



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: VISRAM, W. KARANJA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 147 OF 2013

BETWEEN

GILGIL TELECOMS INDUSTRIES LIMITED.....APPELLANT

AND

DUNCAN NDERITU & 55 OTHERS.....1- 56TH RESPONDENTS

TELKOM KENYA LIMITED.....57TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 137 OF 2013

BETWEEN

TELKOM KENYA LIMITED.....APPELLANT

AND

DUNCAN NDERITU & 55 OTHERS.....RESPONDENTS

(Appeals from the Judgment of the High Court of Kenya

at Nairobi (Kimaru, J.) dated 13th July, 2011

in

H.C. C. C. No. 165 of 2006)

JUDGMENT OF THE COURT

1. The judgment herein relates to Civil Appeals Nos. 147 of 2013 and 137 of 2013 as consolidated by an order of this Court dated 3rd March, 2016. Following the split of the then Kenya Post and Telecommunication Corporation (herein referred to as the Corporation) sometime between 1998 and 1999 three entities were incorporated namely, Communications Commission of Kenya, Postal Corporation and

Telkom Kenya Limited (the appellant in Civil Appeal No. 137 of 2013), Gilgil Telecoms industries Limited (the appellant in Civil Appeal No. 147 of 2013) was a subsidiary of Telkom Kenya. For the purposes of this appeal we shall refer to Gilgil Telecoms and Telkom Kenya as the 1st and 2nd appellants respectively while Duncan Nderitu and 55 others will be referred to as respondents.

2. Sometime after the split agreements on revised terms of service were made between Communication Workers Union of Kenya (formerly known as Union of Post and Telecommunication Employees and herein after referred to as the Union) and the 2nd appellant to wit,

a. Personnel circular no. 2B of 2001 raising house allowance of all employees to 60% of the basic salary effective from 1st December, 2001 was issued by the 2nd appellant;

b. Personnel circular no. 1B of 2003 which revised salaries of all unionisable employees by 7.5% effective from 1st January, 2003 was issued by the 2nd appellant;

c. A further salary increment of 10% payable in two phases with the first phase of 5% increment payable effective from 1st September, 2004 and the other 5% payable effective from 1st September, 2004.

3. Subsequently, during restructuring of the 2nd appellant there was rationalization of employees of the 2nd appellant and its subsidiaries which resulted in the respondents' services being terminated on 15th June, 2006. It was then that respondents claimed for the above improved terms from both appellants. Their contention was that at all material times they were the 2nd appellant's employees deployed to render their services to the 1st appellant hence were entitled to the benefits set out; the said benefits were discriminatorily implemented in favour of employees working directly under the 2nd appellant and the management cadre of the 1st appellant leaving the respondents out. On the other hand, the appellants' with one voice maintained that despite the fact that the 1st appellant was a subsidiary of the 2nd appellant, it was a distinct corporate entity; the benefits in question related to only the 2nd appellant's employees and not to the respondents' who were the 1st appellant's employees.

4. The respondents in the suit before the High Court sought *inter alia* a declaration that they were entitled to the said benefits and payment of the accrued benefits from the year 2001 until date of termination. The trial court by its judgment dated 13th July, 2011 entered judgment in favour of the respondents. It is that decision that sparked the appeals before us wherein the appellants complained that the learned Judge erred by:

i. Failing to pronounce the impugned judgment within 60 days contrary to Order 21 Rule 1 of the Civil Procedure Rules, 2010.

ii. By awarding claims in the nature of special damages which had not been specifically pleaded as required by law.

iii. By being openly biased in favour of the respondents evident from the impugned judgment.

iv. By failing to consider the appellant's evidence.

v. By making findings without any evidence or basis in law.

vi. By shifting the burden of proof on to the appellant contrary to the law.

vii. By framing issues for determination which were not supported by the pleadings and evidence tendered.

viii. By lifting the corporate veil without any legal basis.

ix. By failing to appreciate that by the time the respondents' had filed suit that they were no longer in employment.

5. The appeal before us was disposed by both written submissions and oral highlights. The 1st and 2nd appellants were represented by Mr. C. Wekesa and Mr. C. Ngugi respectively while the respondents were represented by Prof. T. Ojienda and Mr. A. Yoni.

6. Mr. Wekesa submitted that the trial Judge failed to determine the main issue, that is, who was the respondents employer? Instead he contradicted himself on the issue by referring to the respondents at one point as the 1st appellant's employees and later holding that the respondents' had proved their case against the appellants' suggesting they were concurrent employees of both appellants. According to him, the pertinent consideration ought to have been who paid the respondents for their services. He argued that the evidence on record clearly indicated that the respondents were the 1st appellant's employees. In his view there was no basis for the trial court to lift the corporate veil in respect of the appellant companies and in doing so the trial court dealt with an issue which had not been raised by the parties. Reliance was placed on Thomas De La Rue (K) Ltd. -vs- David Opondo Omutelema (2013) eKLR where this Court quoted with approval Captain Harry Gandy -vs- Caspar Air Charters Ltd. (1956), 23 EACA, 139, wherein it was stated;

“Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the Judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.”

7. Mr. Wekesa faulted the trial Judge for holding that the respondents could not tabulate their claim in the pleadings since a specific finding in their favour had not been made by the court. To him the respondents were capable of particularizing the special damages at the time of filing suit. To buttress this line of argument, this Court's decision in Central Bank of Kenya -vs- Martin King'ori (2009) eKLR was cited wherein it was expressed;

“There can be no argument that the pleadings particularized in paragraph 6 of the amended plaint was in the nature of special damages. These are damages relating to past pecuniary loss calculable at the date of trial. The law on pleading such damages is now trite. We take it from Coast Bus Service Ltd. -vs- Sisco Murunga Ndanyi & 2 Others, Civil Appeal No. 192 of 1992 which amongst other authorities was applied in Charles C. Sande -vs-Kenya Co-operative Creameries Ltd., Civil Appeal No. 154 of 1992(UR). This Court stated:-

***“We would restate the position. 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 the suit the particulars of special damages are not known with certainty, 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 the special damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars*”**

He also faulted the learned Judge for granting special damages which had not been pleaded.

8. The 1st appellant contended that the findings by the trial court in particular that it had paid the respondents' union dues and prevented them from entering into a recognition agreement with the Union were not premised on any evidence on record. Mr. Wekesa argued that it was evident that the 1st appellant was not a party to the recognition agreement which was the basis of the improved terms of service; neither were the respondents entitled to the benefits therein nor could the court impose such benefits. Elaborating further he cited Teachers Service Commission -vs- Kenya Union of Teachers & 3 Others (2015) eKLR wherein this Court held,

“In the absence of an existing collective bargaining agreement, the trial court erred in retrospectively fixing an effective date for a CBA that does not exist in fact and in law. A CBA is a contract between the employer and the Unions. In contract law, the terms and conditions of a contract can only be negotiated and concluded by the parties to the contract. This is the essence of autonomy of parties in collective bargaining, freedom of contract and privity of contract.”

9. He also imputed that the judgment was a nullity having been delivered approximately 2½ years after the requisite time frame under **Order 21 Rule 1** of the Civil Procedure Rules. Mr. Wekesa urged us to allow the appeal.

10. Associating himself with Mr. Wekesa’s submissions, Mr. Ngugi mainly attacked the manner in which the trial court evaluated the evidence before it. In his view, the trial Judge made findings which were not supported by the evidence on record. He argued that the respondents had not made a case to warrant the trial court lifting the 2nd appellant’s corporate veil; the 1st appellant was autonomous and as such the 2nd appellant had no say in its operations. Mr. Ngugi submitted that the learned Judge violated the parole evidence rule by concluding that the recognition agreement between the 2nd appellant and the Union catered for the 1st appellant’s employees. Mr. Ngugi also submitted that the trial court failed to comment on the demeanour of the witnesses hence the facts were not premised on the credibility of witnesses. He urged us to allow the appeal.

11. On his part, Prof. Ojienda submitted that the learned Judge was correct in holding the appellants as one and the same based on the fact that the 1st appellant was a subsidiary wholly owned by the 2nd appellant; the 1st appellant’s management was appointed by the 2nd appellant; and the 1st appellant was under constant and effective control of the 2nd appellant. Citing ***Smith, Stone & Knight Ltd. -vs- Birmingham Corp (1939) 4 ALL ER 116*** he argued that one instance in which the corporate veil can be lifted is where the subsidiary company operates as an agent of the holding company as was the case between the appellants.

12. It was argued that the 2nd appellant was responsible for the termination of the respondents; the attempt to explain the termination letters signed on behalf of the 2nd appellant’s chairman and printed on the 2nd appellant’s letterhead as erroneous held no weight; the question that arose was if indeed the 1st appellant was autonomous as alleged why was it not entrusted with the termination of its own employees?; the circumstances surrounding the termination clearly indicated the 2nd appellant’s role in the 1st appellant company.

13. With regard to application of the recognition agreement, Prof. Ojienda submitted that it was the respondents’ uncontroverted evidence that the 2nd appellant prevented the 1st appellant from entering into such an agreement with the Union; the 2nd appellant assured the Union that the improved terms of service would be applied across the board to both its employees and the 1st appellants. He argued that the 2nd appellant was estopped from denying the respondents benefits of the improved terms.

14. Prof. Ojienda maintained that based on the circumstances of the case the learned Judge was correct in granting the declaratory order. On special damages, he submitted that neither did the respondents pray for special damages nor were they granted by the learned Judge; the orders sought were declaratory orders which were made by the court. Relying on ***John Richard Okuku -vs- South Nyanza Sugar Co. Ltd. (2012) eKLR***, he submitted in the alternative that even if the prayers sought were akin to special damages, the degree of certainty and particularity of pleading and proving the same depended on the circumstances and the nature of each case. In this case the respondents did not have the details of the claims at the time the suit was filed and had given sufficient particulars considering the circumstances and nature of engagements between the parties.

15. He finally submitted that with regard to the delay in delivery of the judgment, the appellants’ had not demonstrated the prejudice, if any, they had suffered. In addition Mr. Yoni submitted that the mischief which was sought to be addressed in requiring special damages to be specifically pleaded was to prevent

ambush. He argued that there was no ambush as far as the appellants were concerned since they were aware of the respondents' claims at all material times.

16. We have considered the record, submissions, authorities supplied by the counsel as well as the law. Being a first appeal we are cognizant of our primary role to reassess and re-evaluate the evidence tendered before the trial court and reach our own conclusions bearing in mind that we neither saw nor heard the witnesses. This much was restated by this Court in **Musera -vs- Mwechelesi & Another (2007) KLR 159** ;

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge’s findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”

17. On the delay in delivery of judgment, we note that the hearing before the trial court was concluded on 2nd February, 2009, submissions were filed by 27th of February, 2009 and thereafter judgment was scheduled to be delivered on 4th May, 2009. From the record it is not clear what transpired from the scheduled date of delivery up to 13th July, 2011 when the impugned judgment was actually delivered. We also note that the learned Judge gave no reasons for the delay of over two years. Therefore, did the delay render the entire judgment a nullity? This Court in **Johnson M. Mburugu -vs- Fidelity Shield Insurance Company Ltd [2006] eKLR** while discussing **Order XX Rule 1** of the former Civil Procedure Rules which like **Order 21 Rule 1** of the current Civil Procedure Rules provided for the time frame within which a decision ought to be rendered expressed;

“From what we have stated above, it is possible that the delay in delivering judgment which was from 15th March, 2002 when the submissions were made by the counsel in the case and also written submissions were filed to 28th February, 2003 when judgment was delivered which is eleven and a half (11½) months could have interfered with the learned Judge’s grasp of the entire case that was before him.

Further, and in any event, although Order XX rule 1 states that in suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates, there is no provision as to the consequences of failure by the court to comply with the same rule. This Court considered a similar situation in the case of Nyagwoka Ogora alias Kennedy Kemoni Bwogora -vs- Francis Osoro Maiko – Civil Appeal No. 271 of 2000 (unreported) and had the following to say:

“The real question is what is the consequence of non-compliance therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void IPSO facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment.”

18. In as much as we feel that the lengthy delay here was not warranted and would urge judicial officers involved in the hearing of cases including applications to ensure compliance with **Order 21 Rule 1** of the current Civil Procedure Rules, we feel that it would create injustice and confusion if non-compliance

were to be met with orders declaring such judgments or rulings void. In this case, the delay though we do not condone it, is in our view not such as to warrant the judgment being declared a nullity.

19. Pursuant to **Order XIV Rule 3** of the former Civil Procedure Rules (equivalent to **Order 15 Rule 2** of the current Civil Procedure Rules) which was in force at the time of the hearing and determination of the suit, a court has power to frame issues it considers pertinent for the determination of a dispute between the parties. See ***Epaphrus Muturi Kigoro -vs-William Mukui Nyaga [2015] eKLR***.

In this case the trial court framed the following issues as arising for determination;

a. Whether the plaintiffs (respondents herein) were employees of the 1st defendant (2nd appellant herein) deployed to work for the 2nd defendant (1st appellant herein).

b. Whether the terms of service negotiated by the Union in respect of the 1st defendant's employees in 2001, 2003 and 2004 also covered the plaintiffs.

c. Whether the plaintiffs are entitled to be paid arrears of salaries and house allowance as pleaded in the plaint.

We find that the said issues were relevant and arose from both the pleadings and the evidence adduced at the trial.

20. Turning back to the merits of this appeal, we are of the considered view that the appeal turns on two issues, that is, whether the respondents were the 1st or the 2nd appellant's employees and whether the respondents were entitled to the above mentioned benefits.

21. The starting point as was correctly appreciated by the trial Judge would be to determine whose employees the respondents were. However, we note that despite identifying the same as an issue for determination, the learned Judge failed to make a pronouncement on the same. The ***Employment Act, Chapter 226 (repealed)*** which was in force during the respondents term of employment defined an employee as,

"...an individual employed for wages or salary and includes an apprentice and an indentured learner;

and an employer as,

".....any person, or public body or any firm, corporation or company, who or which has entered into a contract of service to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

22. We find no evidence of the respondents' contention that they were the 2nd appellants' employees. First, none of the respondents produced a contract of service between themselves and the 2nd appellant; the contracts of service on record indicate that the respondents were either absorbed or offered appointments as the 1st appellants' employees. This Court in ***County Assembly of Kisumu & 2 Others -vs- Kisumu County Assembly Service Board & 6 Others [2015] eKLR*** expressed;

"We concur with the learned Judge that the law is not concerned with the manner of engagement or assumption of the position of employee. What is important is the existence of a contract of service "whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time...for wages or a salary." Emphasis added.

Second, from the evidence on record it is quite clear that the respondents were engaged by the 1st appellant way before the 2nd appellant was established in 1999; the 1st respondent and Ezekiel

Maisuri (PW3) testified that they had been employed on 17 September, 1997 and 1st March, 1991 respectively.

23. Furthermore, in our view the fact that the respondents' pay slips from 1999 up to 2001 emanated from the 2nd appellant by itself was not sufficient to prove that the 2nd appellant was their employer. It is not in dispute that prior to the split all the Corporation employees as well as those of its other entities which included the 1st appellant were paid from the Corporation payroll. It was the appellants' uncontroverted evidence that after the split the 2nd appellant assisted the 1st appellant with its payroll system until 2001 when the 1st appellant's system was fully set up. This fact was confirmed by the respondents' witnesses who testified that following the split they received pay slips printed by the 2nd appellant until 2001 when they begun receiving pay slips from the 1st appellant until their termination. Consequently, we find that the respondents were the 1st appellant's employees.

24. On the second issue, it is not in dispute that the basis of the revised terms of service was the recognition agreement between the 2nd appellant and the Union dated 31st August, 1999. **Section 2 of the Trade Disputes Act, Chapter 234 (repealed)** which was in force at the time defined a recognition agreement as:

".. an agreement in writing made between a trade union and an employer or organization of employers which provides (subject to such terms and conditions as may be contained therein) for the recognition of the trade union as the body entitled to represent the interests of those of its members who are specified in the agreement and who are or have been employed by the employer or any of the employers comprising that organization;.."

25. Consequently, did the benefits under the revised terms of service extend to the respondents? On one hand, the respondents maintained that the recognition agreement applied to them since the 2nd appellant had prevented the 1st appellant from entering a separate recognition agreement with the Union; the 2nd appellant had at all material time during the negotiations of the revised terms represented that the same would be extended to the 1st appellant's employees; the respondents were entitled to the benefits under the revised terms. The appellants, on the other hand, maintained that the recognition agreement was between the 2nd appellant and the Union, and not applicable to the 1st appellants' employees; any agreements reached under the said recognition agreement was in respect of the 2nd appellant's employees only.

26. We appreciate as succinctly set out by Githinji, J.A in **Standard Chartered Bank Kenya Ltd. -vs- Intercon Services Ltd & 4 Others (2004) eKLR** that it is a principle of company law of long antiquity enunciated by the House of Lords in **Salmon -vs- A. Salmon & Co. Ltd. (1897) A.C 22** that a limited company has a legal existence independent of its members and that a company is not an agent of its members. However, in order to determine whether the benefits under the revised terms extended to the respondents, in our view, entails consideration of the character, nature and most importantly dealings between the appellants. The trial court appreciated as much by lifting the corporate veil in both companies.

27. The appellants faulted the trial Judge for lifting the corporate veil which in their view had not been raised in the pleadings. In **Attorney General -vs- Halal Meat Products Limited [2016] eKLR** this Court held,

"It is trite that a court should only determine issues raised before it by way of pleadings. See Nairobi City Council -vs- Thabiti Enterprises Limited (1997) eKLR. However, the exception to the foregoing was set out in Odd Jobs -vs- Mubia (1974) EA 476 wherein it was held that a court may base its decision on an unpleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for determination."

Having perused the record we find that the character and nature of the two appellants was an issue which

arose for the court's determination. Dankwerts LJ., in *Merchandise Transport Ltd -vs- British Transport Commission [1961] 3 ALL ER 495* at 518 observed;

“.....where the character of a company, or the nature of the persons who control it, is a relevant feature the court will go behind the mere status of the company as a legal entity, and will consider who are the persons as shareholders or even as agents who direct and control the activities of a company which is incapable of doing anything without human assistance.”

Furthermore, this Court in *Riccatti Business College of East Africa Limited -vs- Kyanzavi Farmers Company Limited [2016] eKLR* held,

“The Court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice.”

28. Based on the evidence we are satisfied that despite the fact that the appellants were incorporated as separate entities the reality was that more often than not they operated as one and the same entity. We say so because firstly, the Union represented unionisable employees of both appellants; following the execution of the recognition agreement between the 2nd appellant and the Union, the 2nd appellant issued Circular No. 1B of 1999 harmonizing employees' salaries which was implemented across the board even to the 1st appellant's employees.

Secondly, if they were distinct entities why was Circular No. 2B of 2001 which revised the house allowance applied to the management cadre of the 1st appellant yet the appellants' claimed it only related to the 2nd appellant's employees. Thirdly, as per the evidence of the 2nd appellant's Chief Human Resource Officer, Khadija Mirethe (DW1) the 1st appellants' Board comprised of mainly the 2nd appellant's Managing Director, Chief Finance Officer and Legal Secretary as well as two permanent secretaries each from the then information and treasury ministries. Lastly, following the restructuring of the 2nd appellant, its human resource department took over the termination of the 1st appellants' employees; DW1 testified that she had signed the respondents' letters of termination on behalf of the 2nd appellant's Managing Director and issued certificate of service in the 2nd appellant's letter head. We note that as much as the said witness maintained that she signed on behalf of the Managing Director and issued the certificates of service in the 2nd appellant's letter head in error, there was no other logical explanation as to why the 2nd appellant got involved in the termination of the 1st respondent's employees other than that the 2nd appellant had management control over the 1st respondent. The witness also confirmed that following the restructuring process the termination packages issued by the 2nd appellant applied across the board to the 2nd appellant's employees as well as the 1st respondent's employees.

29. Conscious of the above mentioned observations we agree with the sentiments of Lord Denning MR. in *Littlewoods Mail Order Store Ltd -vs- McGregor [1969] 3 All ER 855 at 860*;

“I decline to treat the [subsidiary] as a separate and independent entity ... The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit. I think that we should look at the Fork company and see it as it really is - the wholly-owned subsidiary of the taxpayers. It is the creature, the puppet, of the tax-payers in point of fact; and it should be so regarded in point of law.”

We are convinced that the 2nd appellant in executing the recognition agreement and issuing the revised terms thereunder not only did it for the benefit of its employees but also the 1st respondent's employees. Therefore, we find that the trial Judge did not err in granting the declaratory order to the effect that the respondents were entitled to the benefits under the revised terms of service.

30. Last but not least the trial Judge with regard to the actual calculation of the entitlement of each respondent held,

“As a basis calculating the entitlement of each plaintiff (respondent), this court holds that the tables produced by PW3 as plaintiffs’ exhibit No. 8 and No. 9 shall form the basis on which the salary arrears and house allowance arrears dues to the plaintiffs shall be calculated. The plaintiffs shall be paid arrears up to 15th June, 2006 when they were terminated from employment.”

31. On our part, we are of the considered view that the said arrears are in the nature of special damages which not only need to be specifically pleaded but proved. It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly proved. This Court in *William Kiplangat Maritim & Another -vs- Benson Omwenga - Civil Appeal No. 180 of 1993 (unreported)* cited with approval its decision in *Coast Bus Service Ltd -vs- Murunga Danyi & 2 Others - Civil Appeal No. 192 of 1992 (unreported)* and stated as follows:-

“We would restate the position. 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 the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars...”

32. In this case the respondents did not particularize the figures of the arrears due but instead sought an order directing the appellants to immediately pay the accrued arrears. The trial Judge held that it was not possible for the respondents to tabulate their claim in monetary terms since at the time the suit was filed and heard there was no finding by the court that they were entitled to the benefits. In *Robert Okeri Ombeka -vs- Central Bank of Kenya [2015] eKLR*, this Court held,

“In the suit that was filed in the High Court, there is no doubt the particulars of what would have been special damages were known to the appellant at the time of filing the suit; and if, peradventure they were not available at the material time, the appellant had the chance to apply to amend his plaint and include them when they became known to him...”

We find that the respondents were at all material times aware of the particulars of their claims and ought to have specifically pleaded the same.

33. Further, we do not agree with the calculation adopted by the trial court. Ezekiel Maisuri (PW3) produced schedules which he claimed were calculation done by the 1st appellant’s human resource department in respect of each employee’s entitlement. We note that it is neither clear from the said schedules what the basis of the figures therein were nor who was the author thereof. Consequently, we find that the trial Judge erred in placing reliance on such documents. This court in the case of *Douglas Odhaiambo Apel & Emmanuel Omolo Khasin -vs- Telkom Kenya Limited - Civil Appeal No. 115 of 2006* stated that:

“A plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. ... It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved.”

34. The upshot of the foregoing is that the appeal herein succeeds in part to the extent that the order issued and award made in favour of the respondents in respect of accrued salaries and house allowance

arrears is hereby set aside. Each party shall bear its own costs in this appeal.

Dated and delivered at Nairobi this 4th day of November, 2016.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR