



IN THE COURT OF APPEAL
AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CIVIL APPEAL NO. 25 OF 2013
BETWEEN

MACHARIA WAIGURUAPPELLANT

AND

MURANGA MUNICIPAL COUNCIL..... 1ST RESPONDENT
MURANGA MOTOR SPARES LIMITED ... 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Wakiaga, J.)
dated 27th September, 2012

in
Nyeri H.C.C.A NO. 168 of 2012)

JUDGMENT OF THE COURT

1. According to the appellant, on 19th December, 2009, the 2nd respondent at the express authority of the 1st respondent towed away the appellant's motor vehicle registration no. KSZ 892 Nissan Datsun for the reason that the appellant had failed to pay motor vehicle parking fee of Ksh. 30/=. On the part of the 1st respondent, it is admitted that motor vehicle KSZ 892 was towed away and the reasons for towing is that the vehicle had been abandoned at a dump site and was a nuisance within the town of Muranga. The said motor vehicle was towed away to the 1st respondent's yard and it has been lying therein from 2009 to the date of the hearing of this appeal.

2. By an amended plaint dated 24th December 2009, the appellant filed suit against the respondents seeking the following reliefs:
(a) General damages for loss of use of the motor vehicle.

(b) Costs of the suit plus interest.

(c) Such further orders or relief this Honourable Court deems fit and just to compensate the plaintiff for any loss or damage that might have occurred during the towing away process or while the car was in the defendant's possession and any other loss monetary or otherwise that might have been occasioned by the defendant's servants/agents actions.

3. Within the body of the amended plaint at paragraph 5 thereof, the appellant stated that he also claims for recovery of Ksh. 300,000/= that was in the car. In paragraph 8 (c) of the amended plaint, the appellant pleaded that particulars of special damages shall be stated at the hearing of the suit.

4. The suit was heard by the Muranga Resident Magistrate I. K. Orange. The trial magistrate expressed himself as follows in dismissing the appellant's claim and suit:

“I have carefully considered the evidence on record and the submissions made by the plaintiff and the 1st defendant. The plaintiff’s claim is for general damages for loss of use of motor vehicle plus costs of the suit. The plaintiff from the on-set did not plead for loss of Ksh. 300,000/= which was a substantial amount allegedly left in the plaintiff’s motor vehicle. The plaintiff during the hearing called two witnesses who gave contradictory evidence as to the loss of Ksh. 300,000/= PW11 had merely been told that Ksh. 300,000/= had been lost. The plaintiff did not call the purchaser nor was the seller to give evidence as to whether there a transaction in which the plaintiff was acting for them and that the purchaser had deposited some money with the plaintiff. It is this omission that makes the court to find that this was an afterthought on the part of the plaintiff and dismiss this claim. If the court is wrong on that ground, the claim for Ksh. 300,000/= will fail because this was special damages suffered by the plaintiff and should have been specifically pleaded and proved. On the second limb of loss of user, the court finds that the plaintiff’s evidence in chief. The plaintiff PW1 did not give any evidence for the loss of user and that he had incurred an extra expense for alternative means of transport. The plaintiff knew for sure how much expense he had incurred for alternative transport as at the time of filing this suit and the same should have been specifically pleaded. The plaintiff has for the first time introduced loss of user at the submission stage without evidence to supporting the same. The court finds in the absence of any evidence, the claim for loss of user must fail. The plaintiff had not pleaded any irregularity in towing the said m/v nor asked the court to order for the release of the said m/vehicle. The court finds that the plaintiff’s claim fails in its entirety and the same will be dismissed with costs to the 1st defendant”.

5. Aggrieved by the trial magistrate’s decision, the appellant moved to the High Court and his appeal was dismissed by Wakiaga, J. in a judgment dated 27th September, 2012. In dismissing the appeal, the honourable judge of the High Court in concurring with the trial magistrate stated: “It was upon the appellant to plead and prove loss of user. I have analyzed the evidence tendered before the trial herein above and must confess that the appellant did not tender in any evidence for the claim in respect of loss of user which as rightly pointed by the trial court is special damages which needed to be specifically pleaded and proved. The appellant having failed to do so cannot at this stage fault the trial court for dismissing his claim. I note that the appellant’s appeal seems to be hinged on the basis that the 1st respondent did not have by laws to enable it tow the motor vehicle the subject of the appeal and in as much as the appellant might be right in this, I am sorry to state that was not the issue before the trial court and therefore cannot be the subject matter of this appeal. The appeal herein therefore fails and is dismissed with no order as to cost”.

6. The appellant in his submission took issue with the following statement in the judgment of the High Court where the learned judge stated “I must at this point state that I do not understand the basis of this appeal but shall try as much as I can to rule on the same”. The appellant contend that it is true the learned judge did not understand the appeal and he erred in making a ruling or delivering a judgment on what he did not understand. The consequence of the judge delivering a judgment on what he did not understand is that he made errors of law as pointed out in the grounds of appeal lodged in this matter.

7. In his memorandum of appeal, the appellant has listed several grounds that can be compressed into the following:

(i) The learned judge confessed he did not understand the basis of the appeal.

(ii) The learned judge erred when he stated that “I am sorry to state that was not the issue before the trial court and therefore cannot be the subject matter of this appeal.

(iii) The learned judge erred and failed to appreciate that lack of the by-laws was the basis of the appeal as the 1st respondent did not have any by-law to enable it tow away the appellant’s motor vehicle as the 1st respondent failed to comply with Section 201A of the Local Government Act.

(iv) That the learned judge erred in not citing the correct registration of the motor vehicle as KSZ 892 and not KAZ 892.

(v) The Judge erred in stating that the issue in the instant case was not the irregularity of the respondent’s action in towing away the motor vehicle but loss of user and Ksh. 300,000/=.

(vi) That the learned judge was malicious.

8. At the hearing of the appeal, the appellant appeared in person while Messrs Kimwere Josphat appeared for the 1st respondent. There was no appearance for the 2nd respondent despite service.

9. The appellant submitted that the appeal revolved on one key issue which was whether the Muranga County Council, the 1st respondent herein, had a valid by-law approved by the Minister for Local Government pursuant to Section 201A of the Local Government Act. He submitted that Section 201A requires all by-laws to be approved by the Minister. He submitted that the Muranga By-laws to tow a motor vehicle for non-payment of parking fee was never approved by the Minister. The appellant submitted that the learned judge of the High Court erred in failing to appreciate that this was the core and gist of the suit against the 1st respondent. It was submitted that it was an error of law for the judge to state as hereunder that:

“I note that the appellant’s appeal seems to be hinged on the basis that the 1st respondent did not have by laws to enable it tow the motor vehicle the subject of the appeal and in as much as the appellant might be right in this, I am sorry to state that was not the issue before the trial court and therefore cannot be the subject matter of this appeal”.

10. The appellant submitted that the judge erred in failing to appreciate and understand that the claim against the 1st respondent was that they acted in towing away the appellant’s motor vehicle when the 1st respondent did not have a valid by-law. He submitted that the learned judge correctly noted that the appellant’s claim was hinged on the basis that the 1st respondent did not have by-laws to tow the motor vehicle and erred when he stated that this was not the issue before the court. The appellant submitted that as far as he was aware, the proceedings before the trial magistrate were interlocutory in nature where he sought an injunction and had made an application for the return of his motor vehicle. That his suit has never been heard and he is waiting for the full hearing of his case where he will tender evidence to prove loss of Ksh. 300,000/= and the special damages for loss of user. The appellant urged this court to set aside the judgment of the High Court and remit the suit for fresh trial and hearing before another judge of the High Court.

11. Learned counsel Kimwere Josphat for the 1st respondent opposed the appeal. Counsel submitted that the subject motor vehicle is KSZ 892 Nissan Datsun. That the motor vehicle was found abandoned near a dump site within Muranga Municipality and the said vehicle was a nuisance. It was submitted that by Notice dated 10th December 2009, the 1st respondent exercising its powers under the General Nuisance By-Laws gave notice to the appellant to remove the said vehicle which was causing obstruction to persons/vehicles using the street/public open space. That the Notice was issued pursuant to Section 17 (i) of the Muranga General Nuisance By-Law Enforcement Obstruction.

12. Counsel for the 1st respondent submitted that the issue of validity of the Muranga General Nuisance By-Law was never pleaded and it was never canvassed before the trial magistrate and the High Court. It was submitted that the 1st respondent has no objection in the appellant taking his motor vehicle. That the appellant is at liberty to unconditionally take his motor vehicle registration no. KSZ 892. Counsel submitted that the hearing date for the case before the trial magistrate was fixed by consent on 8th March 2010 where the parties consented to the case to be heard on 14th April 2010. It was submitted that the appellant voluntarily withdrew his applications dated 7th December, 2009, and 5th January, 2010, before the trial magistrate on 1st March, 2010. Counsel submitted that during the hearing conducted on 14th April, 2010, the appellant testified that he was praying for loss of user of the motor vehicle and release of Ksh. 300,000/= plus costs of the suit. It was submitted that there is no suit pending for hearing before the trial magistrate’s court since the hearing of the main suit was conducted and judgment delivered.

13. As stated heretofore, this is a second appeal and this Court is enjoined to consider only points of law. Section 72 of the Civil Procedure Act stipulates that:-

“Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely: -

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the

time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”

14. In making a determination on the issues raised in this appeal, this Court is mandated not to give undue regard to technicalities through the overriding objectives as enshrined in Sections 3A and 3B of the Appellate Jurisdiction Act and as stated in *Douglas Mbugua Mungai -vs- Harrison Munyi* – Civil Application No. Nai. 167 of 2010 :- “We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly” As was stated in *Stephen Boro Gitaha- vs- Family Finance Building Society & 3 Others*, Civil Application No. Nai. 263 of 2009. “The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way.”

15. The appellant contends that the hearing conducted by the trial magistrate was interlocutory in nature and he is still awaiting the full hearing of his suit against the respondents. This submission underlines the relief sought by the appellant in this appeal that the matter be remitted to the High Court for hearing and determination before another judge. The gist of the appellant’s allegation is that he has not had his day in court and he has not been given a hearing. A right to a hearing is a fundamental right, and as this Court observed in the case of *Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 Others*, C.A. No. 18 of 2013, Nyeri. “The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

16. Our perusal of the record of proceedings before the trial magistrate does not support the submission by the appellant that there is a suit pending for hearing. The record shows that full hearing of the case was conducted on 14th April, 2010 and the appellant himself testified as the first witness for the plaintiff. The record shows that the hearing date was taken by consent and the applicant had withdrawn two applications before the trial magistrate. We find that the proceedings before the trial magistrate were not interlocutory proceedings and there is no suit pending for hearing.

17. The appellant contend that the Honourable Judge erred in law in making the statement that “I must at this point state that I do not understand the basis of this appeal but shall try as much as I can to rule on the same”. The appellant submitted that from this statement, it is true the learned judge did not understand the appeal before the High Court and the judge erred in making a ruling or delivering a judgment on what he did not understand. We have considered this ground of appeal and examined the judgment as pronounced by the Honourable Judge of the High Court. It is our considered view that the ratio decidendi and the quality of reasoning contained in the judgment delivered on 27th September 2012 by the High Court is not affected by the statement made by the Honourable Judge. We find that the statement quoted was obiter and with due respect not relevant to the proceedings before the court.

18. The appellant in his ground of appeal impugned the judgment on account that judgment as delivered was full of mistakes which were deliberate or malicious. An allegation of malice is serious and we heard the submissions made by the appellant and we note that he never addressed this Court on malice. Likewise, the particulars of malice are not indicated in the memorandum of appeal. The contention that the mistakes in the judgment were deliberate was not canvassed during the hearing of the appeal before this Court and this ground of appeal fails.

19. We now turn to consider whether the learned judge erred in law in stating that the issue before the trial court and the High Court did not relate to irregularity or want of legal authority on the part of the 1st respondent lacking to tow the motor vehicle. The appellant’s contention is that the 1st respondent did not have a By-law duly approved by the Minister under Section 201A of the Local Government Act. The 1st respondent’s contention is that there was a valid By-Law and the issue of validity of the By-Law was never pleaded nor canvassed before the trial court. The respondent submitted that the Honourable Judge did not err in finding that the validity or legality of the 1st Respondent’s By-Laws was not an issue before the trial court and High Court.

20. In the case of *Byabazaire – v- Mukawano Industries* (2002) 2EA 353, 358 it was stated: “An action founded on the provisions of a statute must conform to those provisions and a plaintiff cannot look beyond those provisions unless provided by clear provisions of the statute in question”.

21. The issues for determination before a trial court are to be found in the pleadings filed in Court. The appellant in his amended complaint alleged in paragraph 8 (b) that the actions complained of were unlawful, deliberate and/or negligent. The learned judge in his judgment stated that in his re-evaluation of the evidence on record, the appellant did not tender any evidence to support the allegation that the 1st respondent's conduct was unlawful, deliberate and/or negligent. The appellant on his part submitted that he cited the case of County Council of Muranga – v- Douglas Kariuki Muchoki, Nyeri High Court Civil Appeal No. 13 of 2008 where it was held that the Muranga Council did not have a valid by-law to impound the respondent's motor vehicle.

21. The question for our consideration is whether the wordings and pleadings in paragraph 8(b) of the amended complaint is a sufficient pleading that place in issue for determination whether the 1st respondent had valid By-laws duly approved by the Minister under Section 201A of the Local Government Act. Parties are bound by their pleadings. Paragraph 8 (b) of the amended complaint contains allegations of unlawfulness, deliberate and or negligence on the part of the 1st respondent. These words read in their ordinary and natural meaning refer to the state of mind and conduct or actions of an individual; they do not refer to presence or absence of a valid legal instrument such as a By-Law. It is our considered view that the Honourable Judge of the High Court as well the trial magistrate did not err in finding that the appellant never pleaded the validity of the 1st respondent's by-laws as an issue for determination in the suit. The record also reflects that the issue of validity of the by-law was never canvassed before the trial court.

22. On the issue relating to the claim of Ksh. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended complaint indicates that this is a claim for Ksh.300, 000/= and loss of user which is a claim for special damages. In the case of Siree Limited –v – Lake Turkana El Molo Lodges (2002) 2E.A. 521 the Court of Appeal stated :
“This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages”.
In the case of Maritim & Another – v- Anjere (1990-1994) EA 312 at 316, this Court emphasized:
“In this regard, we can only refer to this court's decision in Sande – v- Kenya Cooperative Creameries Limited Civil Appeal no. 154 where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the complaint must be disallowed.”

22. It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given. In his amended complaint, the appellant at paragraph 8 (c) thereof stated that the particulars would be provided at the hearing. During the hearing of the case, no particulars for special damages or loss of user were provided and both the trial court and the High Court found that since no evidence was tendered to prove loss of user, this claim failed. We have examined the record of appeal and we are satisfied that no particulars for the claim of special damages were given and no evidence was tendered in support of the claim in paragraphs 5 and 9 of the amended complaint. On this issue, we reiterate that this Court will not interfere with concurrent findings by the two lower courts unless the decision is demonstrated to have been based on no evidence or that the said decision was made in error of law. In the instant case, there is a concurrent finding by the two courts below that the appellant did not lead evidence to prove loss of user.

23. In totality, it is our considered view that the grounds contained in the memorandum of appeal have no merit and the upshot is that this appeal is hereby dismissed with costs.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

.....
JUDGE OF APPEAL
MARTHA KOOME

.....
JUDGE OF APPEAL
OTIENO-ODEK

.....

JUDGE

I certify
true copy of the original.

that

OF

this

is

APPEAL

a

DEPUTY

REGISTRAR