proceeds of his business takings at Barclays Bank, but was unable to avail any statements because he had sued the bank. The witness went on to confirm that he had an auditor who would work on this books but that auditor closed his practice hence he could not file any audit report. He went on to state that all his documents were burnt including the lease agreement and tax returns.

15. He then confirmed to court that he had a license to trade in gemstones for the period 2009 and 2014. He rapped up cross examination session by reiterating that he ran the business as a sole proprietor with over 20 employees and that he left the country for the treatment abroad in the year 2005 and only came back in the year 2009.

Analysis and determination

16. Ours being an adversarial system of litigation, the onus of proof is always rested upon the plaintiff as the person who would lose if no evidence at all was led. This is the dictate of the provisions of evidence Act at sections 107-109.

17. The onus remained upon the plaintiff to an extent that the courts frown upon the practice of parties throwing the pleadings, so to speak, at the court and expecting the court to fill in the gaps. The author of HALSBURY's LAWS OF ENGLAND, 4th edition of page 662 writes on this duty:-

“The burden of proof in an action for damage for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act of omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty and an injury to the plaintiff between which and the breach of duty a casual connection must be established”

18. In this case the plaintiff took the position that his premises were destroyed by fire occasioned by some power surge from the defendants distribution line. To prove that it was basic that some evidence be led to prove that the plaintiff's premises were supplied with electrical power supplied by the defendant. To this court a document like an application for power supply or a bill for the relevant period have been an easy way to prove the relationship between the plaintiff and the defendant. Unfortunately no such attempt was made with the result that no proof was availed to prove connection between the parties and a resultant breach of any duty.

19. Additionally the suit was grounded on the tort of negligence. Even through particulars of negligence was pleaded in the plaint; no iota of evidence was led to prove any of the particulars. This being a civil dispute, it was upon the plaintiff to prove not only the existence of a duty upon the defendant but also the act of omission or commission breaching that duty. As it were, the pleadings remained mere allegations to be proved by evidence. When the pleadings are thrown at the court without proof the court is left with nothing to base its decision in favour of the party seeking reliefs from court. The court of appeal in **S.J. - v- Francisco Di Nello & Another [2015] eKLR** made a very succinct and clear observation on this duty. The court said:-

“ A Plaintiff (appellant) cannot throw material at the court without discharging his/her onus of proof and expect success”.

20. Clearly, in this matter, even though the plaintiff acted in person, he had an equal duty to court because everybody must be treated equally before the law. As a litigant he did not lose his legal duty merely because he opted by choice to act in person.

21. I would find and do find that the plaintiff proved no liability as against the defendant to warrant this court asking the defendant to take any responsibility for the alleged loss. This is not to say the plaintiff suffered no loss. It is quite possible that the loss was suffered but the plaintiff had to show what the loss it was and who was to blame for it and on what basis.

22. On a second and different basis, even if the plaintiff had proved breach of duty and negligence upon the defendant, the claims the plaintiff make are essentially in the nature of special damages which by law must be specifically pleaded and strictly proved. Specific pleading in the circumstances of this case would have demanded the particulars of the loss or damaged property with their values even if it be approximate. Even on that duty the plaintiff failed. One need not site any authority, but this is a basic and undoubted position of the law that cannot be overlooked.

23. The foregoing also serve as a decision on why the claim for Kshs.125,000,000 pleaded as lost earnings equally cannot succeed.

But even if that was to be taken to be projected earnings or profits, there must be a basis for calculations to arrive at the figure. If the plaintiff ran a business, audited accounts would be a good pointer on the annual profits and expenses to enable one ascertain what possible loss could reasonably be incurred or suffered by destruction of the business.

24. I do sympathize with the outcome to the plaintiff out of this determination but this court is and must remain a court of law bound to resolve disputes only upon the legal principals and provisions and not otherwise.

25. The upshot of the foregoing is that the plaintiff failed to avail evidence to prove his case and claim and this suit must fail. The suit is therefore dismissed.

26. On costs, I note that the plaintiff did apply to be granted leave to sue and prosecute the suit as a pauper, and such leave was granted on 18.12.2015. That being the position, and even though the plaintiff has failed, it shall serve no purpose to order costs against a pauper. I make no orders as to costs.

Dated at Mombasa this 24th day of February 2017.

P.J.O. OTIENO

JUDGE