



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, GATEMBU & ODEK, JJ.A.)

CIVIL APPEAL NO. 288 OF 2012

BETWEEN

DANIEL GATIHI GACHOMO.....APPELLANT

AND

KENYA UNION OF TEACHERS,

NYERI BRANCH.....RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nyeri (J. Wakiaga, J.)
dated 30th May, 2012*

in

H.C.C.A. NO. 118 OF 2010)

JUDGMENT OF THE COURT

1. This is the judgment of the Court with respect to a second appeal from the judgment of the High Court delivered on 30th May 2012 by which the High Court allowed the respondent's appeal and overturned a Judgment of the Magistrate's court awarding the appellant the sum of Kshs. 79,200.00 as terminal employment dues.
2. Reversing the judgment of the Magistrate's court, the learned judge of the High Court held that ***“the appellant did not give particulars of his claim [of Kshs.79, 200.00] and how he arrived at that figure. He should have pleaded his loss with particularity and since he failed to do so on that basis I allow the appeal herein...”***
3. The appellant's complaint before this Court is that the learned judge erred in equating a liquidated claim for terminal benefits to a claim for special damages and in holding that the appellant's claim was defective for failure to particularize it in his pleading.
4. The only issue for our determination in this appeal is whether the High Court erred in reversing the judgment of the Magistrate's court on ground that the appellant breached the requirement that special damages must be pleaded and proved.

History

5. In a plaint presented to the Magistrate's court at Nyeri on 7th June 2007 in civil suit no. 349 of 2007, the appellant sought judgment against the respondent for Kshs. 79,200.00 "*being the sum due and owing from the defendant to the plaintiff in respect of having served in the organization as a B. E. C member full particulars whereof are well known to the defendant.*" The appellant also pleaded that demand before action had been made and that the respondent had refused to pay the said amount.
6. In its defence, the respondent pleaded that it "*denies owing the plaintiff the sum of Kshs. 72,200.00(sic) claimed, or any part of the same*" and put the appellant to proof. The substance of the respondent's answer to the appellant's claim was that "*in the period the appellant served as a Branch Executive Committee (B. E. C) member, he was only entitled a monthly remuneration in the period of service, as he was still on the payroll of the Teachers Service Commission.*" The respondent also pleaded that it had received notice of demand before action but that it could not comply with it for the "foregoing reasons."
7. It becomes immediately clear that from the pleadings that the respondent was put on notice by the appellant that the appellant was making a specific claim of Kshs. 79,200.00. It is also clear from the pleading in the defence that the respondent did not in any way consider itself handicapped from answering the appellant's claim. We will say more on this later in this judgment.
8. After the conclusion of the hearing before the trial magistrate, counsel for the parties filed written submissions in which the respondent submitted that "*the particulars of the computation of the plaintiff's claim were not specifically pleaded as required by the law.*" The trial magistrate had no difficulty entering judgment in favour of the appellant for the sum of Kshs. 79,200.00, interest and costs. With regard to the complaint by the respondent that the particulars were not pleaded, the trial magistrate after computing the amount due to the appellant stated: "*the computation is very clear and straight forward. Counsel for the defendant however submitted that the particulars of the computation of the plaintiff's claim were not specifically pleaded and that the plaintiff never sought leave to amend defence. I have considered that fact but also note that at this stage that defect is curable such it has been proved to the satisfaction of this court.*"
9. Aggrieved by the judgment of the magistrate's court, the respondent appealed to the High Court on grounds, among others, that the magistrate erred in holding that the appellant's claim for Kshs. 79,200.00 was specifically pleaded and proved. As indicated earlier in this judgment, the High Court allowed the appeal agreeing with the respondent that the appellant breached the requirement that special damages must be pleaded and proved. The decision of the High Court triggered the present appeal by the appellant.

Submissions by Counsel and our decision

10. At the hearing of the appeal before us, Mr. Karweru learned counsel for the appellant submitted that the appellant's claim was for terminal dues based on contract as opposed to a claim for damages for breach of contract; that the formula of arriving at the figure of Kshs. 79,200.00 that was claimed was clearly set out in the Contract of Employment; that despite the appellant's plea in its plaint that the particulars of the claim were well known to the respondent, the respondent did not in its defence raise any issue with regard to the amount claimed; that the appellant provided the particulars of the formula at the trial on the basis of which the claim was computed; that to plead those particulars would have been tantamount to pleading evidence by which the claim was to be proved which would have been against the rules of pleading; that in allowing the respondent's appeal the learned judge in the High Court misapprehended what constituted special damages as terminal dues accruing from a contract of employment are not special damages; that the issue of fatality of pleadings was only raised by the respondent in its closing submissions before the High Court and the appellant was therefore embarrassed in responding; that there is no requirement for particularization of claims in relation to liquidated claims.
11. Opposing the appeal Miss Lucy Mwai learned counsel for the respondent submitted that the High Court was right to allow the respondent's appeal in that the appellant's claim for Kshs. 79,200.00 was not specifically pleaded in that it was not particularized; that the duty of computing the claim was therefore left to the trial court which, on account of want of particulars in the plaint, was left to compute the claim by marrying the pleading with evidence presented so as to arrive at the amount claimed; that the figures making up the claim for Kshs. 79,200.00 ought to have been

- pleaded by the appellant; that it is trite law that special damages must be pleaded and proved and that the requirement to specifically plead in the context of this case meant that the claim for Kshs. 79,200.00 should have been particularized.
12. Miss Mwai referred us to numerous decisions of the High Court and of this Court for the proposition that special damages must be specifically pleaded and proved. The decisions cited included **Charles C. Sande v Kenya Co-Operative Creameries Limited Civil Appeal No. 154 of 1992** and **Banque Indosuez v D J Lowe & Company Ltd [2006] 2 KLR 208**.
13. We have carefully considered the appeal, the submissions by counsel and the authorities cited. The only question that we have to determine is whether the requirement of the rule of pleading that special damages must be pleaded and proved was breached in this case.
14. As this Court stated in **Charles C. Sande v Kenya Co-Operative Creameries Limited Civil Appeal No. 154 of 1992**:

“all the rules of pleading and procedure are designed to crystallize the issues a judge is to be called upon to determine and the parties themselves made aware well in advance as to what the issues between them are.”

15. There can be no doubt that in the present case the respondent was made aware that the appellant was mounting a specific claim for Kshs. 79,000.00 arising from his employment with the respondent. As we observed earlier, there was not the slightest hint by the respondent that it did not understand or appreciate the nature of the appellant’s claim and neither did it seek any particulars or otherwise demonstrate that it was prejudiced by ‘lack of the formula or computation’ in the body of the plaint. The respondent conducted its defence before the trial court without any complaint that it was handicapped by want of particularization. Indeed the first time the complaint was raised was after the conclusion of the trial during the closing submissions.
16. The respondent was put on notice by the appellant’s pleading that it would face a specific claim for Kshs. 79,200.00. Yes, it may have been desirable to “particularize” how that figure was arrived at. But the respondent was not in any way handicapped in answering the appellant’s claim for want of particulars. For if it was, it would easily have sought particulars of the amount of Kshs. 79,200.00. As early as 1892 Lord Justice Bowen in **Ratcliffe v Evans [1892] 2 QB 524** stated that the rationale for requiring special damages to be pleaded is that a defendant is given warning of the claim being made **“in order that there may be no surprise at the trial.”**
17. In **Perestrello v United Paint Co.[1969]1 WLR 570**, Lord Donovan captured the principle behind the requirement that special damages should be pleaded in the following words:

“if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case.”

That is the same wisdom that has informed the many decisions of this Court including **Charles C. Sande v Kenya Co-Operative Creameries Limited Civil Appeal No. 154 of 1992**.

18. We are satisfied that the respondent was duly warned in the plaint what the appellant’s claim would entail. There was no surprise at the trial in that regard and neither has the respondent demonstrated that it suffered any prejudice at the trial on account of lack of “computation” of the claim, which in any event it was at liberty to have sought before trial. The trial magistrate was satisfied, on the evidence, that the claim for Ksh.79,200/- was proved to the required standard. In our view, we do not consider that the requirement that special damages must be pleaded was violated in the circumstances of this case.
19. Having said that, we should say that the requirement that special damages must be pleaded should not be mechanically and technically applied without regard to the particular circumstances of each case. We think, with respect, that in the circumstances of the present case a rule of pleading was mechanically applied. Procedural technicalities have since the promulgation of the Constitution of

Kenya, 2010 been buried by dint of Article 159.
20. In the result we allow the appeal, set aside the judgment of the High Court and reinstate the judgment of the trial magistrate. The appellant will have the costs of the appeal in this Court and in the High Court.

Dated and delivered at Nyeri this 22nd day of January, 2014

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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