



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 138 OF 2012

**CHINA ROAD AND BRIDGE CONSTRUCTION COMPANY
LIMITED.....APPELLANT/APPLICANT**

VERSUS

ISAAC JAMES OMARE

CHRISTINE PENDO OGENDI

**TEPLOH HABERE NANDI (suing on behalf of GOTEMI CHILDRENS HOME.....
....RESPONDENTS**

(Arising from the Judgment of Hon. S.M.S. Soita (Senior Principal Magistrate) delivered on 24th July, 2012 in Molo Senior Principal Magistrate's court Civil Case No 320 of 2009)

JUDGMENT

1. The appellant **China Road and Bridge Construction Company Limited** was sued in the trial court by the Respondents in their capacity as trustees of **Geotemin Children's Home** vide their Amended Plaintiff amended on the 8th March 2011 and filed on the 8th March 2011. The verifying affidavit attached to the further Amended plaintiff was sworn by the three alleged trustees, Isaac James Omare, Christine Pendo Ogendi and Teploh Habere Nandi. The claim was for a sum of Kshs.300,000/= being refund of purchase of water by the plaintiffs following an illegal disconnection of water supply to the **Children's Home**, and which claim was denied by the appellant.

2. Upon hearing the dispute the trial court found in favour of the respondent and awarded the sum of Kshs.300,000/, general damages and KShs.2,000/= as special damages plus costs.

It is the said judgment that the appellant appealed from and preferred the ten grounds as follows:

(1) The Honourable Trial Magistrate erred in Law by failing to appreciate that the Verifying Affidavit sworn jointly by the Respondents offended the mandatory provisions of **Order 19 Rule 3 of the Civil Procedure Rules** which ought to have been struck out, and a suit without a Verifying Affidavit would therefore be unattainable under **Order 4 Rule 1(2) of the Civil Procedure Rules**, when only one Plaintiff had given evidence in Court.

(2) The Honourable Trial Magistrate erred both in fact and law and misdirected his mind when he failed to find that the suit was incompetent and defective since in-as-much as the three Respondents instituted the suit as trustees of Gotemin Children's Home, the Respondents had failed to establish the existence of any trust registered for the Children's Home, any nexus between each or all of

them and the Home or the source of their authority to purport to sue or act on behalf of the Children's Home.

(3) The Honourable Trial Magistrate erred in fact and Law and misdirected his mind by entering Judgment in favour of the Respondents when the Respondents had failed to establish any liability and when no finding of liability had been made against the Appellant.

(4) The Honourable Trial magistrate erred in fact and in Law in entering judgment against the Appellant without establishing the existence of any water pipes or piped water supply alleged to have existed in favour of the Respondents and he source thereof.

(5) The Honourable Trial Magistrate erred in fact and Law by entering judgment for the Respondents against the Appellant for a sum of Kshs.300,000/= without any documentary support or evidence by the alleged supplier and without any proof when special damages ought to be clearly pleaded and strictly proved.

(6) The Honourable Trial Magistrate erred in law and facts by entering judgment in favour of the Respondents for a sum of Kshs.300,000/= as general damages when the same had not been sought for and thereby and extraneous consideration without any justification, considering the evidence by PW1 that the water was supplied at the daily rate of Kshs.2,000/=between 21st May 2009 and March 2011 and further by the evidence that the water was supplied on credit and the debt was still owing, meaning no money had been spent and without calling the alleged creditor as a witness.

(7) The Honourable Trial Magistrate erred in fact and Law by entering judgment for the Respondent for sum of Kshs.300,000/= against the Appellant when he had been persuaded that the Respondent had not proved any special damages.

(8) The Honourable Trial Magistrate erred both in fact and Law by overly relying on the evidence by PW1 and PW2 which were incredible since it was not possible to maintain piped water when they could not even afford paying for water allegedly supplied to them according to their own evidence, while totally ignoring both he evidence by DW1 and the written submissions filed in Court on behalf of the Appellant, without any justification.

(9) The Honourable Trial Magistrate erred in Law in entering Judgment for the Respondent when there were glaring material contradictions in the evidence by PW1 and PW2.

(10) The Honourable Trial magistrate failed to give reasons for his decisions.

The appellant seeks that the Judgment be set aside with costs.

3. **The Respondent's case before** the trial court pursuant to the pleadings in the Amended Amended plaint was that the named **Children's Home** is situated on **Land Parcel No. Elburgon/Turi/9044/1** along the Nakuru – Eldoret Road at Sachang'wan with a population of 51 children then. That the appellant while in the cause of constructing the road intentionally disconnected the water supply resulting to the Children's Home purchasing water at the rate of Kshs.2,000/= per day from the 18th May 2009 making a total of Kshs.300,000/= upto date of filing of the suit.

The evidence was tendered by Isaac James Omare, a pastor and teacher at Gospel Tent Ministries – and manager of the Children's Home.

It was his testimony that the Home had to purchase water up to March 2011 when it was restored upon payment by a donor of pipes worth Kshs.11,000/= and labour costs of Kshs.3,000/=. Receipts for the said purchases of water were not produced as exhibits. The Manager did not produce any evidence to prove the water purchase in the sum of Kshs.300,000/=. It prayed for general damages as a result of the suffering and inconvenience due to the appellants acts.

4. **The appellant denied** the claim in its statement of Further Amended defence filed on the 8th June 2011. In particular, it stated that the claim was defective for violating provisions of **Order 3 of the Civil Procedure Rules**. Through its witness (DW1) the Procurement and Administrative Assistant, evidence was tendered that no damage to water pipes were ever done and no report of such damage was made to their offices, neither were any letters delivered to their company.

5. In its judgment after analysis of the evidence as tendered, the trial court made a finding that the home was indeed connected to water supply but the supplier was not identified and that the water pipes were damaged during excavation by appellant while constructing the road causing it to procure the water privately. For that, it was stated, that the home was entitled to general damages and a further finding that special damages as claimed were not proved.

6. Parties had filed written submissions in the trial court. The Respondent had submitted that general damages in the sum of Kshs.700,000/= were reasonable and a sum of Kshs.300,000/= being water bills and Kshs.14,800/= being cost of Repair to pipes, a total of Kshs.1,014,800/=

The appellant on the other hand submitted that the claim was incompetent as the verifying affidavit was jointly sworn by the three plaintiffs and that offends mandatory provisions of the law as it is envisaged that only one person ought to swear the same, and urged the court to expunge the verifying affidavit from the court records. He relied other case **HCCC No. 120 of 2004 Pastor John Cherutich & 5 Others -vs- Catholic Diocese of Nakuru**. Where the court held that the plaintiffs lacked capacity to bring the suit to enforce a public right in the form of ownership of a public school. The suit was struck out.

7. **The appellant submitted** that the plaintiff/appellant lacked *locus standi* by failing to demonstrate existence of any trust under the trustees (perpetual succession) **Act, Chapter 164 Laws of Kenya**. It was their further submission that there was no demonstrable nexus between themselves and the Children's Home nor any authority to sue on its behalf.

8. On liability, the appellant submitted that no evidence was adduced to show existence of piped water supply to the home nor prove of damage to any water supply for which the Respondent would lay a viable claim against the appellant.

On issue of *quantum* of damages, the appellant submissions that special damages had not been pleaded nor proved at Kshs.300,000/= or Kshs.2,000/=.

9. The court has considered the Judgment of the trial court as well as the submissions by both parties and the grounds of appeal as filed, together with submissions on the appeal.

It is intended to deal with the grounds of appeal collectively on issues of:

1. *Locus standi* - grounds numbers 1, 2
2. Liability - grounds numbers 3, 4, 5, 8, 9
3. Quantum - grounds numbers 6, 7

10. In the trial courts judgment the court did not address itself to the issue of *locus standi* of the Respondents in bringing the suit against the appellant despite submissions having been filed by the appellant on the said issue – which I have stated above. The three persons in the plaint in the primary suit described themselves as trustees of Gotemin Children's Home with its registered offices at Molo in the Amended Amended plaint filed on the 18th March 2011. A certificate of registration of the home as a charitable children's institution under the **Children Act No. 8 of 2001** and under the **Ministry of Gender, Children and Social Development** was produced. It was issued on the 17th March 2009.

During the hearing, the Respondents did not produce any evidence that they were the duly appointed trustees of the Children's Home nor any authority to represent the home.

Order 31 of the Civil Procedure Rules provides the manner of bringing suits by or against trustees executors and administrators. Without the instrument of the trust, the trust deed, duly registered under the **Trustees Act Chapter 164** or under the **Trustees(Perpetual Succession) Act Chapter 167 Laws of Kenya**, the Respondents capacity to represent the Children's Home is doubtful.

11. The Respondents have submitted that the Registration certificate of the home having been provided and the respondents fact of being trustees having not been challenged, then, the court ought to hold that they had capacity to bring the suit against the appellant. It was relied on **Article 159 of the Constitution of Kenya** that justice shall be administered without undue regard to procedural technicalities. The case of **Raila Odinga -vs- IEBC & Others (2013) KLR** where the Supreme court held that **Article 159(2) (d)** means, that the court should not pay undue attention to procedural technicalities at the expense of Justice, but never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice.

In this matter, without proof that the Respondents were duly appointed as trustees of the Children's Home, it would be a grave error if the court were to hold that they were such trustees and had sued for the interests of the institution. It is the court's view that such capacity having not been proved, the three respondents were non suited to being the suit. They had no *locus standi*. See **Zablon John Nthamburi -vs- S M'impwi (2010) KLR** where it was held that trustees of an institution can only be appointed under a duly registered Trust instrument as provided in the **Trustees Act, Chapter 164 Laws of Kenya** or under the **Trustees (Perpetual Succession) Act**.

12. The matter of liability is raised in grounds 3, 4, 5, 8 and 9 of the Memorandum of Appeal.

The trial court after hearing the parties made a finding, that the institution had piped water and the water pipes to the institution were damaged by the appellant forcing it to procure water privately at a cost, and therefore entitled to general damages – due to the inconveniences, and awarded at Kshs. 300,000/=.

The appellant submits that no claim for general damages was pleaded and therefore the ward on general damage was a misdirection. I have looked at the Amended Amended Complaint filed on the 10th March 2011. No claim for general damages was pleaded. A claim for special damages was however pleaded in the sum of Kshs.300,000/= and which the trial court found had not been proved.

13. In the case of **Chalia FSC Ltd -vs- Odhiambo & 9 Others, (1987) KLR** the Court of Appeal pronounced itself that a court is governed by principles of law, that the Judge's feelings of sympathy cannot be an acceptable substitute for the law, and that justice is to both the plaintiff and the defendant. To that end, a court of law is guided by the pleadings and if a claim in general damages is not pleaded, as in the case in the present suit, and however much the court may sympathise with the parties, it ought not grant that which is not pleaded.

The claim on general damages having not been pleaded the award of Kshs.300,000/= in general damages was a misdirection in law. It is set aside.

14. The claim of Kshs.300,000/= in special damages was dismissed by the trial court as having not been strictly proved, though pleaded, though pleaded.

In his judgment, the trial magistrate stated that no evidence was led to prove the special damages. I have re-evaluated the respondents evidence on record. I concur with the trial court that other than statements by the respondents that water was being purchased for Kshs.2000/= per day making a total of Kshs.300,0000/= for the relevant period, no single document was produced to show who the supplier was and the amount spent on the water purchase. Indeed no payment receipts were produced to prove such purchases. It is trite law that a special damage not only must be pleaded but also strictly proved. See **HCA No. 152 of 2011 Equity Bank Ltd -vs- Gerald Wangombe (2015) KLR**, among many authorities on the issue.

15. I am satisfied that the trial court properly directed its mind on the issue and awarded no special

damages to the respondents despite the respondents submission that such damage was proved.

Consequently and in view of the above findings and conclusions, the appellants appeal filed on the 26th April 2013 is allowed. The trial court's judgment and award of general damages in the sum of Kshs.300,000/=with costs to the Respondents is set aside and substituted with an order that the primary suit is dismissed -

16. Each party shall bear its own costs on the primary suit and in this appeal.

Dated, signed and delivered in open court this 9th day of February 2016

JANET MULWA

JUDGE