IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi & Cockar JJ A)

CIVIL APPEAL NO 126 OF 1987

ANTIQUE AUCTIONS LTD…….…….. APPELLANT

VERSUS

PAN AFRICAN AUCTIONS LTD……..…..RESPONDENT

JUDGMENT

Antique Auctions Limited (the appellant), a limited liability company, is a tenant (the tenant of the ground floor of the premises known as LR Number 209/1212/2, (Uniafric House) situated on Moktar Daddah Street, Nairobi. The landlord is the respondent, Pan African Insurance Company Limited, (the landlord). The tenant leased the said premises for its business since 1975, on a lease which was originally for three yeas and thereafter renewed or held over from time to time. The tenant used the premises for ordinary sale and/or by public auction of antique items and other items that it received from its clients.

In the said lease, the landlord covenanted under clause 3(b), *inter alia*, "to maintain in good and tenantable repair, the roof, outside walls, and the main structure of the building and the drains, downpipes, water mains, electrical circuits and sanitary apparatus ' thereof at all times during the said term of the said tenancy. It is pleaded that during the subsistence of the said tenancy, the landlord was in breach of the said covenant in that if failed or neglected to keep or maintain parts of the said premises in good tenantable repairs or condition or at all in that, sewage and/or rainwater from the floors which include the car park above, flooded into the premises which flood caused the appellant to incur expenses and inconvenience and damaged good belonging to its clients which were stored by the appellant pending sale. The dates when damage occurred and the list of items damaged were set out in the plaint. Items damaged consisted of carpets, books, paints, furniture and various other items. There was cost incurred in employing casual labour to clean the premises. In all the loss amounted to Shs 68,535/- which the appellant claimed from the respondent as special damages. There was a claim also of general damages. The trial Senior Resident Magistrate (as he then was) believed the appellant's evidence and referred to it as credible and gave judgment for Shs 60,185/- in special damages, Shs 14,815/- in general damages and costs assessed at Shs 8,443/-.

The respondent appealed to the High Court whereby the appellate judge (as he then was) upheld the award of general damages and allowed the appeal on special damages and costs giving rise to this appeal.

The appellant (tenant) has preferred 5 grounds of appeal which briefly are that the learned judge erred in:

(1) disallowing the claim of special damages

(2) not accepting the credibility of the plaintiff's witness which was accepted by the trial learned Magistrate,

(3) suggesting that special damages could only be accepted if corroborated.

(4) Disallowing the entire claim of special damages thus denying the plaintiffs compensation for the loss thereby occasioning miscarriage of justice.

The evidence before the trial court was that after the appellant obtained possessin of the premises in 1975, there had been several breaches of the covenant in para 3 (b) of the lease in that there was ingress of drainage water from outside the premises as specified above causing great damage to the properties of the appellant. The first of such damage occurred in December 1975. The appellant complained and submitted its claim immediately which consisted of artist prints, photographs and carpets which claim was settled by the respondent. Some repairs were carried out but complaints persisted as and when there floods into the premises that caused damage to items displayed for sale. Correspondences relating to the issue of damage by floods covering the period December 1975 to September 1981 were exhibited. There was no denial of those claims at the trial.

In June 1982 a claim for damage alleged to have occurred in February, May and June 1982 was submitted, by the appellant/s Advocates. This time the damage was heavy. There was further damage in August and October 1982 and February, 1983 which were itemized in the plaint upto January 1984. The suit was filed in November 1984. The respondent (landlord) denied the breach in its defence and further stated that the cause of floods was due to an act of God of which the respondent had no control.

The law relative to a breach of covenant as in this case, is stated in *Halsbury's Laws of England* 4th Edition para Vol 27 para 307 that:

"Where the landlord is guilty of a breach of covenant to repair the demised premises, he is not liable for any damage suffered prior to the receipt by him of the notice to repair or to the time at which he has actual knowledge of the want or repair …….. The tenant is entitled to recover damages for personal injuries and for damage to his chattels during the same period caused by the landlord's default in repairing."

The definition of the term, "damages" is set out in *McGregor on Damages* Fifhteenth Edition paragraph 1 as:

> "pecuniary compensation, obtainable by success, for a wrong which is either a tort or a breach of contract, the compensation in the form of a lump sum which is awarded unconditionally, and is generally, but now not necessarily, expressed in English currency."

Compensation for a wrong committed could be claimed as general damages or special damages. In general damages compensation cannot be quantified but will be assessed by the court. In the case of special damage, such claim of the loss must be specifically pleaded and strictly proved. Proof of damages is by evidence and the Court will decide each case on balance of probability. Strict proof of special damages is not defined but section 12 of the Evidence Act (Cap 80) provides:

> "In suits in which damages are claimed, one fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant."

In allowing the respondent's appeal, the learned appellate Judge gave reason that the appellant did not prove its claim of special damages. In the plaint the appellant claimed that the respondent breached the term of the lease. In the terminology given in *Mac Gregor on Damages*, Fiftheenth Edition para 21 is that:-

> "Special damages, are given in respect of any consequences reasonably and probably arising from the breach complained of"

and para 23 provides:

“Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly.”

In complying with rules of pleading the appellant clearly stated how water ingressed the premises and itemized the items damaged by the floods and the dates when the damage occurred. The respondent had prior notice of the breach and was put on notice of the instant claim for failure to carry out proper repairs through correspondence before the suit was filed. Particulars of breach were given in paragraph 7, 8 and 9. In paragraphs 10 and 11 the particulars of items damaged were listed. There is no evidence shown that the defendant disputed the claim specifically or demanded further and better particulars when the suit was filed until if filed its defence. In the defence, the respondent denied all the plaintiff’s allegations of breach and stated in paragraphs 9 that:-

> “The defendant further avers that if which is denied any loss occurred, which is denied, then the plaintiff failed to discharge its duty of care or in any way to mitigate the loss if / or which is wholly to blame.”

I shall revert to this paragraph later.

The plaintiff is required to prove its claim. There are two claims, firstly on general damages because of the ingress of water and secondly for the damaged chattels.

On the first limb there is evidence given at the trial by the respondent’s witness who stated:

> “We have repaired the roof and the canopy on the car park and built a ramp. The sewage is a problem because the tenants use newspapers instead of toilet papers, and tenants throwing things down. ----------
>
> Whenever the plaintiff company complained, I visited. When I visited there was a large amount of sewage all over the floor. Then the area had been cleared”

And in cross examinations, the witness stated:

“It is true that the complaints have been coming in since 1976. I do not know what had happened between 1976 and 1983. We have done the expansion joint and the ramp and car park and gutters on the drains and also the canopy. All repairs were done in 1983……”

The witness at the time of giving evidence had been employed by the respondent. The witness described herself as property supervisor and was not a professional engineer or architect. She acquired the knowledge of her evidence from correspondence in the property file, but she admitted the defects. She did inform the Court why repairs were not carried out before 1983.

With this evidence, I do not know what the tenant was expected to do in view of the avernments in paragraph 9 of the defence above. The evidence of the witness confirmed that the landlord was in breach of the covenant as claimed by the appellant. That being the case, there was no appeal to the High Court on the award of general damages.

Perhaps commenting further on paragraph 9 of the defence, that the tenant continued to occupy the premises and that it could have mitigated its damages, there are no suggestion put forward by the respondent indicating in which way the tenant could have done or mitigated its damage. Perhaps what the respondent had in mind was that the tenant could have vacated the premises but there was no such suggestion. Their relationship was good and the business was perfectly good except when it rained. The appellant had complained to the respondent as and when floods occurred but no effective repairs were carried out. In the case of *Porter v Jones* (1942) 2 All ER 570 where a tenant took a lease but before

taking over, the Landlord's agent who had authority, undertook to repair the ceiling. After 8 months, as the tenant was in the kitchen, the ceiling collapsed and injured her. It was held that it was not possible to hold, ……. that the conduct of the appellant in using the kitchen at the time of the accident was unreasonable, and, therefore, the appellant was entitled to recover damages in respect of her injuries.

In the present appeal in order for the appellant to succeed, it was bound to plead and prove special damages. On the pleading, this was done, the list of the items damaged and the loss claimed were stated. It was then the question of how the appellant led the evidence to prove its claim. There were previous claims as from 1975 as a result of flood water. The past claims were similar to the present one on appeal. When they were presented, they were paid without any resistance. The present claim may have been resisted because it was larger than the previous one. The correspondence that was put in, place this claim on the similar facts as the previous ones.

In *MacGregor on Damages* 15th Ed (Sweet & Maxwell) 1968 paragraph 1790 on page 1791 it is stated:

> "The evidence in proof of special damages must show the same particularity as is necessary for its pleading. It should therefore normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. Thus, had there been a sufficient allegation of special damage in all the cases where its proof has been refused because of the plaintiff's failure to plead specific instances, the plaintiff would still have been required to give evidence of these specific instances to prove the special damages."

The nature of the business carried out by the appellant was the sale of antiques and sale by public auction of such items as may be deposited there by clients. The goods were stored or displayed for sale on a particular day. The respondent was aware of this business because of previous claims that whenever there were floods during rainy season damage to the goods was inevitable because of lack of proper repairs. The evidence was given by a director of the appellant who stated in part:

"When items are brought in, a vendor is given a receipt and an estimated value is given. In some cases a reserve is put on, in others an auctioneers reserve is put on, which may be lower than the hard reserve under para 10 (1) (a) of the plaint we have taken the reserve price, sold them after damage, and the difference is the claim. I employ valuers from London for the antique side who are qualified to do it. I myself have been doing it for 10 years. The valuation put on is normally the minimum price a client will accept. I always place a low valuation. I exhibit my list of valuation for 10 (1) (a) – Exh 13. My auctioneers fixed the values for the household goods, and the others by the experts I employ. I think in fact the valuations are low. My claim is definitely a minimum claim……. I assessed the damages after sale of those affected by the water. I pay the owners the top reserve. I paid all the money."

All in cross-examination, the witness said also in part:

> "The problems have considerably lessened since the defendant carried out some repairs, but still not satisfactorily. Substantial work has been done to the building. The defendant built the wall at the rear.--- My claim is not exaggerated or exhorbitant. I have dried out carpets on numerous occasions and done repairs on numerous occasions. On numerous occasions, I have tried to hang something up, or put it at a high place. The carpets must be displayed. The prices I am claiming are the minimum amounts.

I observe from the evidence that the loss is only determined after the sale had been conducted and not otherwise. It appears that this kind of loss which is a shortfall as in Exh 13, could not be assessed but only determined after purchasers offered their bids. Paragraph 10 (1) (a) of the plaint sets out the particulars of damaged items in lots. The itemization of the damaged items and the respondent's evidence of repairs in 1983, were accepted by the appellate Judge who further stated in his judgment that the admission of repairs in 1983, was an acknowledgment of its breach of clause 3 (b) of the said lease.

The learned Senior Resident Magistrate, having listened to the evidence stated in his judgment that:

> "PW1 was an excellent witness who gave her evidence well and in a convicing fashion, and I believe her. In particular, I am satisfied that the defendant company was advised over a long period of time about the the defect and were very well aware of the potential damage the plaintiff may have suffered long before the material period……..
>
> As to the quantum, it is true that special damages must be proved, but I do not accept that damages can only be proved by supporting documentary evidence. It all depends on the credibility of the witness and as I have said PW1 was a good witness, with 10 years experience in the auction business and who employs trained valuers. For these reasons I accept her evidence on quantum in its entirety."

This point of an acceptable evidence to prove special damages on the evidence of a witness was considered by Lutta JA in *Kampala City Council v Nakaye* S (1972) EA 446 at page 449 letter I and said:

> "Secondly, in regard to the question of the value of the articles, household and personal of the plaintiff, the latter gave evidence as to what she paid for the articles in question and stated that the receipts in respect thereof had been removed or lost as a result of the demolition of the house, and the Judge believed her. I am satisfied that the Judge was right in accepting her evidence in this regard and I see no reason to differ, ----------"
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> In this case, the credibility of the witnesses were in issue and accepted as credible. The facts of this case are distinguishable from the facts in *Ouma v Nairobi City Council* (1976) KLR 297 where Chesoni J (as he then was) dismissed the plaintiff's suit for failure to prove special damages. Likewise, in the case of *Herbert Halin v Amrik Shah* (1982-88) 1 KAR 738, a claim of special damages was rejected because (a) on the claim of depreciation it was regarded as a claim of special damages but it was neither pleaded nor proved (b). The value of the car on importation having been disclosed, the plaintiff failed to disclosed the selling price later to determine the loss. Similarly, the plaintiff, having incurred air-ticket charges an hotel expenses both in Germany and in Nairobi, produced receipts in support. But the claim was rejected as the plaintiff failed to mitigate his loss which he could have done by driving the car to Zambia after essential repairs to the tail light had been carried out.

There was submission on first appeal that the evidence of witness for the appellant, who was its director, should not be believed because she could have an interest in the claim and could have exaggerated her evidence on the claim to suit her interest. The evidence is a matter of fact and the best judge of those facts is the trial magistrate who saw and heard the witness and assessed the witness demeanour and it was proper for the trial magistrate either to believe or disbelieve.

The appellant's witness gave credible evidence and was believed by the trial Senior Resident Magistrate. As was held by the House of Lords in *Watt or Thomas v Tomas* (1947) AC 484 that:

> "When a question of fact has been tried by a Judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach great importance to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound.-------"

The credibility of a witness is a question of fact reached by the trial court. It is to be noted that the learned first appellate Judge was not given the benefit of the decision of Court of Appeal in *Kampala City Council v Nakaye* in which this issue had been dealt with. Had this been done the first appellate court may have decided differently.

> It is my view that this appeal be allowed with cost. I would therefore, set aside the appellate judgment and restore the trial court's judgment.

These judgments are delivered by two members of the court who heard the appeal as provided by Rule 31 (3) of the Rules of this court.

Cockar JA: I have perused the draft judgement of the Gachuhi JA. I concur with it.

Dated and Delivered at Nairobi this 29th day of September, 1993

J.M. GACHUHI

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL