

**ALEXANDER KAROUT**, Appellant, *v.*

**S. EDWARD PEAL**, Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT,  
MONTSERRADO COUNTY.

Heard: November 22, 1979. Decided: November 27, 1979.

1. The fundamental principles upon which all complaints, answers or replies, shall be construed, shall be that of giving notice to the other party of all new facts which it is intended to prove, whether they are consistent with the facts already stated to the court or being consistent with the present existence, or shown facts, admit or imply their former existence, or show that existing, they can have no legal effect.
2. It is a rule that only issues raised and passed upon at the trial level will be reviewed by the appellate court. Hence, it is irregular to attach documentary evidence to a brief, when such evidence had not been pleaded in the lower court.
3. It is not sufficient merely that appellee states as special damages an amount; he must prove by preponderance of evidence that he has sustained the special damages alleged.

Appellee filed an action of damages for breach of the terms of a lease agreement, contending that his consent was not obtained, as lessor, to the sub-lease or assignment of the premises he demised to the appellant, as lessee. He claimed special damages of \$100,640.00, but at the trial the jury awarded \$27,000.00. Appellant appealed to the Supreme Court to review the judgment entered on the jury's verdict, contending that the special damages of \$27,000.00 were not proven and also that he had not breached the terms of the lease agreement. In support of the foregoing contentions, appellant attached two letters to his brief before the Supreme Court, which were attached to his motion for a new trial, but not to his answer to the complaint. The Supreme Court reversed the judgment and remanded the case to commence with repleading. The Supreme Court ruled that the fundamental principle is to give notice the trial judge did not err when he did not give cognizance to the letters attached to the motion for a new trial, but which were not attached to the answer. The Supreme Court also ruled that as an appellate Court, it can only review documents presented during the trial, and opined that it is irregular to attach documents to

the brief that were not part of the pleading in the lower court. The Supreme Court found, however, that evidence was not presented to substantiate the claims for special damages as required by law, in that special damages must not be only alleged from the acts of defendant, but must be proved to be the actual injury or loss sustained by the plaintiff. The judgment was therefore *reversed* and the case remanded.

*C. Abayomi Cassell* and *J. Emmanuel R. Berry* appeared for appellant. *Joseph P. H. Findley* appeared for appellee.

MR. JUSTICE BARNES delivered the opinion of the Court.

In the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, Republic of Liberia, sitting in its June term, A. D. 1979, the appellee, S. Edward Peal, plaintiff, instituted an action of damages for breach of contract against Alexander Karout, defendant.

In his complaint, plaintiff/appellee alleged that he entered into a lease agreement with the defendant/appellant on the 1st day of July, 1975, for a two storey building known as the Ambassador Hotel, located at United Nations Drive, Mamba Point, Monrovia, Liberia, for a period of ten (10) calendar years certain; which means that the life of the agreement was up to the 30th day of June, 1985. The appellee alleged further in his complaint that in accordance with the provision of clause four (4) of said lease agreement, appellant shall have the right to sublet or assign any portion or the whole of the demised premises for a portion or the full and complete period granted under the lease. Notwithstanding the clear and unambiguous terms and conditions of the lease agreement, appellant had violated them by entering into two contracts: One was a partnership agreement between Alexander Karout and Michel Bsaibes; and the other, an assignment of Karout's rights in the hotel without the written consent as contemplated by clause four (4) of the parent lease agreement. Appellee also alleged in his complaint that in furtherance of appellant's violation of the terms and conditions of the lease agreement, he, the appellant, received the sum of \$27,000.00 from Michel Bsaibes predicated upon a memorandum of agreement executed between them on the 17th day of September, A. D. 1975, canceling all subsequent transactions between them. The memorandum of agreement in consideration of the \$27,000.00, gave Mr. Michel Bsaibes the exclusive and unrestricted right to own, operate a certain portion of the Ambassador Hotel for the full period of the unexpired term of the lease agreement. Again this transaction between appellant and Michel Bsaibes was not referred to appellee for his approval, which

he contends was in contravention of the parent lease agreement. Putting all the alleged acts of violation of the terms and conditions of the lease agreement entered into between appellee and appellant herein, appellee stated in his complaint that he had been damaged thereby in the following sum of money:

\$27,000.00 illegally received from Mr. Michel Bsaibes;

\$73,640.00 balance in consideration of the contract if appellant had kept the terms and conditions thereof with-out the violation calculated as follows:

For the first five (5) years at \$8,580.00 per annum amounting to \$42,900.00 and for the second five (5) years at \$9,580.00 per annum, totalling \$47,900.00.

After deducting the amount allegedly paid by appellant in the sum of \$17,160.00, appellee finally claimed damages for breach of contract in the sum of \$100,640.00.

In his answer, appellant denied appellee's right to an award because the complaint fell short of the law that: ". . .the measure of damages is the actual amount of the loss or inconvenience sustained by the injured person without reference to the degree of misconduct of which the injuring party may have been guilty." Further, counts 2-4 of appellee's complaint are contradictory and inconsistent and obviously did not support in any respect the amount of \$100,640.00 itemized in count five (5) of the complaint, special damages having been prayed for by appellee. And because no special damages were specifically pleaded, the action should be dismissed.

The pleadings having been rested and the law issues disposed of, the case was ruled to trial.

The case was heard at the December Term in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, Republic of Liberia, His Honour Frank W. Smith presiding by assignment. After evidence was submitted, the jury returned a verdict in favour of appellee awarding appellee the sum of twenty-seven thousand (\$27,000.00) dollars as special damages. Appellant excepted to the verdict of the empanelled jury and filed a motion for a new trial.

In his motion for a new trial, appellant alleged that the verdict of the jury was contrary to the weight of the evidence adduced at the trial and repugnant to transparent justice. He contended that it is a settled principle of law that special damages must be specifically pleaded and proved with particularity, which appellee failed to do at the hearing of the case. Therefore, appellee was not entitled to the award of special damages in the sum of twenty-seven thousand (\$27,000.00) dollars. Appellant denied committing a breach of contract and it was therefore error for the jury to have awarded special damages to appellee as it did. Appellant also contended that appellee was in full know-ledge and consent of the sub-leasing

of the subject property to Michel Bsaibes and in support of this allegation he attached two letters marked exhibits "B" and "C" over the signature of Counsellor James G. Bull as documentary evidence.

In resisting the motion, appellee contended that appellant did not introduce the sublease agreement during the trial of the case or any written evidence to establish that he had complied with the provision of clause four (4) of the lease agreement. The trial judge heard the motion and denied it on the ground that the evidence adduced at the trial supported the verdict as returned by the empanelled jury. Accordingly, on the 15th day of February, A. D. 1979, the trial judge entered final judgment confirming and affirming the said verdict of the jury awarding appellee twenty-seven thousand (\$27,000.00) dollars in damages. Appellant excepted to the final judgment and announced an appeal to this Court for a review of the case. Appellant filed a twenty-five count bill of exceptions, but we feel it unnecessary to traverse all of these counts to reach a determination of this case. The case shall be decided on counts 13 and 23 of the bill of exceptions.

The appellant filed with his brief before this Court the same two letters marked exhibits "B" and "C" which he proferted with his motion for a new trial. This Court considers this to be strange to the practice in our jurisdiction. More will be said of this later in this opinion.

Count 13 of appellant's bill of exceptions relates to the letters which Counsellor James G. Bull had addressed to appellee indicating that payment on the sublease had been made by sub-lessee Bsaibes to appellee. But when he attempted to introduce these into evidence by a question to one of his witnesses the question was objected to on the grounds that the letters were never pleaded, unintelligible and not within the *res gestae*. The Court sustained the objection.

Appellant in his argument before this Court insisted that the trial judge erred when he sustained the objection of appellee's counsel to the question put to the witnesses because the documents constituted a proof that appellee had knowledge and consented to the sublease of the subject property and therefore the said documents should have been admitted into evidence on this procedure, even though the document had not been marked.

In his effort to explain why the documents were not pleaded, he stated that Counsellor C. Abayomi Cassell, the original counsel for appellant who had departed the country for foreign parts, requested him to file an answer to appellee's complaint, which he did. It was not until Counsellor Cassell's return to Liberia that it was discovered that the two letters Exhibits "B" and "C" were still in his possession and therefore could not have been made a part of the answer to the complaint. However, in keeping with law, same could be given cognizance by

this Court by way of review.

The appellee, on the other hand, contended that the two letters which appellant had attached to his brief as exhibits "B" and "C" could not be proper subject of review before this Court, said letters not having been pleaded in the trial Court.

Count 23 of appellant's bill of exceptions states that the sum of \$27,000.00 awarded appellee by the empanelled jury was contrary to the evidence adduced at the trial.

The principle issues drawn from the contention by the parties are: (a) whether or not the trial court erred in granting to appellee an award of \$27,000.00 as special damages? and (b) whether or not appellant's exhibits "B" and "C" made profert with the brief can be reviewed by this Court in support of appellant's contention that appellee had knowledge and gave his consent to the execution of the sublease agreement between appellant and Bsaibes, the third party.

We shall dispose of these issues in the reverse order:

The first time the question of notice was raised before this Court was in January A. D. 1894, eighty-five years ago. This is what the Court had to say on the issue:

"The fundamental principles upon which all complaints, answers or replies, shall be construed, shall be that of giving notice to the other of all new facts which it is intended to prove, whether they are consistent with the facts already stated to the Court or being consistent with the present existence, or shown facts, admit or imply their former existence, or show that existing, they can have no legal effect." *Williams v. Allen et al.*, 1 LLR 259 (1894).

In *George v. George*, 9 LLR 33,38 (1945), this Court held that: "The fundamental principle upon which all (pleadings) shall be (construed) shall be that of giving notice to the opposite party." Over the years the fundamental principle of notice has been relied upon by the courts of this country and will continue to be so under existing law.

Predicated upon the above cited principle of law, appellant in filing his answer to appellee's complaint should have made profert of his exhibits "B" and "C" so as to give appellee the opportunity to traverse or respond to the said documentary evidence in the reply to the answer but he failed to do so. We do not agree with the appellant's attempt to introduce the said exhibits "B" and "C" into evidence through the motion for new trial because it would not only be a surprise to his adversary but also a strange practice in our system of jurisprudence. Why the appellant did not amend his answer when he discovered that Counsellor Cassell had returned to Liberia and had in his possession the letters intended to be made a part of the answer?

The Supreme Court has the twofold function: reviewing cases, as well as setting procedure of the lower courts. *Delaney v. Republic*, 4 LLR 3 (1933). It is a rule that only issues raised and passed upon at the trial level will be reviewed by the appellate court. Hence, it was improper for appellant to have attached his documentary evidence to his brief when such evidence had not been pleaded in the trial court.

The second issue which claims our attention is whether or not the verdict which was returned by the jury of the trial court awarding appellee \$27,000.00 as special damages was contrary to the evidence and the law controlling. Here is what the law says on special damages: "When items of special damages are claimed, they shall be specifically stated." Civil Procedure Law, Rev. Code 1:9.3(7). A recourse to the records in this case showed that the appellee has not proved with particularity as required by statute for claims of special damages in the case. For instance, it has not been specifically established how the sum of \$27,000.00 constituted losses to appellee as a result of the breach of the contract. "Specific sums of money asked for as special damages must be based upon definite and certain knowledge as to their correctness and in such eventuality this must be testified to and proven at the trial in order to justify a judgment awarding such sums." *Vianini Company v. Cole*, 16 LLR 95, 97 (1964).

It is not sufficient merely that appellee states as special damages an amount; he must prove by preponderance of evidence that he has sustained the special damages alleged. We are not convinced that appellee has clearly and cogently proved with particularity the special damages alleged in his complaint, as required by statute and the numerous decisions of this Court.

It is therefore our considered opinion that, in the interest of justice, the judgment confirming the verdict be and the same is hereby reversed and the case remanded to the trial court with specific instructions that the parties be permitted to re-plead. The Clerk of Court is hereby ordered to send down a mandate to this effect. And it is hereby so ordered.

*Judgment Reversed; case remanded.*

