



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 4 OF 2011**

**BETWEEN**

**JOHNSON MUGWE WANGANGA.....APPELLANT**

**AND**

**JOSEPH NYAGA KARINGI.....RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court of Kenya*

*at Embu (Khaminwa, J.) delivered on 9<sup>th</sup> February, 2009*

*in*

*H.C.C.C No. 33 of 2004)*

**JUDGMENT OF THE COURT**

1. Joseph Nyaga Karingi, the respondent was a tenant of Johnson Mugwe Wanganga, the appellant. The demised property was used as a business premises. The respondent allegedly fell in rent arrears and the appellant attached the respondent's trade goods and levied distress and/or sought eviction. The respondent contented that the distress and or eviction was illegal and unlawful.

2. By a plaint dated 6<sup>th</sup> August, 2004, the respondent filed suit against the appellant and the auctioneer seeking the following orders:

***(a) a declaration that the attachment of the plaintiff's (respondents) property and eviction from the demised premises was illegal and irregular and an account of all the goods attached, proceeds of the sale of those goods and of the goods remaining unsold to the plaintiff.***

***(b) an order for the payment by the defendant (appellant) to the plaintiff of all sums due on the taking of accounts or delivery of those goods found unsold and for the payment of double their value pursuant to Section 8 of the Distress for Rent Act (Cap 293 of the Laws of Kenya).***

***(c) Damages***

**(d) Interest**

**(e) Costs**

**(f) Further or other relief, including all further necessary or appropriate accounts, inquiries and directions.**

3. At paragraph 8 of the plaint, it is averred that the goods attached were valued at Ksh. 591,704/= and the plaintiff has been deprived the use thereof and has suffered damages including the loss of goodwill, monies out with trade debtors; Ksh. 2,940/= in trading licenses and general loss of reputation as an established and successful businessman within Embu town during his 23 years of tenancy. The plaintiff also claimed loss of earnings at the rate of Ksh. 34,493/= per month plus exemplary and or punitive damages. The plaintiff also claimed loss and damage as a result of closure of business in respect of which he had taken a loan of Ksh. 200,000/= from Kenya Commercial Bank Limited which loan he had to repay with interest at 20% per annum besides other financing obtained from his wife Sarah Wanjiru Kariuki of Ksh. 70,000/= being a loan from Kenya Commercial Bank Limited and Ksh. 147,500/= being a loan from Barclays Bank of Kenya Limited.

4. In a judgment delivered on 9<sup>th</sup> February, 2009, the trial Judge, (Khaminwa, J.), made the following orders:

***“The plaintiff also claims punitive/exemplary damages and loss of business opportunities. These items are not pleaded. The plaintiff is, therefore, entitled to the actual loss he suffered. That is the:***

**(a) Trade debts – Ksh. 50,000/=.**

**(b) Loan unpaid - Ksh. 171,678/=.**

**(c) Lost goodwill – Ksh. 542,820/=.**

**(d) Double the value of goods - Ksh. 1,183,408/=.**

**Total Ksh. 1,847,906/=.**

***Judgment is entered for the plaintiff as prayed in the plaint and damages is assessed at a total of Ksh. 1, 847,906/= with interest from the date of judgment. Cost of the suit to the plaintiff”.***

5. Pursuant to **Section 8** of the **Distress for Rent Act**, the trial judge awarded double value of the goods. That Section stipulates:

***“If any distress and sale are made under this Act for rent pretended to be in arrears and due when in truth no rent is in arrear or due to the person distraining or the person in whose name the right of distress is taken, then the owner of the goods or chattels distressed and sold...shall be entitled to recover double the value of the goods and chattels so distrained and sold together with the full costs of the suit from the person so distraining and the sum shall be recoverable as a civil debt”.***

6. Aggrieved by the judgment of the honourable judge, the appellant has moved to this court citing numerous grounds of appeal in the amended memorandum of appeal dated 17<sup>th</sup> October, 2013. In our view, the three critical grounds of appeal are as follows:

**(a) That the learned judge erred in law in applying Section 8 of the Distress for Rent Act (Cap 293 of the Laws of Kenya) when the same section had been repealed vide Section 34 (j) of the Auctioneers Act No. 5 of 1996.**

**(b) The learned judge erred in awarding the sum of Ksh. 50,000/= for lost trade debts**

*when the same was not specifically pleaded; he further erred in awarding the sum of Ksh. 171,678/- being the loan amount borrowed from the bank when the same had not been pleaded and further erred in awarding the sum of Ksh. 542,820/= for lost goodwill when the same was neither pleaded nor specifically proved.*

*(c) that the learned judge erred in awarding the sum of Ksh. 664,498/= as the value of the attached goods when there was no documentary evidence led to prove the same while the amount pleaded in the plaint being Ksh. 591,704/= only.*

7. At the hearing of the appeal, learned counsel Messrs **P. G. Nganga** appeared for the appellant while learned counsel Messrs **M. N. Nyaga** appeared for the respondent.

8. Counsel for the appellant reiterated and elaborated on the grounds of appeal emphasizing that **Section 8** of the **Distress for Rent Act** had been repealed and the Honourable Judge erred in awarding double the value of the attached goods. It was submitted that the repeal of **Section 8** of the **Distress for Rent Act** meant that no compensation was due for any irregular distress for rent. Counsel submitted that the respondent was not entitled to double compensation for distress for rent. He submitted that in any event, the distress levied was not unlawful as the appellant was in rent arrears as at the time of distress. In relation to damages awarded for trade debts, lost goodwill and bank loans, counsel submitted that these are items of special damages and they should have been pleaded and particulars given. It was submitted that trade debts and bank loans were contractual transactions between the respondent and third parties and that learned judge erred in making the appellant pay third party debts and as well as pay respondent's liabilities to third party banks. Counsel submitted that the loan from Kenya Commercial Bank was meant for capital. If this is true, the trial judge erred in making double payment to the respondent because by awarding the value of goods attached, the capital invested from the loan advanced has been awarded and any further award for loan repayment is a double compensation for the goods attached. Counsel further submitted that how the trial judge arrived at the sums for trade debtors and loan amount as well as the value of lost goodwill is not demonstrated.

9. In opposing the appeal, counsel for the respondent submitted that the trial judge did not err in law or fact in entering judgment against the appellant. The appellant as the decreeholder instructed an auctioneer to execute the decree. The auctioneer was a party in the High Court case but did not file an appeal in this matter. Counsel submitted that the appellant cannot escape liability for the unlawful conduct of its agent, the auctioneer. It was submitted that the auctioneer who was a party in the High Court suit had not filed an appeal and consequently, if this Court were to allow the present appeal, there would be two conflicting judgments on the same matter, one from the High Court against the auctioneer and the other by this Honourable Court.

10. For the respondent it was conceded that **Section 8** of the **Distress for Rent Act** had been repealed and the trial judge erred in awarding double the value of the goods attached. However, the respondent submitted that the fact of repeal of **Section 8** of the **Distress for Rent Act** did not mean that the respondent was not entitled to any compensation for losses incurred as a result of illegal distress and eviction from the premises. It was submitted that within the body of the plaint, a claim for lost goodwill, trade debts and bank loan was made and the trial judge did not err in awarding sums under those headings as the same were pleaded.

11. In relation to the quantum of goodwill, the respondent submitted that a valuation report was tendered in evidence to prove the value of the goodwill. The respondent urged this Court not to interfere with the judgment sum awarded notwithstanding the repeal of **Section 8** of the **Distress for Rent Act** because the conduct of the appellant should be subject to punitive damages and general damages for trespass. Counsel further urged this Court to find that the record of appeal lodged before this Court was defective as there are missing documents.

12. In reply to the respondent's submissions, counsel for the appellant submitted that under **Rule 75** of the **Rules of this Court**, the present appeal is not affected by failure of the auctioneer to lodge an appeal. It was further submitted that there was no cross-appeal by the respondent and this Court cannot award

general damages for trespass or any sum for punitive or exemplary damages which were not awarded by the trial court.

13. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in Selle -vs- Associated Motor Boat Co., [1968] EA 123, 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.*”**

14. This Court stated in Jabane – vs- Olenja, [1986] KLR 661, 664, thus:

***“This Court ... will not lightly differ from the findings of fact of a trial judge ...and will only interfere with them if they are based on no evidence... see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu, (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services, (1982-88) 1 KAR 870.”***

15. We have considered the submissions made by counsel in this appeal. We have examined the evidence on record particularly the pleadings and the judgment of the trial court. It is trite law that parties are bound by their pleadings and a court can only pronounce itself on matters that have been pleaded. In Galaxy Paints Co. Ltd. -vs- Falcon Guards Ltd., (2000) 2 EA 385, it was stated:

***“It is trite law, that issues for determination in a suit generally flow from the pleadings and the trial court may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the Court’s determination. (See also Odd Jobs – v- Mubia (1970) EA 476”.***

15. A claim for trade debts, lost goodwill and bank loans are claims for special damages. This Court has often stated that a claim for special damages must be specifically pleaded and proved. 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”.***

16. 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 plaint must be disallowed.”***

17. In the instant case, whereas in the body of the plaint, the respondent pointed to loss of trade debt, goodwill and bank loans to be repaid, there is no prayer for these items in the plaint. As was stated in Great Lakes Transport Co. (U) Ltd. –v- Kenya Revenue Authority, (2009) eKLR, it is now settled law that it is dangerous for a Court to canvass its own matters in its judgment and to rely on evidence not canvassed before it by the parties. That notwithstanding, the respondent’s prayers as claimed in the plaint are founded on the repealed **Section 8 of the Distress for Rent Act**. It is not clear in the plaint whether the general damages are sought under the **Distress for Rent Act** or under tort law or contract law.

18. If the claim for general damages is based on tort or contract law, the issue of remoteness of damage arises. The question for us to consider is whether a landlord who illegally or unlawfully levies distress or

eviction in a business premises is liable for trade debts, lost goodwill and any loans that were advanced to the tenant in the course of business. Are such losses remote? Both in contract and tort, damages are compensatory for losses incurred.

19. In contract, the principle relating to remoteness of damage is enunciated in the case of **Hadley –v- Baxendale, (1854) 9 Exch. 341**. For loss to be recoverable, the damages should be such as may fairly and reasonably be considered either arising naturally i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. In the instant case, it is our considered view that loss of trade debts and non-repayment of bank loans are not anticipated as the natural and probable consequence of breach of a landlord-tenant relationship. If any such loss was suffered, the damage is remote. The trade debtors are persons known to the respondent; breach of landlord tenant relationship does not relieve the trade debtors their obligation to pay the respondent.

20. As regards both trade debts and bank loans, it is our considered view that a landlord tenant relationship is not a novation contract where the landlord undertakes to pay all debts due and owing to third parties by the tenant in the event of breach of the tenancy agreement. We find that the learned judge erred in law in awarding damages for loss of trade debts and bank loan to the respondent in this case.

21. In the instant case, if the respondent's claim for general damages is founded on tort, the principle of remoteness of damage as enunciated in the **Wagon Mound**, cases apply. (See **Overseas Tankship (UK) Limited –v- Morris dock Engineering Co. Ltd. (The Wagon Mound), [1961] AC 388**). Applying the Wagon Mound principles, it is our considered view that the chain of proximate causation between the appellant's distress and attachment of the respondent's goods and the alleged loss of trade debts and non-payment of bank loans is remote. In the case of **Liesbosch Dredger (Owners) –v- Edison (Owners), [1932] AC 449**, the pertinent facts were that the owners of the dredger required it for the performance of a contract, delay in the completion of which exposed them to heavy penalties. Owing to want of funds, they could not purchase a dredger to take place of the Liesbosch, and were forced to hire one at an exorbitant rate. It was held that the increased loss which the plaintiffs suffered due to their impecuniousities could not be recovered.

22. On the award of double the value of attached goods, both the appellant and respondent concede that the award was based on the repealed **Section 8** of the **Distress for Rent Act**. We do not need to belabor the legal principle that the award was made *per incuriam* and it cannot stand in law. The next issue for our consideration is whether an award can be made to compensate for the value of the attached goods. At paragraph 8 of the plaint, it is averred that the goods attached were valued at Ksh. 591,704/= and the plaintiff has been deprived the use thereof. It was not disputed by the appellant that goods were attached. The appellant did not challenge the value of the goods that were attached. The trial court awarded double the value of goods at Ksh. 1,183,408/=. This means that the value of the goods as per the trial court was Ksh. 591,704/=. It is our considered view that the respondent is entitled to compensation for the value of the goods attached and we so find. In relation to the bank loan, it is our considered opinion that if the loan was indeed used as capital for the business, the capital is reflected in the stock or value of the goods attached and consequently, any compensation for bank loan is not only remote but double compensation, and is, therefore, not allowed.

23. As regards the claim for goodwill, it is our considered view that goodwill is a claim for special damages which must be proved and particulars given. In the instant case, there are no particulars of the goodwill pleaded in the plaint and the Honourable Judge erred in not indicating how the sum of Ksh. 542,820/= was arrived at representing lost goodwill. We are also of the considered view that damages for loss of goodwill is remote in respect of landlord tenant relationship and it was not proved as between the appellant and the respondent, who owned the goodwill in respect of the demised premises.

24. In totality, the upshot of our re-evaluation of the evidence on record and application of law is that this appeal has merit and partially succeeds. We make the following orders:

**(a) Judgment of the High Court delivered on 9<sup>th</sup> February, 2009, be and is hereby set**

*aside in its entirety.*

*(b) We substitute in its place judgment in favour of the respondent herein for the sum of Ksh. 591,704/= being the loss in value of the goods attached and interest thereon at court rates from 9<sup>th</sup> February, 2009.*

*(c) For avoidance of doubt, there are no general damages awarded for loss of trade debts, unpaid loans, lost goodwill and double the value of attached goods.*

*(d) The appeal being partially successful, each party shall bear their own costs.*

*Dated and delivered at Nyeri this 19<sup>th</sup> day of March, 2014.*

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

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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**