



REPUBLIC OF KENYA



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**Gatemu Housing Company Ltd v Ndaruga (Cause E018 of 2021)
[2022] KEELRC 13569 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13569 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E018 OF 2021
ON MAKAU, J
DECEMBER 15, 2022**

BETWEEN

GATEMU HOUSING COMPANY LTD APPELLANT

AND

PHILLIP MURURI NDARUGA RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable F.Muguongo (Senior Resident Magistrate), delivered on 27th October, 2021 in Nyeri CMCC No.13 OF 2002.)

JUDGMENT

1. The respondent was employed by the appellant from 1994 to 2001 as a secretary manager. A dispute arose between the parties herein concerning loss of Kshs 371,853.70/= which was in the custody of the respondent as the appellant's employee and the appellant filed a suit being CMCC No 13 of 2002 claiming the said sum, costs and interest from the respondent.
2. The respondent filed defence which he amended with the leave of the court on June 24, 2003 and added a counter claim for Kshs 252,972/= made up of salary underpayment, house allowance and gratuity. He also sought costs and interest at court rates. The appellant filed reply and defence to the counter claim on June 27, 2003 and the respondent responded to the same on May 24, 2021.
3. In the meanwhile the respondent was charged with criminal case and he was convicted and sentenced. However, he appealed and the conviction was quashed.
4. On April 24, 2017, the appellant withdrew its suit against the respondent leaving the respondent's counter claim. On October 4, 2017, the appellant objected to the counter claim on grounds that it fell within jurisdiction of the Cooperative Tribunal under section 76 of the *Cooperative Societies Act*. The trial court (Hon Kagendo- CM) allowed the objection and dismissed the suit for want of jurisdiction.



5. The respondent appealed and the High Court allowed the appeal on grounds that the trial court had jurisdiction since it was employment dispute which had nothing to do with the business of the appellant as contemplated by section 76 of the Cooperative Societies Act.
6. The applicant still raised another objection on grounds that the counter claim was statute barred but the trial court (Hon Muguongo – SRM) dealt with the same together with the merit of the case. After hearing witnesses from both parties the trial court rendered itself on October 27, 2021, holding that the counter claim was not statute barred and allowed the respondent’s claim for Kshs 252,972/= costs and interest at court rates from the date of filing the counter claim.
7. The applicant was aggrieved and filed this appeal challenging the whole judgment on the following grounds:
 1. That the learned trial magistrate erred in law and fact by applying the wrong principles of law thus erroneously allowing the respondent’s claim under the head of special damages whereas the respondent had not specifically pleaded and strictly proved the same, thereby occasioning a gross miscarriage of justice.
 2. That the learned trial magistrate erred in law and fact by applying the wrong principles of law thus erroneously allowing the respondent’s claim under the head of underpayment of salary, unpaid house allowance and gratuity, whereas the same were not proved to the required standards, thereby occasioning a gross miscarriage of justice.
 3. That the learned trial magistrate erred in law and fact by relying on a document that was not part of the respondent’s counterclaim which had particularized and itemized the respondent’s claim, thereby occasioning a gross miscarriage of justice.
 4. That the learned trial magistrate erred in law and fact by applying the wrong principles of law by failing to make a finding that part of the respondent’s claims were sought outside the limitation period hence statutorily time barred, thereby occasioning a gross miscarriage of justice.
 5. That the learned trial magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings in the judgment, thereby occasioning a miscarriage of justice.
 6. That the learned trial magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.
 7. That the learned trial magistrate erred in law and fact in failing to evaluate the entire evidence as well as submissions as presented by the appellant, thereby occasioning a miscarriage of justice.
8. The appeal was disposed of by written submissions which were both filed on November 21, 2022.
9. The appellant argued ground 1 and 3 of the appeal together in which it faulted the trial court for allowing the claim for Kshs 252,972/= when it lacked particulars of the alleged under payment, house allowance and gratuity. This view was advanced under ground 2 of the appeal when it was urged that the claim was not specifically pleaded and proved as special damages.
10. It was further contended that the position of the secretary manager was not provided for in wage orders for one to know what was the minimum salary payable and therefore the claim for under payment, house allowances and gratuity was unfounded. The trial court was faulted for basing her decision on a document which was not formally produced as an exhibit and seeking refuge under the cover of article 159 (2) of the Constitution.



11. To fortify the foregoing submission, reliance was placed on the case of *Kakula Hamisi v Peris Pesu Tobiko & 2 others* (2013) eKLR, *Raila Odinga v Independent Electoral & Boundaries Commission & others* (2013) eKLR and *Kenneth Murige v Austia Kiguta & 2 others* (2015) eKLR where the courts held that article 159 (4) (d) of the *Constitution* is not a panacea or a general white-wash that cures and mends all ill, misdeeds and defaults of litigation in the name of procedural technicality.
12. As regards ground 4 of the appeal, it was submitted that the counter claim offended section 4 of the *Limitations of Action Act* which applied to the cause of action and the trial court was faulted for not dismissing it. The court was further faulted for applying section 90 of the *Employment Act*, 2007 which could not have applied retrospectively.
13. Finally ground numbers 5, 6 & 7 of the appeal were argued together and the court was urged that the trial court failed to address her mind to the pleadings on record and the evidence by the parties and instead proceeded to take into account extraneous and irrelevant considerations. The court was also faulted for failing to evaluate the entire evidence and submissions by the appellant leading to an erroneous findings and miscarriage of justice.
14. It was further submitted that the appellant had further documentary evidence to substantiate the shortage of Kshs 328,278.70/= under the watch of the respondent plus receipts plucked from the receipt book by the respondent totaling Kshs 12000/=. In conclusion it was submitted that the loss of the said funds while in the custody of the respondent should have been considered and the counter claim dismissed.
15. The respondent submitted that the impugned judgment was properly entered and it should not be disturbed. He argued that it was right for the trial court not to revive matters which were ascertained by the High Court in a previous appeal.
16. As regards the claim for Kshs 252,972/=, it was submitted that the same was particularized and itemized in the table attached to the application for amendment and it was received by the court registry and fee was paid for the pleading of Kshs 13,200/=.
17. It was further submitted that the trial court properly invoked article 159 (2) (d) of the *Constitution* to cover the defect in his case because the said table was already on record. It was further submitted that under order 51 rule 15-2 of the *Civil Procedure Rules* an application cannot be defeated on a technicality and want of form that does not affect the substance of the application.
18. As regards the issue of the position of secretary manager not appearing in the wage orders, the respondent submitted that he was performing the duties of a cashier because he was handling payments and issuing receipts. He however did other duties like cleaning the office also. Therefore he maintained that he was entitled to the payment as per the wage orders on page 36 – 45 of the record of appeal.
19. As regards the issue of audit report for 1994-2001, the respondent submitted that the trial court was right in finding that the applicant had disobeyed court order to produce the audit reports so as to show what salary was paid to the respondent. He further submitted that the trial court cannot be faulted for the judgment she made after the applicant failed to produce the said audit reports.
20. Finally, the respondent submitted that he was acquitted of the criminal charges of theft of money when his conviction and sentence were quashed by the High Court on appeal. Therefore he prayed for dismissal of the appeal with costs and upholding the impugned judgment.



Analysis and Determination

21. Having considered the record of appeal and the submissions, it is clear that this appeal turns on the following 3 issues:-
 - a. Whether the counter claim was statute barred.
 - b. Whether the sum of Kshs 252,972/= awarded by the trial court was specifically pleaded and proved to the required standards.
 - c. Who should pay the costs of the appeal.
22. This being a first appeal, this court is obliged to revisit the evidence presented before the trial court and analyze it in order to arrive at its own independent conclusion while appreciating that I did not see or hear the witnesses when they testified.

Statute bar.

23. The counter claim herein is in respect of salary under payment, house allowance and gratuity for the period between 1994 and 2001. Obviously that fell within the provision of section 4 of the Limitation and Actions Act which allowed a span of six (6) years for any claim founded on contract to be commenced in court. In this case parties were engaged in an employment contract up to 2001 when they parted. The respondent filed the counter claim in 2002 to recover employment benefits which allegedly, accrued during that period of employment before it ended in 2001.
24. I have perused the record of appeal and noted that the appellant had objected to the counter claim on grounds that it was statute barred by dint of section 90 of the Employment Act. It also made submissions on that point. However, the trial court appreciated that the applicable law was section 4 of the Limitation of Action Act which allowed six (6) years period to file suit. The court then went on to hold that the claim was not statute barred under the said two provisions. The said finding was right and I agree with the trial court that the objection to the suit on ground of limitation period was devoid of merits.

Was The Claim Specifically Pleaded And Proved?

25. It is a well settled principle of law that special damages must not only be specifically pleaded but must also be strictly proved. It is also well settled principle of law that parties are bound by their pleadings. It follows therefore that a court of law has no power to decide on a matter which is not contained in pleadings unless the parties concede to the same.
26. In the case of Richard Okumu Oloo v South Nyanza Sugar Co. Ltd (2013)eKLR the court of Appeal held that:-

“a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity.....”
27. In Harun v Singh (1985) KLR, the Court of Appeal held that:-

“ Special damages must not only be specifically claimed (pleaded) but also strictly proved....”
28. The catena of judicial proceedings on this subject is endless and supports the view that if an award of special damages is not supported by pleadings and evidence it will be set aside on appeal.



29. In this case, the respondent obtained leave to file, amend defence and counter claim. Paragraph 8 – 11 of the amended defence and counter claim pleaded that;
8. “The defendant by way of counterclaim avers that the defendant was employed by the plaintiff in 1994 till May, the year 2001 and that from the date of the defendant’s employment by the plaintiff the plaintiff had been underpaying the defendant and which underpayment the defendant claims form the plaintiff herein.
 9. The defendant adds that during the period of his employment, the plaintiff had not been paying the defendant house allowance which is based on 15% of the basic salary payable.
 10. The defendant avers that during the termination of the employment by the plaintiff, the plaintiff did not pay the defendant the said underpayments, house allowance and gratuity which amount to Kshs 252,972.00.
 11. The defendant therefore counterclaims the sum of Kshs 252,972.00 which the plaintiff has unlawfully failed, refused and or neglected to pay to the defendant upto and including the date of this counterclaim.”
30. The above paragraphs pleads a global figure of Kshs 252, 972 made up of salary underpayment, house allowance and gratuity. There are no particulars of each item sought and how they add up to the sum of Kshs 252,972/-. The appellant raised that issue during the hearing and in answer the respondent said that the particulars of the claim were contained in a table attached to his supplementary affidavit in support of his application for leave to amend defence. The appellant’s counsel drew that fact to the attention of the court and the court noted the concern and even explained the deficiency to the respondent.
31. The record shows that the respondent maintained his reliance on the said table which was not referred to in the defence and counter claim and failed to seek leave to amend his pleadings to set out the particulars of the claim. The purpose of amendment of pleadings under order 8 rule 5 of the Civil Procedure Rules is:-
- “...for determining the real question in controversy between the parties or of correcting any defects or error in any proceeding”
31. Section 100 of the Civil Procedure Act further provided that:-
- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issues raised by or depending on the proceeding.”
32. The respondent’s attention was drawn to the fact that his pleadings had some deficiency but ignored. Therefore, the trial court went ahead to treat the aforementioned tabulations as if they formed part of the pleadings. The said decision by the trial court amounted to a misdirection and it went against the said established principles of law on pleadings.
33. Having found that the trial court travelled outside the pleadings without any amendment and allowed claim for special damages which were not specifically pleaded, this court holds that the court below fell into error and the appeal must succeed. Consequently I allow the appeal, set aside the impugned judgment and substitute therewith a judgment in favour of the appellant dismissing the suit, number Nyeri CMCC 13 of 2002 with costs. The respondent will also pay cost of the appeal.



DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2022

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

