REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 137 OF 2008

POLLMANS TOURS & SAFARIS LTD …….…….. APPELLANT

V E R S U S

GUPTA SEA TOUR LIMITED ……..…… RESPONDENT

(An appeal from the Judgment and Decree of Hon. M. K. Mwangi (SRM) delivered on 17th July, 2008 in CMCC No. 650 of 2004)

JUDGMENT

1. The Mbsa Chief Magistrate Court in **Civil Case NO. 650 of 2004** delivered a judgment of Respondent which judgment is addressed by this appeal. The said Court awarded the Respondent Kshs. 145,815/- being special damages for repair of Respondent's motor vehicle Registration No. KAQ 173L. The Court also awarded Respondent Kshs. 94,500/- as compensation for loss of use of the vehicle for $4^1/_2$ weeks.

2. Although Appellant filed this appeal against those awards at the hearing of the appeal Appellant only submitted on the award of loss use and abandoned the other grounds.

3. This is the first Appellate Court and the duty of this Court has often been the subject of my decisions. One such decision is **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES v JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013]eKLR** where the Court Appeal stated viz-

> **"This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way. See the case of KENYA PORTS AUTHORITY –Vs- KUSTON (KENYA) LIMITED (2009)2EA 212 wherein the Court of Appeal held inter alia that:-**
>
> **'On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

4. The evidence touching on the ground being appealed against is of PW1 and PW4.

5. PW1 was the loss assessor engaged by the Respondent. The subject accident occurred on 30th March 2003. He was engaged by Respondent to prepare his report on 6th June 2003. He prepared the report and was paid for the same on 17th June 2003. He then stated-

> **"The spare parts were not readily available in the market …. I tried to source the spares but they were not readily available … I indicated that it would take 14 days to repair the motor vehicle."**

6. PW4 was the Managing Director of the Respondent Company. He testified that when Respondent's vehicle KAQ 173L was involved in an accident with Appellant's vehicle it was on hire to the African Safari Club. That hire had been for two months prior to the accident. That under that contract of hire the hirer was to cover minimum 5,000 kilometres per month at a minimum of 20/- per kilometer. The evidence adduced by PW4 was that the Respondent was making between Kshs. 50,000/- to Kshs. 60,000/- per month. However after making that statement he said-

> **"… but I can't remember off head" in reference the amount of profit made."**

He then proceeded to say that although the vehicle was off the road for 5 months Respondent was only claiming 2 months. Again on being asked how long the repairs of the vehicle took he said-

> **"They took 2-3 months. Can't recall exact period."**

7. The Appellant faulted that evidence and submitted that it fell short of proving special damages. That is loss of use. Appellant relied on the case **RYCE MOTORS LTD AND ANOTHER –Vs- ELIAS MUROKI CIVIL APPEAL NO. 119 OF 1995** where the Court of Appeal in reference to proof of special damages stated-

> **"The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this Court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The Plaintiff simply gave evidence to the effect that his matatu was bringing him income of Kshs. 4,500/- per day. He did not support such claim by any acceptable evidence."**

8. Appellant relied on that same case to show that Respondent had an obligation to mitigate their loss. Appellant submitted that there was no sufficient explanation why when the accident occurred on 30th March 2003 it took Respondent upto 6th June 2003 to request a loss assessor to do his report. Further that the loss assessor assessed the period to be 14 days, yet the repairs took far much longer, that is 5 months. In regard to the need to mitigate loss in that case **RYCE MOTORS LTD** (supra) the Court of Appeal stated-

> **"The owner must take all reasonable steps to ensure that the vehicle is back on the road within a reasonable period. The owner must mitigate his damages by having the vehicle repaired if it was not a write-off."**

9. Respondent in opposition stated that the loss of use was set out in the hire agreements produced at trial. Respondent relied on the case **MBSA CIVIL APEPAL NO. 88 OF 2009 D. T. DOBIE & CO. (K) LTD V WANYONYI WAFULA CHEBUKATI** where the Court considered lack of receipt in a claim for special damages and stated viz-

> **"Additionally Respondent was right to have relied on the Court of Appeal decision in the case: JACOB AYIGA MARUJA & ANOTHER –Vs- SIMEON OBAYO COURT OF APPEAL AT KISUMU CIVIL APPEAL NO. 167 OF 2002 where the Court stated-**
>
> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the**

production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

ANALYSIS

10. Special damages such as the ones claimed in this case ought to have been specifically proved. That is the Law. See the discussion by Court of Appeal in the case-

"SIREE LIMITED –Vs- LAKE TURKANA EL MOLO LODGES (2002)2E.A. 521 where this Court stated that:

'As regards the special damages awarded, 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."

The Appellant also cited the case of MARITIM & ANOTHER –Vs- ANJERE (1990-1994)EA 312 at 316 where this Court stated-

'In this regard, we can only refer to this Court's decision in Sande –Vs- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must al so be specifically proved and those damages awarded asspecial damages but which were not pleaded in the Plaint must be disallowed."

Although Respondent relied on the case **JACOB AYIGA** (supra) I find the facts in that case are distinguishable to this case. In that case the Court of Appeal referred to failure of production of Certificates not necessarily being fatal to a claim. Here however Respondent had contract to hire its vehicle. There is a hire agreement produced in Court. Why was it difficult to produce payment vouchers to show how much that vehicle indeed was earning of the Respondent. At the least the Respondent could even have produced its account to prove that earning. The Respondent in my view dealt with that issue in a too casual manner, to its detriment.

11. There was also contradiction of how long it took to repair and if indeed it took 5 months, there was no explanation of why there was no mitigation.

12. On the whole Respondent failed to prove loss of use, that is the number of days the vehicle took to be repaired, no explanation was offered why it would take more than 5 months; and more particularly failed to prove the loss per day or per month. I find there is merit in the Appellant's appeal.

CONCLUSION

13. The Judgment of the Court is-

a. **The lower Court's award for loss of use is hereby set aside. The lower Court's costs payable to the Respondent should be reflective of the amount that will remain as an award.**

b. **The Appellant is awarded half the costs of this appeal.**

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE