



Case Number:	Civil Appeal 1 of 2017
Date Delivered:	10 Sep 2021
Case Class:	Civil
Court:	High Court at Embu
Case Action:	Judgment
Judge:	Abigail Mshila
Citation:	Apollo Njiru Munyi & another v Kenya Power and Lighting Company Limited [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Embu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO.1 OF 2017

APOLLO NJIRU MUNYI.....1ST APPELLANT

JOHN NJOKA RUNJI.....2ND APPELLANT

-VERSUS-

KENYA POWER AND LIGHTING COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment of Hon. R.O. Oigara PM delivered on 14thDecember, 2016 in Embu CMCC No.291 & 292 of 2010; the appellants sued The Respondent for all the Replacement of properties destroyed or damaged by a fire in the Appellants houses due to an electric fault.

2. After a full trial, the trial court dismissed the Appellants claims and made a finding that they did not prove their case to the desired threshold.

3. Being dissatisfied with the judgment of the trial court, the Appellants filed this instant appeal and listed six (6) grounds of appeal as are summarized hereunder;-

a) The learned magistrate erred in both law and in fact when it found that the Appellants had not proved their claims on a balance of probability.

b) The learned magistrate erred in failing to consider the evidence of the expert witness F.N. Mugo (**PW3**) whose testimony and documentary evidence was of paramount probative value in proving the negligence and liability of the Respondent; This expert evidence was not rebutted by any expert witness of the Respondent.

c) The learned magistrate erred in law and in fact in failing to properly evaluate the evidence on record and find that the cause of the fire was an electrical fault due to lack of proper maintenance thereof by the respondent or its servants or agents; and.

d) The learned Magistrate erred in fact and in law in dismissing the Appellants case against the weight of the evidence.

4. The parties were directed to file and exchange written submissions and here is a summary of the parties respective submissions;

APPELLANTS CASE

5. The Appellants submitted that it was not in dispute that there was a fire at the school complex on 8/2/2009 and that it was caused by an electrical fault and that it occasioned damage to the Appellants' property; The bone of contention was who was to blame for the fire and the award to be made for damages.

6. In apportioning blame upon the Respondent the Appellants relied on the testimony of the **PW3** an electrical engineer who had worked for the Respondent company for 2 years as an Electrical Inspector (Installations) and prepared and produced the Fire Investigation Report ('**PEXh.2**'); the expert witnesses evidence blamed the Respondent for the fire and not a third party and submitted that this evidence was not converted.

7. The Appellants contend that the trial court erred in finding that the Appellants did not plead and did not prove their consequential

loss, when in fact they had pleaded the particulars of special damages and listed down every item destroyed in the fire; the value of the items was ascertainable and disclosed in the List of Documents; They argued that their claims were not strictly monetary in nature and they were only obligated to disclose the particulars of the properties damaged and or destroyed without disclosing the value which was only ascertainable upon taking stock or accounting.

8. They submitted that their Appeal had merit and prayed that it be allowed.

RESPONDENTS CASE

9. In response the Respondent opposed the appeal and submitted that all was well from the meter box to the supply pole and it was its responsibility to maintain the supply line up to the point it connects to the consumers meter board. Thereafter the consumers responsibility begins from the point of connection at the meter box where the cut offs are affixed. Case law relied to support the contention that the Respondents liability stops at the point electricity is delivered to the consumer at the meter board is the case of **Jeremiah Maina Kagema vs Kenya Power & Lighting Co. Ltd (2007) eKLR and Grace Wamere Kanyi & 2 Others vs Kenya Power and Lighting Co. Ltd (2009) eKLR;**

10. For those reasons the Respondent urged the court to find that the appellants had not proved liability or negligence on the Respondents' part to the required threshold.

11. Further under cross-examination **PW3** admitted that he did not have any certificates or licences to prove that he was a trained electrician; his conclusions were erroneous and pre-meditated as he stated that from the history of the case he was made to believe that the fire was caused by electricity; the respondent urged the court to disregard the evidence **PW3** as he was an unreliable witness and his testimony was contradictory in that the cause of the fire was caused by an electric fault yet he confirmed the evidence of **DW2** and **DW3** that the electric line from the power supply pole to the meter board was intact without any damage from the fire.

12. The Respondent submitted that the Appellants did not discharge their burden of proof; they also did not provide any evidence linking the Respondent to the cause of fire.

13. For those reasons the Respondent prayed for the dismissal of the appeal for lack of substance.

ISSUES FOR DETERMINATION

14. After having read the written submissions filed by both parties and having perused the Record of Appeal this court has adopted and framed the same issues for determination; and the issues are as set out hereunder;

(i) Whether the appellants proved their case on a balance of probabilities,

(ii) Whether the special damages claim was specifically pleaded and proved.

ANALYSIS

15. Before addressing this issue, it is important to state that the principles to be considered when reviewing an Appeal on damages are laid out in the Court of Appeal case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR;** this decision sets out the parameters under which an appellate court will interfere with an award in general damages; it held that: -

'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....'

16. Similarly, in the case of **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** the Court of Appeal held that: -

'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has

misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Mariga V Musila [1984] KLR 257).'

Whether the appellants proved their case on a balance of probabilities;

17. What was not in dispute was that there was a fire at the school complex on 8/2/2009 and the trial court made a finding *'that the fire was electrically started'*; The bone of contention was who was Responsible for the fire and the trial court had found that the respondent was *'not liable for the fires after the meter box'*,

18. The Appellants were aggrieved with this finding and it was their contention that the Respondent was to blame.

19. The Applicable law is found at Section 107 and 108 of the Evidence Act which states that he who alleges a fact must prove it; the burden of proof in this case is one on a balance of probabilities the party must show one probability is more probable than the other; case law **Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR.**

20. In apportioning blame upon the Respondent the appellants relied on the testimony of the **PW3** an electrical engineer who had previously worked for the Respondent company and had prepared and produced the Fire Investigation Report (**'PEXh.2'**) as evidence.

21. Three expert witnesses gave evidence one being **PW3** for the Appellants and the other two witnesses gave testimony for the Respondent being Elishama Ndambuki (**DW1**) and Richard Wachira (**DW2**), **PW3** stated he was a trained electrician whereas **DW1** was an electrician and **DW2** was a Senior Foreman.

22. These expert witnesses all gave their versions of the probable causes of the fire; **PW3** stated that he was not trained in fire investigations of fire but formed the opinion that the cause of the fire was electricity due to a surge in the electric voltage whereas the evidence of **DW2** through his report was that the cause of the fire was not electric in nature because all the adjacent customers on the same line, Kindaruma Kiambere line, would also have been affected but their houses did not burn yet there were people inside the houses whose loads were connected and these had susceptible points in the event of surges; both **DW1** and **DW2** stated after the fire, the cut outs and meters were found intact after the fire and this ruled out the fact that the fire was electric in nature.

23. Upon re-evaluating the evidence on record this court notes that the Appellants evidence is hinged on the evidence of **PW3** and the Fire Investigation Report that he prepared. However, as indicated by his own admission that he had no Licenses or Certificates to prove that he trained as an electrician this would therefore mean that he was not qualified to do any investigations and or prepare the said Report which is therefore found by this court to have no probative value and cannot be taken into consideration; it is for this reason that this court will disregard **PW3s** evidence and in the absence of any evidence finds that the Appellants did not prove their claim under this head to the desired threshold and as such their claim must fail; this court therefore finds no good reason to interfere with the trial courts findings.

24. This ground of Appeal is found devoid of merit and it is hereby disallowed.

Whether the special damages claim was specifically pleaded and proved;

25. The trial court made a finding that the Appellants had *'not to proved their case on this issue as required'* and proceeded to dismiss the case.

26. Upon perusal of the plaint filed in court by the Appellants it is noted that destroyed liazed the pleadings list the items that were razed by the fire but the Appellants did not assign any specific sum or value to any of the items, they pleaded as follows:-

'...documents relating to ownership of the property itemized in paragraph 7 above were destroyed in the fire; hence its actual value is not ascertainable at the time of filing suit but can nevertheless be ascertained by recourse to the prevailing market value at the time of the trial of the suit.'

27. There are legions of authorities on the necessity of particularizing with certainty any special claim and strictly proved by evidence, in the case of **Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR** the Court of Appeal held;

“We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered. Such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only specific pleading, but also, indeed the more, strict proof.”

28. It is trite law that for a claim of special damages, certainty and particularity is always insisted upon both in pleadings and proof of damages; The plaint as it stands is devoid of particularization of their claim with certainty as the values of the items razed by the fire are not ascertainable as found by the trial court *‘it is not enough to simply aver in the Plaint as was done in this case that the particulars of special damages would be supplied at the time of trial.’*

29. The trial court found that the Appellants pleadings fell short of the requirements of a specific pleading and that their claim was not strictly proved.

30. In the circumstances of the case the absence of specific and certain pleadings on the value would mean any evidence adduced would be inconclusive or speculative; for those reasons this court finds no good reason to interfere with the findings of the trial court;

31. This ground of appeal is found to be devoid of merit and it is hereby disallowed.

FINDINGS & DETERMINATION

32. For the forgoing reasons this court makes the following findings and determination;

- (i) The Appeal is found to be devoid of merit and it is hereby dismissed,
- (ii) Each party shall bear its/their own costs on this Appeal.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 10TH DAY OF SEPTEMBER, 2021.

HON.A.MSHILA

JUDGE



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