



REPUBLIC OF KENYA



KENYA LAW
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**Ikumu v NCBA Bank Kenya PLC (Civil Suit E012 of 2023)
[2024] KEHC 10286 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 10286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E012 OF 2023
F WANGARI, J
FEBRUARY 23, 2024**

BETWEEN

BEATRICE WANJIRU IKUMU PLAINTIFF

AND

NCBA BANK KENYA PLC DEFENDANT

JUDGMENT

1. In the Plaint dated 6th February 2023, the Plaintiff pleaded among others that:
 - i. On 9th April 2021, the Defendant advertised in the local dailies that it intended to sell Title No. L.R MN/1/1285 Nyali Mombasa pursuant to statutory power of sale and the sale was to be carried out by Josrick Merchants Auctioneers.
 - ii. The Plaintiff was declared the highest bidder in the auction in the sum of Kshs. 45,000,000.
 - iii. Vide Memorandum of Sale dated 9th April 2021, the Defendant accepted the first installment of Kshs. 11,250,000 as deposit while the remaining balance of Kshs. 33,750,000 was paid directly to the Defendant on 8th June 2021.
 - iv. The Defendant was under obligation to cause the property to be registered in the name of the Plaintiff.
 - v. The Plaintiff also paid outstanding rates of Kshs. 294,714 and Kshs. 100,000 as her Advocate's professional fees.
 - vi. The sum is thus Kshs. 45,394,714 which the Plaintiff claims as against the Defendant.
 - vii. It was also contended that Land Registry declined to accept stamp duty on the conveyance as the property could not have been subject to statutory power of sale.
2. The Plaintiff therefore prayed for reliefs as follows:



- a. Kshs. 45,394,714
 - b. Interest at court rates
 - c. General and exemplary damages
 - d. Cost
3. The Defendant filed the Statement of Defence dated 20th March 2023 in which it substantially denied the claim. However, it was stated that the Defendant was doing all that is possible to transfer the property to the Plaintiff including filing Mombasa ELC JR No. E004 of 2022.
 4. At the hearing, the Plaintiff adopted her witness Statement dated 6th February 2023 and Bundle of Documents both filed on 15th February 2023 as well as the Further Bundle of Documents dated 27th September 2023.
 5. It was her case that she bought land from the Defendant advertisement in the newspaper for Kshs. 45,000,000. Further, that she also paid rates and legal fees at Kshs. 294,000 and Kshs. 100,000 respectively and which she claimed together with the purchase price.
 6. On cross examination, it was her case that her advocates prepared the transfer documents and forwarded to the Defendant for signature. However, it emerged that the suit premises could not be transferred because there was a restriction lodged against the land. It was her evidence that the Application by the Defendant in ELC JR No. E004 of 2022 was dismissed.
 7. The Defence did not call any witness.
 8. It was directed that the parties do file their respective written submissions. I have perused the submissions filed in Court as well as the authorities in support thereof. It is not for the lack of regard and appreciation that I do not set out the contents thereof in this submission.

Analysis

9. The Court has reviewed and considered the pleadings, testimonies and evidence produced by parties, together with the submissions and authorities in support and opposition to their respective cases.
10. analysis ssThe main issue for determination in this case is whether the Defendant should refund the purchase price, rates and the legal fees incurred by the Plaintiff.
11. The issues in this case are largely not disputed. The Defendant does not dispute that it received the purchase price of Kshs. 45,000,000. The Defendant stated it was still doing what is possible to ensure the land is transferred to the name of the Plaintiff. This clearly shows that the Defendant is unwilling to refund the purchase price that the Plaintiff is asking for.
12. Be that as it may, the Plaintiff is not asking for the transfer of the suit premises to her name. She is only interested in getting back the amounts she paid as a result of the transaction that did not materialize. It is said that the transfer failed due to some restrictions registered on the title to the suit premises.
13. I have perused the various documents and correspondences that relate to the relationship between the parties in this case. The burden is on the Plaintiff to prove her case on a balance of probabilities. I proceed to establish whether the Plaintiff is entitled to the reliefs sought. The Plaintiff prayed for Kshs. 45,394,714.



14. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

15. Further, in *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

16. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

17. What the Plaintiff prays for constitutes special damages. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”



18. Special damages are thus very specific and constitute liquidated claim which must be specifically pleaded and strictly proved. In *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J held that:

“In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore, in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallized and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

19. Regarding proof of loss, while it is true that that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See *Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269*, *Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425*; [2003] 1 EA 98, *Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992*.
20. The expenses incurred by the Plaintiff have also not been controverted by the Defendant. The case in ELC JR No. E004 OF 2022 was dismissed. It is this case that the Defendant hinged on to



promise the Plaintiff that it would transfer the suit property to the Plaintiff. Unfortunately, it did not succeed. Therefore, to this court, the only recourse through which the Plaintiff can access justice is by demanding the refund.

21. Upon perusal of the correspondences, it is clear that the Defendant refused to release the claimed amount, hence this suit. Therefore, without a decree of this court, the Defendant is likely to continue in refusal to make good the Plaintiff's claim. I am thus unable to resist the urge to allow this suit.
22. The Defendants did not call any witness to testify in Court. I am alive to the fact that even without the Defendant's testimony, the Plaintiff is obliged to prove his case on a balance of probabilities. In the case of *Kerai Ghanshyam v James Wambua Muendo* [2021] eKLR, the court stated as follows: -

14. I am alive to the Court of Appeal's position in *Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another* [2014] eKLR that espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

In the above case, the court held that submissions alone do not amount to evidence. The appellant in the lower court failed to tender evidence and hence the respondent's evidence remained uncontroverted.

23. However, in the case of *Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007*, Ali Aroni, J citing the decision in *Edward Muriga through [Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997](#)* that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the [Evidence Act](#) are clear that he who asserts or pleads must support the same by way of evidence.”

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.”

24. The Defence in this case consequently contains mere allegations that were not substantiated in evidence, and I so find.

25. As to the General Damages, the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 stated that:

...General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it...



26. In the circumstances of this case, I do not find that the Plaintiff has laid any ground for the award of general damages. Although the Plaintiff particularized negligence on the part of the Defendant, the same was improper. The failure to transfer the suit premises was not entirely due to acts and omissions of the Defendant.

27. As for the exemplary damages, as stated in the case of Godfrey Julius Ndumba Mbogori & another V. Nairobi City County [2018] eKLR

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

28. Like in the case of general damages, this prayer fails. I do not find conduct on the part of the Defendant that warrant this court to exercise its discretion to award exemplary damages. On the balance of probabilities, the Plaintiff has failed to proof her case for exemplary damages to the required standard.

Determination

29. The upshot is that I allow the suit and make the following Orders:

- i. The Plaintiff shall have Kshs. 45,394,714 payable by the Defendant.
- ii. Interest on (a) above shall accrue at court rates from the date of filing the suit.
- iii. The Plaintiff shall have the costs of the suit.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of:-

Gikandi Advocate for the Plaintiff

Kongere Advocate for the Defendant

Barile Court Assistant

