



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KOOME, WARSAME & SICHALE, JJ.A)**

**CIVIL APPEAL NO 97 OF 2008**

**BETWEEN**

**CALTEX OIL (KENYA) LIMITED.....APPELLANT**

**AND**

**RONO LIMITED.....RESPONDENT**

*(an appeal from the ruling and order of the High Court of Kenya at Nairobi (Waweru, J.) dated 24<sup>th</sup> February 2005*

*in*

*H.C.C.C. No 1388 of 1992*

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**JUDGMENT OF THE COURT**

This appeal raises two important issues. The first relates to the jurisdiction of this Court as to whether the court has powers to grant an order not specifically pleaded in the pleadings, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders.

The background of this appeal is fairly straightforward: By way of a sale agreement dated 19<sup>th</sup> June 1991, the appellant agreed to sell to the respondent the premises known as LR No 209/4599. The sale was to be completed on 31<sup>st</sup> January 1992. However, on 24<sup>th</sup> January 1992, the appellant attempted to cancel the transaction, which prompted respondent to sue the appellant for the following reliefs:

- 1. An order of injunction to restrain the defendant from either disposing of, charging or leasing land reference no 209/4599 Nairobi, or creating any rights over the same in any manner inconsistent with the sale agreement dated 19<sup>th</sup> June 1991;***

**2. An order of specific performance of the said sale agreement with all the necessary and consequential orders and directions;**

**3. Further or alternatively damages for breach of contract;**

**4. Costs of the suit.”**

After the appellant had entered appearance and put in its defence, the respondent filed an application under Order XII rule 6 of the retired Civil Procedure Rules in which it asked for judgment on admission in the following terms:

**“take notice that this Honorable Court will be moved on the 5<sup>th</sup> day of July 1994 at 9:00am by counsel for the plaintiff for orders that judgment be entered in terms of prayers 2 & 4 of the Plaint herein AND damages payable to the plaintiff for breach of contract be assessed by this Court AND the costs of this application be provided for.”**

This application was allowed by Ole Keiwua J. (as he then was) on 15<sup>th</sup> February 1999. The learned judge entered judgment in the following terms:

**“the making of the sale agreement is admitted and that to me is an admission that a contract is binding has been made.... Accordingly, I enter judgment for the plaintiff as prayed in the application with costs and costs of the suit.”**

The matter was thereafter to proceed for assessment of damages but before that could be done, the appellant raised a preliminary objection by way of two notices dated 13<sup>th</sup> July 2001 and 19<sup>th</sup> November 2002. The gist of the preliminary objection was that the judgment of the high court - allowing the respondent's suit - did not allow for the assessment of damages; that in any event, the court did not have jurisdiction to assess damages that had not been pleaded, and that the court was now *functus officio*. The preliminary objection was heard by Waweru J., who found it unmeritorious and dismissed it with costs to the respondent, prompting the appeal that is now before this Court.

This appeal was ventilated by way of written submissions that were highlighted orally before this Court. The appellant first submits that the order of Ole Keiwua J. was made without jurisdiction and as such, they should be reversed in the interest of justice. In particular, it contends that there was no mention of loss of profits in the plaint, and thus the respondent could not be awarded damages under this head. Mr. Munyalo, learned counsel for the appellant, therefore submitted that it would be unlawful for the high court to proceed to assess damages because no damages were pleaded.

Mr. Munyalo further contended that in the plaint, the order for damages was an order to be granted in the alternative to the order for specific performance. In addition, the damages were not pleaded in the plaint, and neither was any evidence led to prove them. Moreover, the damages envisioned could not be awarded because as a general rule, general damages are not awarded for breach of contract. Counsel further submitted that even if general damages could be awarded for breach of contract, then the respondent would have been required to plead them in the plaint, which it did not do. The appellant therefore contends that the damages that the respondent seeks to be granted by the court would be speculative and arbitrary, and if granted, that would amount to unjust enrichment. Appellant's counsel therefore urged us to allow this appeal, set aside the orders of Waweru, J., and uphold its preliminary objection, effectively terminating the proceedings before the High Court.

Mr. Esmail, learned counsel for the respondent, opposed the appeal. He first submitted that the issues raised by the respondent are *res judicata* as they have been litigated a number of times before the High Court. Mr. Esmail further submitted that the prayer for damages for breach of contract was not an alternative prayer, but was an additional prayer that was based on the equitable jurisdiction of the court, and which arose after the filing of the plaint until the time of transferring the property. According to the respondent, the claim for damages was a good claim because it was made under the equitable jurisdiction of the court, and not on specific pleadings, and that it was within the discretion of the court whether or not

to grant specific performance, and also to grant an award of damages.

The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in the *locus classicus* of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696** at 700 wherein Law, JA stated that:

***“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newbold P. added as follows at page 701:

***“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

The gravamen of the appellant’s preliminary objection is that the High Court could not proceed to assess damages in line with the order made by Keiwua J., first because the said damages were not specifically pleaded in the plaint, and secondly because there could be no general damages that were awardable for breach of contract.

It is not disputed that the respondent herein was given specific performance and that the property in question was transferred to him shortly after the ruling of Keiwua, J.

The damages that were envisioned in that ruling could not have been in the nature of special damages. It is trite law that special damages must be pleaded and proved. See **Mohammed Ali & another v Sagoo Radiators Limited [2013] eKLR (Civil Appeal No. 231 of 2005)** wherein the Court adopted the holding of the Court in **Hahn vs Singh [1985] KLR 716** that:

***“... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”***

The plaint did not contain the prayer for specific damages, and neither were the damages that were claimed by the respondent particularized. In the circumstances therefore, this could not have been a prayer for special damages.

As a general rule, ***“a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which could reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken.”*** See **Openda v Ahn [1984] KLR 208**.

In **Ritho v Kariithi and another [1988] KLR 237** this Court held that it has the power to award damages **in lieu** of specific performance in the following terms:

***“In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it thinks fit, to award damages to the party injured, either in addition to or in substitution for an injunction or specific performance and such damages may be assessed in such manner as the court shall direct.”***

See also *Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998* where this Court held that:

***“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”***

*(emphasis added)*

As we have stated above, the prayer for specific performance was granted by the learned judge; this order was executed soon after the judgment on admission ordered.

The prayer for damages was couched as follows:

***“Further or alternatively damages for breach of contract”***

Halsbury's Laws of England in Volume 29 (2014)) 317 distinguishes special and general damages, and states that general damages are

***“those which will be presumed to be the natural and probable consequence of the wrong complained of, with the result that the plaintiff is required to assert that such damage has been suffered.”***

In the plaint, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant's breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered an injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary. The fundamental question is whether the respondent made a specific prayer in its plaint. The answer is in the negative, since the prayer was in the alternative. A prayer for damages must be specifically pleaded and particularized

because the claimant has suffered as a result of the wrong that is complained of. There was no justification for a court to award damages for an alternative prayer as couched above.

This leads us to the conclusion that the appellant's preliminary objections raised in the High Court were meritorious. We therefore set aside the order of Waweru, J. disallowing the same, and substitute therefor an order upholding the preliminary objection with costs to the respondent.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of June, 2016**

**M. KOOME**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original*

**DEPUTY REGISTRAR**