REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 229 OF 2013

BENARD KANJAU NGAMAU.....APPELLANT

VERSUS

COMPLY INDUSTRIES LTD.....RESPONDENT

(Being an appeal from the judgment/decree of Hon. D.K. Mikoyan Ag. Senior Principal Magistrate, Nyahururu delivered on 4th December 2013 in Nyahururu SPMCC No. 69 of 2012)

JUDGMENT

1. The appellant who was the plaintiff in the trial court had sued the Respondent for a liquidated claim of Kshs.1,850,276 and general damages for breach of contract in a claim related to destruction and damage of trees following an agreement to purchase poles by the Respondent from the Appellants' **Plot No. Nyandarua/Oljoro-Orok West/1754.**

The trial court after a full trial dismissed the appellant's claim for special damages and awarded a sum of Kshs.200,000/= to the appellant as exemplary damages.

This judgment gave rise to the appeal hereof and filed on the 1st April 2014.

2. The Respondent filed a cross-appeal on the 27th January 2015 and faulted the trial Magistrate for holding the respondent wholly liable for unacertained damage to trees and awarding exemplary damages that were not pleaded to the Respondent.

3. The grounds upon which the appeal is premised are:

1. **That** the learned Magistrate erred in law and infact in awarding what was not pleaded.

2. **That** the learned trial Magistrate erred in law and fact by failing to consider the evidence and submissions by the Plaintiff and critically analyse the same and accord it due weight to the extent that it was able to prove its case.

3. **That** the learned Magistrate erred in law and in fact in holding that the Appellant had established a *prima facie* case based on the pleadings on record and evidence but failed to award as per the prayers sought.

4. That the learned Magistrate erred in law and in fact by applying his own theory in assessing

the pleadings, evidence, exhibit and submissions which made him fall into error of speculation and inserted facts and findings which were not supported by the pleadings, evidence, exhibits and submissions.

5. That the learned Magistrate erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence, exhibits and submissions of parties.

It is urged that the Judgment and decree by the trial court be reviewed in its favour.

4. The Respondent filed a cross-appeal on the 27th January 2015 as stated above without leave of the court to extend time, judgment having been delivered on the 4th December 2013. Without going into the merits of the cross-appeal, it is the court's finding that, on the face of the record, the cross-appeal is incompetent and it is dismissed by virtue of having been filed out of time and without leave of the court.

5. **The Appellant's case** before the trial court is straight forward. That by an agreement between the appellant and the Respondent and dated 17th November 2011 the appellant sold poles (trees) from his farm **Nyandarua/Ol Joro-Orok that the Respondent** was to harvest at a price of Kshs.3,500/= per pole. It was expressly agreed that while harvesting the said poles, the respondent would take care not to damage other trees, but an allowance of 10% was agreed upon, based on the number of poles harvested. The respondent harvested a total of 700 poles and was paid in full in November 2011. During the harvesting of the trees (poles,) the appellant's manager was at site and no complaint at all was raised as to destruction and or damage of other trees until after three months, when by a letter the appellant informed the respondent that a total of 680 poles were damaged and gave a sum of Kshs.1,762,168/= being estimate of damage as assessed by appellant's valuer from the Kenya Forest Services and a sum of Kshs.88,180/= being valuation fees at 5% of the total value of damage, giving a total of Kshs.1,850,276/= pleaded in his plaint as a special damage.

It was the appellant's claim that the above sum arose from the breach of contract that, by its special and additional conditions, the damage that may be occasioned should not exceed 10% which was necessary in the protection of the environment and forest cover, the growing trees and conservation of the environment.

6. **The Respondent** denied the claim and by its professional valuers assessment of the alleged damage, carried out on the 27th March 2012 arrived at a damage rate of 8% that was below the greed rate of 10%. It was the foresters evidence that he visited the farm to assess the alleged damage and indeed found some damage and assessed the same at 8%. A detailed report on the assessment of the damage and produced as an exhibit before the trial court. The appellants valuation report by Kenya Forest Services (KFS) staff, according to him was not an assessment of damage of trees but a valuation of all the trees in the said plot. It was his statement that the company harvested 750 trees and on the agreed value of Kshs.3,500/= per tree, the full purchase price was paid, and as at the time of payment, no complaint of damage was raised but later after two months, and that no reason was given why it took that long to discover that there was damage to 628 trees valued at Kshs.1,762,168/=.

7. In its judgment, the trial court found that indeed there occurred some damage to the appellants trees which the appellants valuer captured at a value of Kshs.1,762, 168/= but not the percentage as opposed to the Respondents assessment of 8%, being 56 trees and at the agreed price would give Kshs.196,000/= and agreed as permissible damage.

The court further made a finding that the appellants valuer merely took an inventory but did not rate the damage as per the agreement between the parties. He further held that there was unascertained damage to the trees and for that he held the respondent liable. He then proceeded to award a sum of Kshs.200,000/= to the appellant as exemplary damages with costs and dismissed the claim on special damages.

8. As the first appellate court, I am obligated to re-evaluate the evidence tendered before the trial court by all the parties and come up with my own findings and conclusions. While doing so, I am alive to the fact that I never saw or heard the witnesses testify before the trial court.

See the case of **Selle and Another -vs- Associated Motor Boat Co. Ltd** (**1968) EA 123.**

Likewise, the court will only interfere with the trial court's findings only if it is found that the same are not based on no sound evidence or is shown demonstratably to have acted on wrong principles of law in reaching the said findings. See **Kemfro Africa t/a Meru Express Services** and **Another v-s- Lubia & Another (1982-88. KAR 727.**

9. **Analysis of evidence and submissions.**

The issues that arise from the evidence tendered before the trial court, in my considered view, are:

1. Whether the respondent was in breach of the terms of contract entered into on the 17th November 2011 and the additional special conditions.

2. Whether the trial court's award of exemplary damages was anchored upon the appellants pleading and/or justified.

3. Whether the claim of Kshs.1,850,276 as a special damage was strictly proved against the respondent.

10. The court has carefully considered evidence tendered together with the pleadings by the opposing parties, and in particular the contract executed by both parties on the 17th November 2011 and the basis of the claim. The said contract together with the additional conditions were unambiguous, that in the harvesting of poles/trees in the appellant's plot, a damage limit of 10% of the harvested trees was allowed as permissible damage.

It is not in dispute that during the time of harvesting some damage occurred to the growing trees and others not marked for harvesting. What is in question was the percentage. Evidence came out clearly that the appellants assessor from Kenya Forest Services did not asses damage so as to come up with a percentage of the damage but did a valuation of the trees in the farm, coming up with a valuation of the trees in the sum of Kshs.1,762,168/= whereas the Respondent's assessment of the damaged trees gave a percentage of 8%, that was a permissible damage upto the rate of 10% in terms of the contract. The trial court was therefore correct in its finding that according to the Kenya Forestry Services forester report, there was unascertained damage to trees at the site. He was also correct to hold that for that damage, the respondent was liable. That in my view, is the reason why the trial court did not award the sum claimed as a special damage as it was unascertained and therefore not strictly proved. It is trite that special damages ought to be pleaded and strictly proved. See **Benedetta Wanjiku Kimani -vs- Chagwon Cheboi & Another (2013) KLR.**

Where Justice Emukule stated on Page 4:

> ***"Plaintiffs must understand that if they bring actions for damages it is not enough to write particular and so to speak, throw them at the court, saying, "this is what I have lost, I ask you to give these damages, they have to be proved."***

The above shows clearly that the Respondent was not in breach of the terms of the contract. That answers issue No. 1 above.

11. In the judgment and after making a finding that the Respondent was responsible for the ascertained damage of trees, and whose percentage was given at 8% by the respondents assessor, the next question would then be, on what basis did the trial court award exemplary damages to the appellant? The appellant in its submissions stated that the award of exemplary damages was not based on any reasoning in law having made the findings of fact in favour of the appellant. To that extent the appellant concede that the trial court made a finding based on no evidence. In the case **Kemfro Africa** (Supra), the court will interefere with the trial courts findings if they are based on no sound evidence, or if it is shown that the

court acted on wrong principles of law. The award of exemplary damage was not only pleaded but also not proved. I agree with the appellants submissions that this award was based as no evidence and it ought to be set aside.

It is stated in the case **John -vs- MG Ltd (1996) I ALL E.R. 35**

that ***"--- exemplary damages on the other hand are ---- beyond compensation and are meant to punish the defendant."***

In our context, I find that the trial court misdirected itself in awarding the said damages as the damages to the appellants trees was assessed at 8%, a rate agreed as admissible, and therefore not subject to payment.

There was nothing to punish the respondent for, and in any event, such damages were not pleaded. That award is set aside.

12. The third limb of the appeal is whether the special damages as pleaded were strictly proved against the respondent.

The valuation report that came up with the above sum of damage was not in prove of the damaged trees in terms of the contract between the parties but a valuation of the trees on the appellants farm. I have pronounced myself on the same issue. The trial court was correct when it failed to allow the said special damage as having not been proved to the required standard. The trial court held that there was no precise conclusive evidence on the value of the damaged trees. I have no reason to upset the above finding.

13. The upshot of the above findings and conclusions is that the appeal as filed has no merit and is dismissed.

As I stated in **Paragraph 3 above**, the cross-appeal is also dismissed. As the appeal and cross-appeal are dismissed, each party shall bear its own costs.

Dated, Signed and Delivered in open court this 9th day of February 2016.

JANET MULWA

JUDGE