



Vishva Stones Supplies Company Limited v RSR Stone (2006) Limited (Civil Appeal (Application) E308 of 2020) [2024] KECA 978 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 978 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E308 OF 2020
S OLE KANTAI, P NYAMWEYA & JM MATIVO, JJA
JULY 26, 2024**

BETWEEN

VISHVA STONES SUPPLIES COMPANY LIMITED APPELLANT

AND

RSR STONE (2006) LIMITED RESPONDENT

(An appeal against the Judgment and Decree of the High Court of Kenya, Nairobi (Makau, J) dated 20th December 2018 in Milimani HCCC. No. 388 of 2007)

JUDGMENT

1. This is a first appeal against the decision of the High Court (Makau, J.) in which the appellant's suit was dismissed for failure to particularize special damages pleaded in the plaint filed on 31st July 2007. As such, this Court's primary role is namely, to re- evaluate the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In Kenya Ports Authority vs Kuston (Kenya) limited [2009] 2EA 212 this Court held 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.”

2. The factual matrix in this case is essentially uncontested or common ground. It is not disputed that the parties herein entered into an agreement on 1st March 2006 for the sublease of the appellant's (Vishva Stone Suppliers Company Limited) property known as LR. No. 7538 (Original I.R. No. 7072) to the respondent (RSR STONE (2006) LIMITED) for the purposes of undertaking quarrying



works together with all the excavating machinery, tools and equipment all in good working condition. However, the appellant unilaterally terminated the contract on or the 1st week of August 2006 and on the 2nd week of August 2006, the appellant collected all its machinery, tools and equipment from the site which the respondent was in possession, claiming that the respondent had refused to:- pay rent arrears for the month of July 2006; refunds of payments made to KPLC; and refund for the purchase of a stolen switchboard while the respondent was in possession of the premises.

3. The appellant also claimed that some of its machinery and equipment were destroyed while the respondent was in possession of the site. In his quest to recover the alleged expenses and sums allegedly owed to it by the respondent, the appellant instituted Milimani HCCC. No. 388 of 2007, Vishva Stone Suppliers Company Limited vs RSR Stone (2006) Limited against the respondent before the trial court on 31st July 2007, seeking judgment against the respondent for the sum of Kshs. 5,214,114.40, interests and costs.
4. In its defence dated 8th October 2007, the respondent denied the alleged indebtedness and averred that if at all it owed the appellant, it had not failed or neglected to pay the same. Hearing proceeded ex parte on 20th April 2015 and judgment was entered in the appellant's favour on 19th November 2015. However, on 5th July 2018, the parties recorded a consent setting aside the ex parte judgment on condition that the respondent pays the appellant the sum of Kshs.1,656,000.00 and that the disputed sum of Kshs.3,558,114.40 be determined by the Court. Pursuant to the said consent, hearing proceeded before Makau, J primarily to determine the disputed amount. In the impugned judgment dated 20th December 2018, the learned judge distilled two issues:
 - a. whether the plaintiff is entitled to payment of Kshs 5,214,114.40; and, (b) whether the plaintiff is entitled to costs and interests.
5. On the first issue, the learned judge found that the appellant's claim was for special damages of Kshs.5,214,114.40 as per paragraph 4 and 6 of the plaint. However, the learned judge held that the said sum was not specifically pleaded in the plaint and since parties are bound by their pleadings, the learned judge found that the claim has not been specifically pleaded and proved. He dismissed the appellant's decision to rely on his witnesses' statements describing it as an attempt to change the character and nature of the appellant's pleadings contrary to the provisions of the *Civil Procedure Act*. The learned judge dismissed the appellant's suit and condemned the appellant to pay for costs.
6. It is the said verdict which elicited this appeal which is premised the grounds that the learned Judge erred in law and fact in:-
 - a. Placing over-reliance on the effects of not pleading special damages in disregard of the provisions of Article 159(2) (d) of *the Constitution* and considering that the evidence of the special damages was in any event before him.
 - b. Disregarding and/or misapprehending the overwhelming evidence adduced in favour of the Appellant's case.
7. The appeal was disposed of by way of written submissions and oral highlights. The appellant's submissions are dated 16th March 2021 while the respondent's submissions are dated 26th April 2021. Mr. Mutiso, learned counsel for the appellant, in elaborating the aforesaid grounds submitted that the jurisprudential underpinning of the necessity to specifically plead special damages in the plaint ought to be more progressively interpreted in the present circumstances where the suit is no longer a bare statement but a volume of documents that contain the very documents that constitute special damages. Therefore, the appellant ought not to be faulted for the brevity of counsel's pleadings as was stated at paragraph 4 and 6 of the plaint. Nevertheless, the appellant elucidated the documents during his oral



- testimony. Therefore, there was sufficient material on record to consider and the trial court fell into error when it held that the appellant's claim was faulty merely because it was not specifically pleaded in the plaint.
8. Counsel further submitted that Article 159 of *the Constitution* places on the court the obligation to do justice on a constitutional pedestal unfettered by procedural limitations. Mr. Mutiso urged this Court to adopt this as progressive jurisprudence considering there is presently the innovation and requirement that parties to a suit must also file a witness statement and list of bundles of documents at the point of filing the plaint as provided under Order 3 Rule 2 of the Civil Procedure Rules. (This rule has nothing to do with witness statements).
 9. Mr. Mutiso contended that the appellant's bundle of documents was filed in court and produced during the trial without objection by the respondent who cross-examined the appellant's witness on the basis of the document. Counsel also submitted that although special damages must be strictly proven the standard of proof is still on a balance of probabilities which in this case was satisfied by the appellant and judgment should be given against the respondent in the sum of Kshs.5,214,114.40 less 2,412,000.
 10. In opposing the appeal, learned counsel Ms. Chege maintained that the prevailing law at the time the appellant filed the subject plaint required claims in the nature of special damages to be specifically pleaded and also strictly proved. In support of this contention, counsel cited *Herbert Hahn vs Amrik Singh* [1985] eKLR where this Court held that special damages must be not only be pleaded specifically but must also be proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.
 11. Ms. Chege further contended that the appellant introduced new claims in its witness statement dated 31st October 2018. Additionally, Ms. Chege urged that the failure to plead special damages was a deliberate attempt by the appellant to engage in trial by ambush, yet the appellant had 11 years to analyze and make appropriate amendments to particularize its claim. Counsel cited this Court's decision in *Daniel Kosgei Ngelechei vs Catholic Diocese Registered Trustees of Eldoret & Another* [2016] eKLR in support of the holding that the requirement that special damages should be pleaded serves the purpose of warning the other party the nature or type of claim and evidence that he will be confronted with at the trial.
 12. Regarding the claim for rent for July, 2006, Ms. Chege submitted that it was the appellant's director's evidence that he had not raised the rent invoice for the month of July 2006 and he did not give any reasons for not raising an invoice. Counsel maintained that the reason why no invoice was raised for the month of July 2006 was because the respondent was not in occupation of the leased premises.
 13. Regarding the claim for the replaced switchboard which the appellant was seeking reimbursement pursuant to clause 9 of the lease agreement dated 1st March 2006, the respondent submitted that the appellant did not produce any receipts to prove the purchase of the main switch board and neither did the appellant produce any receipt to demonstrate payments made to KPLC to which payment the appellant was entitled to reimbursement.
 14. Regarding the electricity bill and payment receipts produced at pages 36 and 37 of the Record of Appeal, the respondent's counsel maintained that the receipts show expenditure as at August 2006. Further, the respondent was not in occupation in July and August 2006. The appellant has therefore not proved the amount owing from the respondent. In any event, the appellant had advised the respondent that the transformer had been removed by KPLC. It is not therefore clear how power bills were accumulating when the transformer was absent. It was the respondents' contention that invoices



are not proof of expenditure as was held by this Court in Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs Janevams Limited [2015] eKLR.

15. Regarding the claim for the alleged damage to the appellant's machinery, it was submitted that if truly the machines were damaged, the appellant should have provided proof of such damage by way of an assessor's report showing the damage and the cost of repair. Also, the machines could have been damaged during transit from the leased premises and during the four months period they were in the custody of the appellant, prior to the issuance of the 1st demand letter on 7th October 2006. As regards the alleged missing tools, Ms. Chege submitted that the appellant did not produce an inventory to prove that the items were not collected from the respondent nor could the probability of the appellant's officials being responsible for loss be ruled out.
16. We have considered this appeal, submissions and the impugned judgment. We have also considered the decisions relied on and perused the trial court's record. The key question in this appeal is whether the appellant in his plaint specifically pleaded and particularized the special damages, and whether he proved the claim to the required standard. The appellant's claim for special damages of Kshs.5,214,114.40 was pleaded at paragraphs 4 and 6 of the plaint as follows:-
 - "4. The defendant has failed, or otherwise neglected to pay all the amounts due and owing from it to the plaintiff from the defendant as at October 2006 stood at Kshs. Five Million Two Hundred Fourteen Thousand One hundred and Fourteen and Forty Cents which amounts continues to accrue
 - "6. "The plaintiff claims from the defendant full payment of the said sum of Kenya Shillings five million two hundred and fourteen thousand one hundred and fourteen cents as at October 2006 with all accrued amount up to payments plus accrued interest and bank charges".
17. From the above averment, there is no doubt that the claim lacks particulars. In fact, the appellant's counsel did not dispute the established requirement that special damages must strictly be pleaded and proved nor did he dispute that the special damages were not specifically pleaded in the plaint. His argument as we understood it is that the jurisprudential underpinning of the necessity to specifically plead special damages in the plaint ought to be more progressively interpreted in the present circumstances where the suit is no longer a bare statement but a volume of documents that contain the very documents that constitute special damages. He contended that there was sufficient material on record to support the claim, therefore the trial court fell into error when it held that the appellant's claim was faulty merely because it was not specifically pleaded in the plaint. Mr. Mutiso contended that the appellant's witness statement dated 31st October 2018 detailed the particulars of the claim for special damages as follows: rent arrears for the month of July, 2006 in the sum of Kshs.2,030,000.00; reimbursement of the money advanced into replacement of the stolen switch board at Kshs.661,200.00;cost of KPLC at Kshs.862,640.00;Broken main jack arm caterpillar wheel loader 950 at Kshs.1,075,494.00; Rail 4.5M long 41 No at Kshs.1,025,000.00; Rail 3M Long 2 No at Kshs.33,000.00; Rail 2M long 3No at Kshs.22,000.00; Rail 1 M long 2 No at Kshs.16,665.00; One set of box spanner at Kshs. 15,000.00; One set of combine spanner at Kshs.4000.00; 2 fit stone cutting saw 8 No at Kshs.96,000.00; Broken engine Oil sump 1 No; at Kshs.45,000.00; Broken engine Manu fault 1 No at Kshs.30,000.00; Lost diesel filter housing at Kshs.10,000.00; and used light bill at Kshs.43,565.40. Be that as it may, under paragraph 6 of the plaint, the appellant merely threw at the trial court a global figure of Kshs.5,214,114.40 as at October 2006 with all accrued amount up to payments plus accrued interest and bank charges. Counsel sought further refuge in Article 159 (2) (d) of *the Constitution* which requires courts to determine cases without undue regard to procedural



technicalities. It was his submission that the court has an obligation to administer justice in accordance with constitutional dictates unfettered by procedural limitations.

18. It is now firmly established that special damages must not only be specifically pleaded but also must be strictly proved, before they can be awarded by the court. This Court in *Hahn vs Singh* [1985] KLR 716, at P. 717, and 721 (Kneller, Nyarangi JJA, and Chesoni Ag. J.A) stated: -

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

19. Special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly. (See *Stroms Bruks Aktie Bolag & Others v. John & Peter Hutchison* [1905] AC 515 at page 525). The appellant’s pleadings did not particularize the special damages contrary to the above settled principle.

20. Mr. Mutiso was at great pains trying to persuade the Court that it was sufficient that the appellant had particularized the claim in his witness statement. Mr. Mutiso’s argument is legally frail and ignores the fact that there is a wide difference in law between a pleading and a witness statement. Pleadings are formal written statements filed by the parties to a lawsuit, outlining their respective claims, defences, and responses to each other's claims. A pleading includes claims and counterclaims but not the evidence which the litigant intends to prove his case. On the other hand, section 3 of the [Evidence Act](#) defines evidence as follows:

“evidence” denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity;

21. A written witness statement is essentially a means by which a litigant proves his case. Therefore, a witness statement is evidence whose primary purpose is to prove the litigant’s claim. The witness can simply adopt the statement as his evidence in chief and proceed to be cross-examined on the evidence. The attempt by the appellant to equate a witness statement with a pleading has no basis in law. Evidence is led to prove the averments in the pleadings, but no evidence can be led beyond pleadings. Therefore, a witness statement cannot supplement a pleading nor can the function of the two be confused.

22. The other argument urged by Mr. Mutiso is that this Court should pay homage to Article 159 (2) (d) of [the Constitution](#) and avoid elevating technicalities of procedure above substantial justice. The requirement that special damages be pleaded and strictly proved is not a legal or procedural technicality. Article 159 (2) (d) cannot be used as a cure for failure to plead special damages with specificity a grave or as a basis to convert evidence into a pleading. As was held by this Court in *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 Others* [2014] eKLR while quoting with approval an excerpt from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” restated that: -

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot



be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

23. The appellant is bound by its pleadings. It cannot purport to amend its pleadings by means of a witness statement. Arising from our findings herein above, we are persuaded that the trial Judge arrived at the correct finding and dismissed the appellant's suit for failure to particularize the special damages in the plaint filed on 31st July 2007.
24. This appeal therefore lacks merit. We accordingly dismiss it with costs to the respondent both on appeal and in the High Court.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

