REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 514 OF 2010

MUKURU MUNGE ..... APPELLANT

VERSUS

DAVID CHEGE NJUKI ……..…..……1ST RESPONDENT

THE CHAIRMAN OF NGOCHI

POWER PROJECT ……..……. 2ND RESPONDENT

J U D G M E N T

The appeal herein arises from the judgment and decree of Hon. R.A.A. Otieno, Principal Magistrate Githunguri Law Courts in PMCC 103 of 2007 delivered on 27th October 2010.

Briefly, the appellant vide a further amended plaint dated 27th August 2008, claimed and prayed for judgment against the respondent for:

a) General damages for harassment and lost time; and

b) Costs and interest at court rates.

The above prayers were premised on the claim that, in 1980s, he paid Shs. 14,000 to Ngochi Power Project of which he was a member which project collapsed and so he sought for a refund of his money from the defendant who was the chairman of the said power project but the defendant/respondent refused.

The appellant reported the matter to the area Assistant Chief who summoned the respondents severally but the respondents ignored. The Assistant Chief directed the respondent to convene a member's general meeting but he again rejected. The matter was then referred to the Chief and later to the Githunguri District Officer and to the police, culminating to the respondent settling the money on 23rd November 2007.

He therefore decided to sue the respondent for damages for lost time, expenses incurred in following up his money and the inconvenience he was subjected to before he was paid. He produced evidence of demand notices, Chief's summonses, proceedings before the Assistant Chief, Chief and police station to demonstrate the agony he went through claiming for his money.

The defendant David Chege Njuki denied the claim and filed defence to the further amended plaint dated

10th September 2008 seeking dismissal of the suit with costs. He stated that the deposit made towards the power project, according to their by-laws was non refundable and that he did not hold the money for the project but after a general meeting of members held after the appellant's incessant demands for refund of his money deposited, a resolution was passed amending the by-laws to provide for refund of deposits to members who opt out of the project.

He also denied wasting the appellant's time and or inconveniencing him over the claim. He also denied ever harassing the appellant.

After hearing the parties and their witnesses and considering submissions for and against the claim, the Principal Magistrate framed 5 issues for determination namely:-

i) Did the plaintiff pay Sh. 14,000/- to Ngochi Power Project.

ii) Did the plaintiff make a demand for refund of the said amount and if he did, when did he do so?

iii) Did the defendant in any way hinder the refund if at all of the plaintiff's said contribution?

iv) Does the plaintiff have a genuine claim against the defendant if yes what damages is he entitled to?

v) Are the pleadings defective?

The Principal Magistrate found on issues Nos. 1, 2, 3 and 4 to be positive and therefore in favour of the appellant. On issue No. (v), the Principal Magistrate found that the pleadings as alleged by the respondent were not defective as the respondent was sued in his capacity as chairman of the water project not in his personal capacity.

The trial magistrate was satisfied that the defendant imposed unnecessary conditions upon the plaintiff by requiring the withdrawal of the formal demand letter before the request could be actioned.

Further, that the shuffling from one office to another office by the appellant would not have been necessary had the defendant/respondent acted on the demand letter of 14th July 2007 and convened a member's meeting to deliberate on it.

The trial magistrate further found that the respondent had sufficient material before him to convene a meeting of members to deliberate on the demand for refund but he procrastinated thereby inconveniencing the appellant from receiving his demand in earnest which amounted to unnecessary harassment and delay.

Consequently, on the basis that the appellant lost precious time pursuing the refund of his money and therefore he had a genuine claim proved on a balance of probabilities as required by law and entered judgment in favour of the appellant against the respondent as prayed and awarded him Sh. 70,000/- general damages for harassment and lost time together with costs of the suit and interest at court rates.

Dissatisfied with the said judgment delivered on 27th October 2010, the appellant on 24th November 2010 filed a memorandum of appeal, setting out 8 grounds of appeal and praying to his Hon. Court to enhance the general damages.

The said grounds of appeal are that:

1. The learned trial magistrate erred in law and fact in giving a manifestly insufficient amount of damages under the circumstances of the case;

2. The learned Magistrate erred in law and fact in failing to explicitly structure the basis for awarding general damages for harassment and lost time;

3. The learned Magistrate erred in law and fact in failing to be guided by the exhibits and evidence tendered on pecuniary losses and decided to pluck a figure of Sh. 70,000/- from the air;

4. The learned Magistrate erred in law and fact in failing to distinctly separate damages for harassment and damages for lost time while assessing the quantum of damages;

5. The learned Magistrate erred in failing to take into account the conduct of the defendant for the entire duration of the lower court proceedings which clearly pointed at harassment even at the point of the case hearing;

6. The learned Magistrate erred in law and fact in failing to acknowledge that costs incurred should have attracted interest from the date of filing suit owing to the fact that a number of the costs incurred by the appellant were in the nature of disbursement.

7. The learned Magistrate erred in law and fact in failing to factor in the undisputed fact that the appellant was a contractor and farmer of repute whose loss per day of six months cannot even be remotely covered by damages awarded.

8. The learned Magistrate erred in law and fact by failing to lay any basis for the judgment which though in principle awarded for the appellant but in reality is actually favourable to the respondent as he will pay a paltry sum not commensurate with six months of harassment, malice, mental torture and remarkable public humiliation where the appellant an old man could camp for days alone just chasing after his dues.

This being a first appeal, this court is obliged, under Section 78 of the Civil Procedure Act to examine and evaluate the evidence of the trial court and come to its own findings and conclusions, but in doing so, given an allowance to the fact that it neither heard nor saw the witnesses testify as espoused in the case of **Sielle – Vs – Associated Motor Boat Co. (1965) EA 123**.

The appeal as presented and the submissions made on 28th October 2014 when the appeal was heard was that:-

The appellant submitted that he relied on his memorandum of appeal and informed the court that he expected the court to award him Sh. 600,000/- general damages for harassment and loss of time. He stated that Sh. 70,000/- general damages as awarded was too little as he had been harassed, his time wasted, he had gone to court – several times. According to him, the trial magistrate did not award him what was acceptable under the law as the respondent caused his business to collapse and he suffered mental torture and humiliation.

The appeal was opposed by Mr. Gatere advocate for the respondent who urged the court to dismiss the appeal as the appellant had laid 8 grounds of appeal but argued only one relating to inadequacy of general damages. In his view, the alleged general damages for harassment and of time are claims not backed by facts and that Sh. 70,000/- as awarded was adequate nominal damages and todate he has refused to take the Sh. 70,000/- as awarded by the court so he cannot claim interest on the same.

From the grounds of appeal and submissions made in favour of and against this appeal, two issues for determination emerge.

1. What damages are payable in this case; and

2. Whether the trial magistrate should have awarded to the appellant interest not only on the principal sum awarded but also on costs of the suit from date of filing suit.

From the onset, it should be appreciated by both parties to this appeal that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions. This principle was discussed in the case of **Peter M. Kariuki – Vs – Attorney General [2010] eKLR** where the court observed that

> ***"… It is trite that this court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a larger sum. In order to justify reversing the trial Judge's finding on the question of the amount of damages it will generally be necessary that this court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, and entirely erroneous estimate of the damages to which the plaintiff is entitled …"***

The object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetic calculation because money is not being awarded as a replacement for the other money; rather, it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances.

The appellant at paragraph 16 (a) of his further amended plaint dated 27th August sought, not only the principal sum for damages for wasted time equivalent to 6 months from 4th June 2007, during which period his businesses were allegedly seriously affected, but also claimed for general damages.

In the main prayers, prayer 1(a) sought for general damages for harassment and lost time.

The ancillary question, therefore is, what was the appellant seeking from the court? Was it special damages or general damages?

As the evidence in the trial court was clear that the appellant had been refunded his money deposited with the project, it would be expected that if he sought any other principal sum allegedly for lost time and business for 6 months when he was seeking for the refund thereof, this claim would be in the nature of a liquidated claim, which he initially sought in his amended plaint dated 18th February 2007 but which he discarded in the further amended plaint. He had sought for Sh. 1,500/- per day for all the days he wasted with his argument from 4th June 2007 to 28th November 2007 and also demand damages and torturing my mind, as per his paragraph 17 which sought double payment the amount he paid or wasted looking for the refund (sic).

The claim for lost business opportunity, unfortunately was not specifically pleaded and strictly proved as that is not a general damage but a special damage. The applicable settled law is that special damages must not only be specifically pleaded, but strictly proved. In **James Thiongo Githiri – Vs – Nduati Njuguna Ngugi (2012) eKLR**, it was held that

> ***"Special damages are those damages which a plaintiff is entitled to claim, but which without a special claim the law does not assume to follow from the wrongful act, as opposed to general damages which the law presumes to be the direct and natural or probable consequence of the act complained of … Special damages on the other hand, are such as the law will not presume from the nature of the act … They must therefore be claimed specially and proved strictly. The term "special damages" denotes the actual pecuniary loss arising out of the special circumstances of the case, and is to be super added to the general damage implied by the law as following if the plaintiff has been caused pain, suffering or wounds/injuries of any description. A claim for special damage must be specifically pleaded by the plaintiff setting out each particular item and the amount claimed in respect of it. Such damage not being presumed by the law, the plaintiff must expressly prove his special damage, and if he fails, either to plead or***

to prove it, he is not entitled to recover."

In this appeal, it is clear from paragraphs 15 of the further amended plaint that the plaintiff/appellant was refunded the principal sum on 23rd November 2007 amounting to Sh. 13,900/- excluding interest, although he had deposited with the defendant Sh. 14,000/-. Paragraph 16 (a) pleads that

> ***"The plaintiff's claim other than the principal sum is for damages for wasted time equivalent to 6 months from 4th June 2007. During this period, the plaintiff's businesses were seriously affected and the plaintiff claims general damages."***

In his testimony at page 54 of the record of appeal, the appellant testified as follows:-

> ***"… My money was finally refunded to me on 23rd November 2007. I am not demanding the principal sum. If the defendant had not declined to have my money in good (sic) time, we would not be here. I spend lots of money on the road, hotels and away from my family. I was troubled before I was paid."***

In cross examination by the defence counsel, the appellant at page 55 of the record of appeal stated:-

> ***"I spent money to come to court, to spend in hotels and to eat. I have no receipts but it is well known I have no wife here."***

From the above extracts, it is clear that the appellant, by his pleadings and testimony in court was seeking special damages, which as I have stated in the cited case **of James Thiongo Githiri – Vs – Nduati Njuguna Ngugi (Supra)** must also be strictly proven. The appellant anticipated the lower court to award him special damages for money spent travelling going to ask/claim for the refund, hotel accommodation and meals since he did not reside in that area.

The law is further clear that parties are bound by their pleadings. In this case, it is expected that the appellant would prove his claim in the further amended plaint dated 27th August 2008 paragraph 16 (a) replicated above. Instead, his testimony was different from the pleadings. What he sought in his testimony did not even agree with paragraph 1 (a) of his final prayers which sought general damages for harassment and lost time.

It is also clear that what the appellant sought in his testimony was not general damages but expenses incurred in travelling to and from Ngochi Water Project and accommodation expenses as he sought for refund of his Sh. 14,000/-

Those expenses, in the court's view, were special damages and therefore they ought to have been particularized in the plaint and strictly proved at the hearing. In this case, the said special damages were neither particularized nor proved at the hearing and for those reasons, the appellant cannot expect the court to have awarded him the same.

On the other hand, as the appellant's final prayers sought general damages, such claim is unliquidated and no question of special damages in the sense of a calculated loss prior to trial arises. The quantification of such damage fell for the court to determine during the trial. This is the principle espoused in the case of **Thabiti Finance Co. Ltd (in liquidation) & Another – Vs – Augustine Riwa Abiero [2004] eKLR**.

In this case, further, the appellant was under a duty, as provided for under Section 107 of the Evidence Act to prove that he lost his business as a result of the default in refunding him his deposit in time. Loss of business is not a general damage.

It is in the nature of a special damage which ought to have been particularized and strictly proved at the hearing, as it is a calculated loss incurred by the appellant before the trial. The appellant having abandoned that prayer No. 1 in the plaint and amended plaint by filing a further amended plaint, cannot

now seek to recover the same through an appeal as it is not available to him. Even assuming that claim of Sh. 1,500/- per day for all days wasted from 4th June 2007 – 28th November 2007, was genuine, the appellant did not adduce any evidence to prove that loss.

What this court finds on record is a claim for general damages for *"harassment and lost time"* in his prayers, upon which the trial magistrate awarded the appellant Sh. 70,000/-

I must caution that there was no basis for awarding the appellant this sum, having found that his pleadings showed some semblance of unproven special damages as opposed to strictly general damages. The appellant, in my view, is lucky that there was no cross-appeal by the respondent against the award by the trial court seeking to overturn the said award, as there was no foundation for such an award.

However, noting that the appellant was and has been acting prose, I say no more and I would not interfere with that award, which, in my view cannot be stated to be nominal in the circumstances of this case, the trial magistrate correctly exercised his discretion in making such award.

In conclusion, I find that the damages as awarded by the trial court to the appellant in the sum of Sh. 70,000/- general damages was sufficient and adequate compensation and I uphold it. There was no succinct evidence of pecuniary losses adduced before the trial court.

On the issue of whether the appellant should have been awarded interest on the principal sum awarded but also on costs of the suit from date of filing suit, Section 26 (1) of the Civil Procedure Act is the relevant applicable law.

The appellant's plaint simply claimed for costs and interest at court rates. He did not in his testimony or even submissions dated 6th April 2010 pray for interest on costs from the date of filing suit.

It is therefore anticipated that having succeeded in his claim, the trial magistrate would award him costs and interest at court rates as prayed.

At page 87 of the record of appeal, the trial magistrate awarded the appellant

i) General damages for harassment and lost time

Sh. 70,000/-

ii) The plaintiff shall have costs and interest at court rates

Although the judgment does not state that interest shall be on costs as awarded, neither does it specifically exclude interest on costs which if awarded, would naturally run from date of filing suit until payment in full, if such costs were based on a claim for special damages.

In **Prem Lata – Vs – Peter Musa Mbiyu (1965) EA 592**, the court held that:-

> ***"… The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit, where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."***

In a Ugandan case of **Pan African Insurance Co (U) Ltd – Vs – International Air Transport Association (HCT OO-CC-CS-0667) of 2003**, the court was categorical that

> ***"As regards interest, the principle is that where a party is entitled to a liquidated amount or specific goods and has been deprived of them through wrongful act of another, the party should be awarded interest from the date of filing suit. Where however, damages does not arise until they***

are assessed in such event, interest is only given from the date of judgment."

The above authorities though persuasive, are good law and I find no reason to depart from them.

In other words, I find that the interest as awarded to the awarded sum of Sh. 70,000/- general damages is to run form date of judgment in the lower court until payment in full.

On the questions as to whether interest on costs ought to have been awarded to run from the date of filing suit. I reiterate the provisions of Section 27 (2) provides that:-

> ***"The court or Judge may give interest on costs at any rate not exceeding fourteen percent per annum and such interest shall be added to costs and shall be recoverable as such."***

Interest on costs is therefore discretionary for the trial court to award.

In this case, as I have stated above, there is no specific denial or award of interest on costs awarded to the appellant. However, this court is unable to interfere with the award as made by the trial magistrate, as no basis has been laid for such entitlement.

In as much as the award of interest on costs is a discretionary power, it has not been shown what error the trial magistrate committed in awarding interest without stating that the interest would be on costs as well, such prayer or submission not having been made by the appellant. Accordingly, I decline to disturb the judgment of the trial magistrate.

The upshot of all the above is that I dismiss the appellant's appeal on all grounds. Noting that the appellant had not received the Sh. 70,000/- general damages as awarded in 2010 by his own refusal, I make no orders as to costs of this appeal. The appellant gets costs of the lower court.

Dated, signed and delivered at Nairobi this 3rd day of December, 2014.

R.E. ABURILI

JUDGE