Seasons Restaurants & Hotels Limited v Kenya Power & Lightning Co. Ltd (Civil Appeal 118 of 2018) [2023] KECA 1379 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1379 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 118 OF 2018

FA OCHIENG, LA ACHODE & WK KORIR, JJA

NOVEMBER 24, 2023

BETWEEN

SEASONS RESTAURANTS & HOTELS LIMITED ..... APPELLANT

AND

KENYA POWER & LIGHTNING CO. LTD ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nakuru (Mulwa. J) dated 27th of July 2017 in Nakuru Civil Case No. 30 of 2013)

JUDGMENT

1. This is the first appeal of Seasons Restaurants & Hotels Limited (the appellant) against the judgment and decree dated 27th July, 2017 of J.N Mulwa J. Kenya Power & Lightning Co. Ltd is the respondent.

2. The background of this appeal is that on the 26th February 2013, about 5.40 pm the respondent's transformer at the main gate of the appellant business premises caught fire that spread to the hotel and lodges. Consequently, the appellant filed a plaint dated 16th April 2013 faulting the respondent for negligence and consequential damage occasioned to the establishment. It was averred that the respondent failed to effectively ensure that the transformer and other related appliances were constantly maintained and repaired. The particulars of damages pleaded being for building burned down Kshs. 14,178,840, landscaping, lawns & trees kshs.300,000, and loose assets Kshs, 3,681,000. They further claimed for lost business and benefit from burnt premises as: guest rooms (8 units) Kshs 600,000 per month, conference hall (1 unit) kshs.575,000 per month and special damages (loss assessment report) Kshs 50,000. As such, they prayed for:

    a) Kshs. 18,159,840/=

    b. Kshs. 1,175,000/= per month from 26th February 2013 until the reconstruction of the burnt facilities in full.

c. Special damaged of Kshs. 50,000

3. In rebuttal, the respondent filed a defence dated 24th October 2013. It denied the allegation in the plaint and attributed the negligence to the appellant. In the alternative, it pleaded the doctrine of volenti non fit injuria.

4. At the hearing, the appellant presented three witnesses: Julius Lietaya Devoni (PW1), Daudi Kibet (PW2) and Pius Isaiah Khahoya (PW3) to urge its case, while the respondent presented one witness, Timothy Muoki Maingi (DW1) to defend.

5. The appellant's case was that PW1 was carrying out his duties as a security guard at the material time and day, at the main gate of the appellant's hotel when he heard a loud blast from the transformer that was about 15-20 meters away from the road then he saw fire from the transformer and the dry grass. He called for help from the lodge manager, and with the assistance of the staff, tried to put out the fire before the fire fighters came to help. However, the fire burnt some of the hotel houses, trees, and the grass before it was put out. He confirmed that later, the hotel houses were rebuilt to the same standard as they were prior to the fire.

6. PW2, an accountant employed by the appellant told the court that he visited the lodge soon after the fire and confirmed that eight rooms and the conference hall had been destroyed by the fire. He gave a tabulation of the incomes they were getting in that period and averred that from the date of the fire, no revenue was received from the rooms and conference hall. That they were rebuilt and started operations in 2014 after a loss and adjustment report was prepared.

7. PW3, a registered valuer was instructed by the appellant to inspect and value the burnt down building and trees and adjust the loss. He produced in court the report he prepared stating that he used the appellant's bookings to arrive at the loss and income of the respondent. However, he did not produce the documents he alleged to have used.

8. In opposition, DW1, a Technical Officer who oversaw the KPLC depot at the material period confirmed the occurrence of fire at the material date and time. He testified that the transformer was one year old, was not overloaded and was used well. His testimony was that an explosion from a transformer would have been caused by a fault or oil spill, but that that was not the case in this circumstance. He testified that he prepared a report on his investigation into the cause of the fire but he did not produce it in evidence.

9. Upon consideration of the evidence before her, the learned judge found the respondent liable for negligence and the consequential damage arising therefrom. She further, held that the appellant's claim for damages was not proved except for special damages of Kshs. 50,000 which was awarded. She accordingly dismissed prayers (a) and (b) with costs and awarded prayer (c) with costs and interest at court rates from the date of filing of the suit.

10. The appellant being aggrieved and dissatisfied by the above decision, filed an appeal on the following grounds:

    a. "That the learned judge erred in law and fact in holding that the appellant had not proved special damages despite there being sufficient evidence to the contrary.

    b. That the learned judge erred in law and fact by failing to appreciate sufficiently the appellant's evidence and submissions having entered judgment for the appellant on the issue of liability.

    c. That the learned judge erred in law and fact by misapplying the law applicable in civil cases."

11. The respondent affirmed the decision of the superior court through the Notice of Grounds for Affirming the Decision dated 14th October, 2022, upon grounds other than those relied upon by the judge, namely:

    a. "That the plaintiff did not produce into evidence any bank statement, audited accounts, mpesa statements, receipt, inventories and/or invoices to support their claim on special damages.

    b. That the plaintiff's accountant (PW2) did not provide any persuasive oral or documentary evidence to substantiate their special damages claim of Kshs. 18,159,840/=.

    c. That the plaintiff did not produce proof of the exact period, if any, when the alleged loss of income occurred.

    d. That the valuer (PW3) who prepared the valuation report (PEX1) and testified was not qualified to carry out any quantity survey on costs of reconstructing the affected buildings.

    e. That the valuer (PW3) was not qualified to carry out valuation of movable properties such as furniture."

12. The respondent also filed Notice of Cross Appeal on the following grounds:

    a. "That the learned judge erred in law and fact by failing to find that the plaintiff had not established liability on the part of the defendant.

    b. That the learned judge erred in law and fact by shifting the burden of proof on liability on the part of the defendant.

    c. That the learned judge erred in law and fact by holding that the burden of proof on the causation of the fire lay with the defendant.

    d. That the learned judge erred in law and fact by failing to find that the plaintiff had substantially and/or wholly contributed to the occurrence of the fire and its spread.

    e. That the learned judge erred in law and fact by failing to find that the plaintiff was liable under the doctrine of volenti non fit injuria.

    f. That the learned judge erred in law and fact by misapplying the doctrine of res ipsa loquitor in the circumstances of the case

    g. That the learned judge erred in law and fact by misapprehending the evidence of the defence witness to arrive at an erroneous conclusion that the defence witness confirmed switching off the burning transformer.

    h. That the learned judge erred in law and fact by misapprehending the evidence of the defence witness to arrive at an erroneous conclusion that the fire occurrence was at the defendant's transformer."

13. The firm of M/S Chuma Mburu & Company Advocate filed written submissions dated 14th November 2022, on behalf of the appellant and urged that the court ought to be conscious that the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of. That the valuation report was comprehensive, and the valuer was to advise on the fair and reasonable value of the current open market value of the buildings and loose items damaged by fire and loss of income. Further, that the valuation report indicates that the value of the loose assets/ items and losses from the building is based on inventory and their respective receipt from the owners.

14. It was contended that the valuer was an expert whose evidence the respondent did not controvert. They relied on the decision of The *Jubilee Insurance Company of Kenya Ltd vs Zahir Habib Jiwan & Another* (2017) eKLR, where the court admitted the valuation report and awarded damages.

15. It was emphasized that the valuation report gave value as it was when the building burnt down. That the claim was not for compensation for the reconstruction but was the value of the burnt premises. It was argued that a valuation report is a basic inspection of the property that will determine its value and that "the court in its judgment did not state that the valuer did not prove that he was unqualified to do the report." That the accuracy of his opinion did not waver, and he gave report as it was without exaggeration.

16. In response to the cross appeal, the appellant concurred with the findings of the trial court that the respondent was to blame for the fire.

17. In rebuttal, the firm of M/s Kinyanjui Njuguna & Co Advocates filed written submissions dated 15th December 2022 on behalf of the respondents. They submitted on three grounds as follows: whether the appellant proved liability against the respondent, whether the appellant contributed to the fire outbreak and spread, and whether the appellant strictly proved the special damages sought under prayer (a); and lost business and benefit under (b) in the plaint dated 16th April 2013.

18. It was submitted that the burden of proof of liability in a civil case always rests with the claimant. They urged this Court to be persuaded by the High Court decision in *Alexander Mwendwa Mwova & Others v Attorney General* (2021) eKLR, where it was held that the silence of the defendant cannot be used to assist the plaintiff in law and courts are alive to the veracity of section 107 and 108 of the *Evidence Act*. It was submitted that the superior court erred by shifting the burden of proof of liability from the appellant to the respondent. Further, that DW1 did not admit that there was any fire or explosion from the transformer. On the contrary, that the evidence of DW1 was misconceived by the erroneous conclusion that DW1 confirmed switching off the burning transformer.

19. The respondent urged that the superior court erred in its analysis that the respondent failed to show probable cause of the fire. Further, that the respondent did prove the probable cause of the fire to be the overgrown dry grass that caught fire and spread it to the houses. That the alleged loss and damage would not have occurred had it not been for the one-meter overgrown dry grass very close to the premise. That there was no evidence that the transformer was too close to the houses, or that the fire spread through the electricity supply line to cause the premises to burn down. Consequently, the applicability of the doctrine of *res Ipsa Loquitor* is misconceived and inapplicable as the respondent had given a perfect and plausible reason for the fire out break and spread.

20. The respondent argued that apart from the figure of Kshs. 18,159,840 the appellant did not offer any detailed and arithmetic breakdown with some degree of certainty and particularity supported by bills of quantities, purchase receipts and labour costs inter alia to justify the huge claim. Also, the appellant did not call any quantity surveyor to provide evidence of the costs of reconstructing the alleged damaged premises. They relied on *Capital Fish Kenya Limited v The Kenya Power & Lightning Company Limited* (2016) eKLR, where this Court sustained the High Court's decision dismissing special damages not proved. They also cited this Court's decision in *National Social Security Fund Bond of Trustees v Sifa International Limited* (2016) eKLR, where it was determined that the costs of demolished structures fall under special damages to be strictly proved.

21. The respondent further contended that despite the recent construction of the alleged destroyed guest rooms and conference hall, no documentary proof was produced to show their pre-fire value. Further that, PW2 testified that the buildings were insured against fire, but he did not produce the insurance

contract to show the approximate pre-accident value and/or sum insured. They concurred with the impugned judgment dismissing the appellant's claim of Kshs. 18,159,840.

22. On loss of business, the respondent also agreed with the impugned judgement that the appellant did not produce any proof of payment and/or business income from rented premises. They relied on Capital Fish Kenya Limited supra where this Court dismissed alleged loss of business claim for lack of evidence.

23. With the foregoing contentions between the parties in mind, we considered the record of appeal, cross appeal, and the parties submissions to reach our own conclusion. This being the first appeal, our duty is as stated in this Court's decision in *Gitobu Imanyara & 2 Others v Attorney General* (2016) eKLR thus:

> "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must 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 allowances in this respect"

24. Consequently, the issue that falls for our consideration is whether the appellant proved his case beyond reasonable doubt on liability and damages.

25. The appellant argued that the fire came from the transformer and spread through the grass to their premises and burnt eight hotel rooms and the conference hall. On the other hand, the respondent contended that the appellant did not prove that the respondent was liable for the fire that damaged the appellant's property. They urged that the appellant was liable for the destruction of their property since they had overgrown dry grass close to their premises, which caused the fire to burn their property.

26. In the impugned judgment the learned judge stated that the appellant pleaded the doctrine of *res Ipsa Loquitor*, and in allowing it held that:

> "In my analysis of evidence, I came to the same conclusion as stated in the cases above. The plaintiff had pleaded the said doctrine in its particulars of negligence. I do not agree with the defendant's submissions therefore, that the doctrine is inapplicable in the circumstances of this case. In the absence of evidence from the defendant to attempt to show the probable cause of the fire, and not blaming the plaintiff for the same or any negligence, there is no other reasonable conclusion, other than the defendant by itself or its authorized agents was responsible by omission or commission and failure to take proper care for the transformer and therefore the plaintiff's safety and of its business premises.
>
> In my respectful opinion, the plaintiff has proved its case to the required standard, on a balance of probability. I find the defendant liable in negligence and the consequential damages arising therefrom.

27. Section 107 of the *Evidence Act* provides that:

> "(1) Whoever desires any Court to give Judgment as to any legal right dependent on the existence facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

28. In civil cases, such as the one before us the standard of proof required is on a balance of probabilities. This standard was explained by Lord Nicholls in the decision in *Re H C minors* {1996} AC 563 at 586 as follows:

> "The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers, that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegations, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation "

29. In the impugned decision, the learned judge allowed the doctrine of res Ipsa Loquitor as pleaded by the appellant. *Halsbury's Laws of England* Vol 78 5th Edition discusses this doctrine as follows:

> " Where the claimant successfully alleges res Ipsa Loquitur, its effect is to furnish evidence of negligence on which a Court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not reverse the burden of proof, so that where defendant provides a plausible explanation without proving either of those matters, the Court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference."

30. It is trite law that the burden to prove a claim is on the person who alleges it and at no instance does it shift to the defendant.

PW1 testified that he saw the fire coming from the transformer which spread to the appellant's property, he also testified that he and other staffs tried to put the fire out, however, it spread too fast and since there were only three of them, there was nothing much they could do. On the other hand, DW1 testified that he saw the fire on the appellant's premises, he switched off the transformer and upon inspecting it, he found that it was in a good condition hence could not be the cause of the fire. He however failed to produce the report he prepared.

31. It is not in contention that some of the rooms in the appellant's hotel burnt down at the material time and date. We have considered the evidence of PW1 and DW1 and we are convinced that the appellant has proved its case on the balance of probability that the fire came from the respondent's transformer. As such, the respondent is liable for damage caused by the fire to the appellant's hotel rooms and conference hall.

32. Turning to whether the appellant has proved the damage caused. The evidence shows that the appellant heavily relied on the evidence of PW3 for proof of damages. In its submissions it contended that the valuer was an expert, and that the respondent did not controvert the evidence he gave. The respondent on its part contended that the appellant did not offer any detailed and arithmetic breakdown to support its claim.

33. The learned judge in dismissing the damages sought by the appellant pronounced herself thus:

> "It is noted that no explanation was offered during cross examination as to why such vital documents were not availed, or even annexed to the report. No bills of quantities were produced for the repair and reconstruction of the destroyed buildings. Indeed, the plaintiff produced no evidence of the destroyed buildings, their values and/or proof of construction costs or payments of the sums claimed in the plaint to the service providers.
>
> As to the income lost from the guest rooms, again nothing was tendered to the court to prove the average income prior to the damage. Lists and schedules provided, unless supporting documents are also provided remain as such. Lists and schedules and therefore of no evidential value."

34. The damages sought by the appellant were special damages which must be specifically pleaded and strictly proved as was held by this Court in *Capital Fish Kenya Limited v The Kenya Power & Lightning Company Limited* (2016) eKLRy. The Court held:

> "it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit."

35. According to the report prepared by PW3, the basis of valuation of the burnt hotels and conference hall was the sum of the depreciated replacement cost of affected improvements being had, to the standards of finishes of other similar buildings within the subject property. In their estimation the buildings needed 70% construction work to complete and reinstate them, which would cost kshs.14,178,840=. The respondent on the other hand contended that despite the recent construction of the alleged destroyed guest rooms and conference hall, no documentary proof was produced to show their pre-fire value.

36. In our view the appellant failed to prove the amount that it pleaded for the reinstatement of the burnt hotel and conference hall to the standard it was in pre-fire. What is prayed for under this head does not qualify as special damages since the valuation report terms it as an estimate. During the trial there was evidence that the damaged buildings had been rebuilt and reinstated to their pre-fire status. The appellant was therefore in a position to not only plead but also strictly prove the special damages by producing in evidence, supporting documents such as receipts or bills of quantities for the work it had done. It failed to do so. We therefore agree with the decision of the learned judge on this that the special damages was not proved.

37. The second set of damages was the value of the loose assets burnt. It was stated in the report that the damages were based on the inventory and respective receipts from the respondent. In his report PW3 put the damages under this limb at Kshs. 3,681,000. However, PW3 did not produce in court the inventory and the receipts that led him to those figures. As such we agree with the learned judge that these damages were not strictly proved. We also hold that the landscaping, lawns & trees damages estimated at Kshs. 300,000 was not strictly proved.

38. The appellant also sought for compensation for loss of income per month for the period before the construction of the burnt hotels and conference hall. The report recommended Kshs. 1,175,000/- as compensation. However, there was no documentary evidence to support the amount. We therefore agree with the learned judge that the appellant did not strictly prove this damage as required by law.

39. Ultimately, both the appeal and the cross appeal fail and are hereby dismissed. Each party shall bear its costs.

It is so ordered.

DATED AND DELIVERED IN NAKURU THIS 24TH DAY OF NOVEMBER 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR