Wanyonyi v Manyonge (Civil Appeal 58 of 2022)
[2024] KEHC 2212 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 58 OF 2022

REA OUGO, J

FEBRUARY 27, 2024

BETWEEN

FRED WANYONYI ..... APPELLANT

AND

CAROLYN MANYONGE ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Wattimah (SPM) delivered on 22/6/2022 in Sirisia SPMCC No E007 of 2021)

JUDGMENT

1. The background to this appeal is that the appellant was the registered owner of Motor Vehicle Registration No. KCG 443W. On 7th December 2020, the appellant's driver lost control veered off the road, and crashed into the building on the suit plot known as A-Z Senator Guest House. The parties by consent settled the issue of liability in favour of the respondent in the ratio of 70:30.
2. The trial magistrate after considering the evidence on record entered judgment in favour of the respondent:
    a. Liability 70:30 in favour of the respondent
    b. Costs for shattered rooms.....Kshs 717,600/-
    c. Loss of income (global award)..... Kshs 600,000/-
    Sub-total..... Kshs 1,317,000/-
    d. Less 30% contribution..... Kshs 395,280/-
    e. Net award..... Kshs 922,320/-
    f. Cost and interest of the suit from the date of judgment

3. The appellant dissatisfied with the judgment of the trial magistrate has now filed this instant appeal challenging the award on the following grounds:

    1. That the learned trial magistrate erred in law and fact by adopting the wrong principles in making the determination on the special damages and/or loss of user awardable to the respondent.

    2. That the learned trial magistrate erred in law and fact by awarding the respondent Kshs 717,600/- as special damages which is on the higher side without taking into account depreciation and the evidence on record.

    3. That the learned trial magistrate erred in law and fact by making and/or adopting global sum of Kshs 600,000/- as loss of user for shattered rooms based on assumption rather than the evidence on record in which the same was not proved.

    4. That the learned trial magistrate erred in law and fact by failing to consider the appellant's submissions and judicial authorities on the issue of quantum thereby arriving at erroneous decision on quantum.

4. The appellant in his submissions has identified two issues for the court's consideration:

    i. Whether the trial magistrate erred in law and in fact in awarding special damages that were excessive in the circumstance.

    ii. Whether the trial magistrate erred in law and in fact in adopting a global sum for loss of income.

5. The appellant faults the trial court for overlooking the depreciation aspect by failing to assess both the value of the building and its age. The respondent sought compensation for the expenses of constructing a new building, which would presumably be appreciated. According to the valuation report, the structure was constructed with burnt clay brick walls. They argue that the valuer was also not brought to court to testify on his finding. They referred the court to the case of *John Otieno Opiyo v Kipturgo Andany* [2007] eKLR where in the statement of the valuer in that case, it was indicated that he considered the depreciation of the said building while assessing the building.

6. On the second issue, the appellant argues that the plaintiff claimed for loss of user but did not specify the period. A claim under this head is a special damage claim. In *Ndungu Transport Co. Ltd v Daniel Mwangi Waithaka* (2018) eKLR the court held that damages under loss of income are special damages and can in no circumstances be equated to general damages. The respondent ought to have given a specific duration for the loss of income. There was also no proof that the respondent repaired the 4 rooms to mitigate the loss. Therefore, the trial magistrate ought to have dismissed the claim for loss of user as the same was not proved. The amount awarded by the trial magistrate was therefore speculative since the respondent did not avail any records for the rooms as proof of her claim.

7. The respondent opposed the appeal. She argues that in this case the claim for Kshs 717,600/- was pleaded and the amount was arrived at based on a professional valuer whose report was produced by both parties by consent. There was no challenge on cross-examination regarding the author of the report.

8. The subordinate court's finding on loss of user can also not be faulted given that the documents proving the business operations, receipts, and other incomes were all produced by consent of both parties. The appellant did not offer a rebuttal to the respondent's case and he should not be allowed to adduce evidence on appeal. She submits that the trial court was correct in adopting the global award.

Analysis and Determination

9. The appellant has challenged the award of damages made by the subordinate court. The appellants contend quantum awarded is excessive. Conversely, the respondent has argued that the amount is reasonable. In *Kemfro Africa Limited t/a Meru Express Services [1976] &another v Lubia & Anor.* (No. 2) [1985] eKLR the Court of Appeal enunciated principles for setting aside or interfering with the award of damages. It was stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

10. It is desirable for the valuer, P.I.Khaoya to have produced the valuation report, however, there was no objection raised by the appellant when the respondent produced the same. The document was admitted as evidence and the appellant cannot object to its production at the appeal stage. The appellant in his submissions has also challenged the report on grounds that it did not factor the issue of depreciation. For the appellant to effectively contest the valuation report, he needed to provide his own valuation report and demonstrate that the figure stated in the respondent's report was not the optimal price. Additionally, he had to establish that the valuation was conducted without considering relevant factors such as the depreciation of the damaged building. The court in *Zum Investment Limited v Habib Bank Limited* [2014] eKLR the court stated:

> " It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on in disposing of the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds."

11. In this case, the defendant did not adduce any evidence at the trial court and the evidence of the respondent was therefore uncontroverted. The court in *Board of Trustees Meru Diocese Kirimara Parish v Dores Wanja Bore* [2020] eKLR held that:

> " It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fails to call a witness to adduce evidence and be cross-examined to test the evidence. It follows that the statement of defence is nothing more than mere allegation....
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> ... the failure by the defendant to adduce evidence, not only to challenge the evidence but to give their side of the story must impact this appeal negatively. The defendant did not controvert the evidence tendered by the plaintiff."

12. The evidence by the respondent that she would require Kshs 717,600/- for the construction of the damaged building. This being a special damage claim, I find that the same was sufficiently pleaded and proved.

13. It was also the respondent's case that as a consequence of the destruction of the rooms, she suffered a loss of income. She did not plead an exact sum of the loss of income from her business or an exact duration for the loss despite her claim for loss of income being a special damage claim. The Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others* (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment) stated:

> " Special damages on the other hand are awarded for losses that are not presumed but have been specifically proved and that can be quantified... It is trite under common law in this regard that special damages must be specifically pleaded and proven. This Court is guided by the reasons why special damages must be pleading and proved as set out in D.B. Casson and I.H. Dennis, Odgers: *Principals of Pleading and Practice in Civil Actions* in the High Court of Justice at pp. 170 to 171:
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> "Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote."

14. It was not possible to know how much the respondent lost in business as a result of the damage to the property for reasons that the same was not pleaded and proved. I agree with the submissions of the appellant that the magistrate award of Kshs 600,000/- was not lawful as the respondent failed to prove her claim for loss of income or profits and the appeal succeeds in part.

15. In the end, I set aside the award of loss of income of Kshs 600,000/-. The special damage award of Kshs 717,600/- was pleaded and proved and shall be subjected to the agreed liability. The appeal having partially succeeded the appellant is awarded half the cost of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2024

R.E. OUGO

JUDGE

In the presence of:

Mr. Oguttu for the Appellant

Mr Olonyi h/b for Mr. Sichangi for the Respondent

Ms Wilkister C/A