



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, AZANGALALA & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 20 OF 2014

BETWEEN

PAUL MUIYORO

t/a SPOTTED ZEBRA..... APPELLANT

AND

BULENT GULBAHAR.....1<sup>ST</sup> RESPONDENT

REMAX REALTORS.....2<sup>ND</sup> RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Ougo, J.) dated 31<sup>st</sup> May, 2013*

*in*

*H.C.C.C. No. 600 of 2010)*

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**JUDGMENT OF THE COURT**

[1] This appeal arises from a suit which was filed in the High Court at Nairobi by **Paul Muiyoro Njuguna t/a Spotted Zebra** (herein "the appellant"). He had sued **Bulent Gulbahar** and **Reamax Realtors** (herein "the respondents"), seeking, *inter alia*, special damages of Kshs. 3,800,000/=, general damages, loss of business and an injunction restraining the respondents from interfering with his quiet possession and enjoyment of premises on **LR No. 1/299** along Argwings Kodhek road Nairobi (herein "the suit premises").

[2] The origin of the litigation was a written sale agreement dated 28<sup>th</sup> July, 2010 vide which the appellant purchased, from an entity called **Club D' Mills**, the latter's business of a bar and restaurant located on the suit premises owned by the respondents for Kshs. 3,800,000/=. The respondent approved the transaction and offered the same business space to the appellant on new terms. However, the appellant claimed that shortly after he purchased the said business and took possession of the premises, the respondents refused to enter into a formal lease agreement with him and unlawfully disconnected power to the suit premises. They also served him with a month's notice to unlawfully terminate the tenancy over the suit premises and then sent auctioneers to levy distress for rent yet he had no outstanding rent.

[3] The respondents' said unlawful actions provoked the appellant to file ***Business Premises Rent Tribunal Cause Nos. 756 of 2010*** and ***903 of 2010*** which causes however, became a cropper as the tribunal declined jurisdiction.

[4] The appellant believed that the respondents did not want him in the premises as he claimed in addition to the above wrongful acts, they deposited building material at the entrance of the suit premises thereby interfering with his business and rendering the suit before the High Court necessary.

[5] The respondents having been served with summons, entered appearance but failed to file defence within time as a result of which interlocutory judgment was duly entered in favour of the appellant. The respondents applied to have the interlocutory judgment set aside but ***Waweru, J.***, found that the respondents had not explained their failure to file defence as they had been indolent litigants not deserving of the court's discretion in their favour.

[6] Subsequently, the matter was listed before ***Ougo, J.***, for formal proof. The appellant produced the sale agreement between him and ***Club D' Mills*** and demonstrated how he had paid the Kshs. 3,800,000/= for the business. He then narrated how the respondents had frustrated the running of his business by power disconnections, leaving cement at the entrance to the premises and sending auctioneers to take away his furniture and stock thereby grounding the business.

The appellant further testified that the respondents wanted him to vacate the premises for purposes of developing the same and indeed put up a mall shortly after he was forced out. He claimed the said sum of Kshs.3,800,000/= which he had paid for the business which he could no longer run in the suit premises. He also claimed future profits which he projected at Kshs. 10.3 Million for the five (5) years he expected to be in the suit premises. The appellant further blamed the respondents for the property the auctioneers had carted away which he valued at Kshs. 669,767/=.

[7] The respondents were allowed to participate in the formal proof as they had entered appearance. On cross-examination, the appellant testified that the structures demolished on the suit premises were valued at Kshs. 2.8 Million and that he had paid goodwill of 496,000/=. He however, admitted that the Auctioneers'

Licencing Board determined that the auctioneers' proclamation of his properties had been properly issued. He acknowledged that power disconnection to the suit premises had caused difficulties in the running of the business which however, picked up before it was finally brought to an end when he was forced out.

[8] The appellant called one, ***Isaac Mutiso Kanyiri, (PW 1)***, an accountant who explained the projected profits of Kshs. 10,265,958/= and reiterated that the business declined due to lack of electricity.

[9] In his submissions after the formal proof hearing, the appellant claimed the said Kshs. 3.8 Million, Kshs.10,256,955/= for loss of business, Kshs.1,250,874/= general damages, Kshs.669,767/= being value of goods carted away by auctioneers and Kshs.200,000/= being amount he deposited for rent.

[10] In her judgment, the learned Judge dismissed the appellant's suit. She determined that the appellant had failed to prove his claim. She found that the appellant's claim for loss of business and rent deposit were not pleaded. With regard to goods taken by the auctioneers, the learned Judge found that the appellant had not strictly proved their value and with regard to the claim for general damages, the learned Judge found that the appellant's claim sounded in contract where damages are not at large.

[11] With regard to the sum of Kshs. 3.8 Million, the learned Judge determined that the respondents were strangers to the same as they had not sold the business to the appellant.

[12] Being dissatisfied with that judgment, the appellant lodged this appeal. In the memorandum of appeal, the appellant challenged the findings of the learned Judge with regard to the payment of Kshs. 3.8 Million for the purchase of business on the suit premises; the loss of business of Kshs. 10,256,955/=; the sum of Kshs. 669,767/= for goods taken and sold by the auctioneers and for reliance on technicalities

contrary to the express provisions of **Article 159 (2) (d)** of the **Kenya Constitution 2010**.

[13] Notwithstanding the grounds in the memorandum of appeal, counsel for the appellant, in his written submissions which he wholly adopted at the hearing of this appeal, focused on two issues namely, whether the learned Judge fell into error on the question of liability and whether the appellant proved his claim of Kshs. 3,800,000/= as special damages.

[14] It was learned counsel's contention that once an interlocutory judgment had been entered in favour of the appellant, the question of liability became a foregone conclusion and could not be revisited. In learned counsel's view, only the issue of quantum could be considered after the formal proof hearing. According to learned counsel, the learned Judge in this case revisited the issue of liability and in doing so, clearly committed a grave error on the face of the record.

On proof of the claim for Kshs.3,800,000/=, learned counsel submitted that the appellant produced the agreement under which he purchased the business which was being operated on the suit premises. Having purchased the business the appellant, according to learned counsel, expected to enjoy quiet possession of the suit premises for five 5 years which became a cropper because of the actions of the respondents. It was learned counsel's further contention that in questioning the privity of contract between the appellant and the respondents with regard to sale of the business operated on the suit premises, the learned Judge revisited the issue of liability which had been closed when interlocutory judgment was entered against the respondents.

[15] In response, learned counsel for the respondents submitted before us that despite the interlocutory judgment, during the formal proof hearing, the appellant dealt with other issues which he had not pleaded. In learned counsel's view, all claims made by the appellant were in the realm of special damages which were neither specifically pleaded nor strictly proved. In any event, according to learned counsel, general damages which the appellant also sought were not available for breach of contract which was the basis of the appellant's claim. In his view, the appellant failed to prove his claim during the formal proof hearing.

[16] We have considered the grounds of appeal, the written submissions on behalf of the appellant, the oral submissions on behalf of the respondents, the authorities cited and the applicable law. The appeal before us is a first appeal. This court therefore, has jurisdiction to re-consider the evidence re-evaluate it afresh and draw its own conclusion though that jurisdiction must be exercised cautiously bearing in mind that the learned trial Judge had the advantage of seeing and assessing the demeanor of the witnesses. See ***Peters -v- Sunday Post [1958] EA 424***; and ***Selle -v- Associated Motor Boats Company Limited [1968] EA 13***. It is not disputed that the respondent never filed a defence to the appellant's claim and that interlocutory judgment was entered in favour of the appellant.

[17] We would have thought that the effect of the interlocutory judgment was that liability in regard to the appellant's claim was no longer in issue as the respondents had failed to dispute the facts pleaded by the appellant in the plaint. In paragraph 6 of the plaint, the appellant averred that he had purchased '**CLUB D' MILLS**' located at the premises owned by the respondents and paid the sum of Kshs. 3,800,000/=. In paragraph 18 (a) the appellant sought compensation for the said sum of Kshs. 3,800,000/=.

The appellant furnished the basis for that claim in paragraphs 6, 7, 9, 10 and 11 of the plaint in which he averred that the respondents had approved the purchase of the business but subsequently and unlawfully disconnected power to the business. The respondents further unlawfully served him with a notice to terminate the tenancy which was to last for 5 years and had sent auctioneers to levy distress for rent which was not outstanding.

[18] The appellant was in effect saying that the respondents had, by their actions, destroyed his investment in the business which he had purchased for Kshs.3,800,000/= and which he expected to run for 5 years in the premises owned by the respondents. Those are some of the pleaded facts which were not disputed.

[19] The formal proof entailed the taking of evidence in order to demonstrate the loss arising from the

respondents' alleged breach of agreement and the justification for the reliefs sought by the appellant. The court, at the stage of formal proof, is only concerned with the extent of the loss and the appropriateness of the relief sought.

[20] The appellant testified and called one witness at the formal proof hearing. The evidence of purchase of the business then run on the suit premises could not be and was not disputed. He produced the sale agreement for the purchase and demonstrated payment for the business. At no time did the appellant allege that he had bought the business from the respondents. The business did not belong to them in any event. Having demonstrated that he had made that investment, the appellant set out to demonstrate that the business was no more, thanks to the acts of the respondents. He lost his entire investment which was domiciled on the suit premises owned by the respondents. The best way to demonstrate the value of that investment was to produce the sale agreement and show how he had paid for the same.

The respondents may have discredited some of the contentions of the appellant during the formal proof hearing but the record is plain that the appellant paid for the business for the said sum of Kshs.3,800,000/= which business could no longer be carried out on the premises thanks to the acts of the respondents.

[21] That being our view of the matter, we think the circumstances before the learned Judge did not justify the dislodging of the interlocutory judgment which had been regularly entered against the respondents. It is now settled that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion. In ***Felix Mathenge -v- Kenya Power Lighting Company Limited [Civil Appeal No. 215 of 2002] UR***, the Court held:

***"The role of the court after entering interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages".***

[22] The learned Judge stated as follows, with regard to the claim for Kshs.3,800,000/=:

***"I ask myself, were the defendants privy to the sale between the Club D' Mills and Spotted Zebra? The relationship between the plaintiff and the defendants was that of Tenant and Landlord so I can carefully conclude that there was no link between the plaintiff and the defendants in the sale since he did not benefit monetarily or otherwise from the sale therefore, the plaintiff cannot claim special damages from the defendants on this issue".***

[23] It is plain that the learned Judge with all due respect to her, misapprehended the appellant's case. She declined the appellant's claim for loss of his investment because in her view, the appellant did not purchase the business from the respondents. The learned Judge was re-opening the issue of liability and thereby set out to resolve a dispute which she had not been tasked to resolve and which issue had long been concluded when the interlocutory judgment had been entered on uncontested facts some of which facts have been referred to above. It was not open to the learned Judge to do so. All that the appellant was required to demonstrate was the basis and justification for claiming the Kshs. 3,800,000/=. Being a special damage claim, he had to specifically plead the same which, in our view, he did and strictly prove it which again he did admirably by producing the sale agreement and the transfer of funds for the purchase. He then went ahead to demonstrate how that investment had been destroyed by the acts of the respondents.

[24] We agree with the appellant that the learned Judge misdirected herself on the issue of liability with regard to the appellant's claim for Kshs.3,800,000/= for which interlocutory judgment had been entered and which claim the appellant had specifically pleaded and then strictly proved at the formal proof hearing aforesaid.

[25] We are not at all surprised that learned counsel for the appellant, in his written submissions, abandoned the other claims which the appellant had made before the High Court. In our view, learned counsel was plainly right in abandoning those claims. We say so, because those claims were not available to the appellant. The claim for loss of business of Kshs.10,256,955/= was a special damage claim. It had to be specifically pleaded and strictly proved. The appellant did not plead the same and could not therefore lead evidence in proof thereof.

The claim for Kshs.669,767/= for goods sold off by the auctioneer fell in the same category of special damages. As the claim was not pleaded, it could not be awarded even if evidence had been led in proof of the same.

[26] The position was confirmed by this Court in *Mbaka Nguru & Another -v- James George Rakwar [Civil Appeal No. 133 of 1998 (UR)]*. There, the Court cited with approval *Lord Goddard, C.J. in Bonham Carter -v- Park [1948] 647*

*T.L.R. 177* and continued:

***"It will suffice to say that plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the absence of any pleading as to damages claimed under this head, we are constrained to disallow the whole of that award and we set it aside wholly".***

That position was reiterated in *National Social Security Fund Board of*

*Trustees -v- Sifa International Limited [2016] eKLR*, where the Court stated:

***"Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars".***

[27] Given the case law on pleadings and proof of special damages, there was no way the appellant could be awarded the claims for loss of business, and that of value of goods taken and sold by the auctioneers as the same were not pleaded at all.

[28] The appellant's claim for general damages which he stated to be Kshs.1,250,874/= for breach of contract could not also succeed. We say so, because there is a long line of authorities which postulate that normally, general damages cannot be awarded for breach of contract since damages arising from breach of contract are usually quantifiable. The principle was crystallized in

*Dharamshi -v- Karan [1974] EA 41*, where it was stated:

***"This case has been accepted by this Court as an authority for the proposition that general damages cannot be awarded for a breach of contract and that proposition makes sense because damages from a breach of contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general".***

See also *Kenya Commercial Bank Ltd. -v- Stephen Mukiri Ndegwa &*

*Another [2014] eKLR*, among many others.

[29] The upshot is that, this appeal must succeed. The judgment of the learned Judge of the High Court

dismissing the appellant's suit with costs is hereby set aside and Judgment is entered for the appellant for the sum of Kenya Shillings Three Million, Eight Hundred Thousand (Kshs.3,800,000/=), being special damages suffered by the appellant by reason of wrongful acts of the respondents.

The said sum shall attract interest at court rates from the date of filing suit until payment in full.

[30] The appellant shall have the costs of this appeal and of the suit in the High Court.

***Dated and delivered at Nairobi this 25<sup>th</sup> day of November, 2016.***

***R. N. NAMBUYE***

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***JUDGE OF APPEAL***

***F. AZANGALALA***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR.**