Brand Strategy & Design Limited & another v Pride Inn Hotels and Conferencing (Civil Appeal E379 of 2021) [2024] KEHC 9394 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9394 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E379 OF 2021

DKN MAGARE, J

JULY 30, 2024

BETWEEN

BRAND STRATEGY & DESIGN LIMITED ..... 1ST APPELLANT

EVA MURAYA ..... 2ND APPELLANT

AND

PRIDE INN HOTELS AND CONFERENCING ..... RESPONDENT

(Being an appeal from the Judgment of Hon. D. O. Mbeja (PM) in Nairobi CMCC No. 4215 of 2019, delivered on 18th June, 2021)

JUDGMENT

1. This is an appeal from the Judgment of Hon. D. O. Mbeja (PM) in Nairobi CMCC No. 4215 of 2019, delivered on 18th June, 2021. The Appellant was the defendant in the court below. They set forth 6 grounds raising only 3 issues:
    i. Award of general damages of Ksh 1,000,000/= for breach of contract.
    ii. Satisfaction of the contract.
    iii. Effect of payment proposals in the harsh economic environment.
2. The court entered judgment as follows:
    a. 1,000,000/= damages.
    b. Prayers sought in the plaint.
3. The Respondent sought the following reliefs in the plaint:

i. 1,020,000/= unpaid balance.

ii. 297,500/= accrued balance.

iii. General damages.

4. The above amounts were awarded in addition to Kshs. 1,000,000/= for breach of contract.

Pleadings

5. On 12/6/2019 the Respondent filed suit stating that between 2/5/2017 – 5/5/2017 they offered services where a sum of Kshs. 1,020,000 was unpaid. A sum of Kshs. 1,694,000/= was invoiced for Kshs. 1,574,000/= and Kshs. 120,000/= on 7/6/2017. An amount of Kshs. 574,000/= was paid leaving Kshs. 1,120,000/=.

6. It was stated that on 2/5/2018 the respondent paid a sum of Kshs. 100,000/= leaving Kshs. 1,020,000/=. The Appellant cheque No. 0239 was issued and banked. However, it was dishonoured on presentation attracting fine on the plaintiff's account.

7. The Respondent claimed interest from 2/5/2017 to June 2019 of a sum of Ksh. 297,500/-.

8. The Appellant filed defence and averred that they outsourced conference services but the same were paid for. It was their case that they had honoured their part of the bargain. They vowed to produce bank deposit slips, cheque payment to buttress the assertion. Alternatively they prayed to expunge without prejudice admissions pursuant to Section 23 of the *Evidence Act*. They sought reconciliation of accounts. However, no counterclaim of this was filed.

Evidence

9. After several false starts, the Respondent's witness testified on 10/12/2020. PW1 Timothy Kimuyu adopted his statement dated 10/6/2019 and produced exhibits. He stated a sum of Kshs. 1,020,000/= is outstanding. He stated that they provided a full conference package for 300 guests at the Appellant's request. Despite rendering services the Appellant failed to pay. He reiterated contents set out in the plaint. The participant signed forms confirming attendance. He was not cross examined.

10. PW2 Peter Muchiri Keyema, a Credit Controller testified that they were seeking interest and Kshs. 1,020,000/= general damages. He produced documents dated 20/1/2020. On cross examination, he stated that there was part payment.

11. DW1 Esther Wamboi Chege Akila testified on 14/12/2020. She admitted the claim and said they paid 12,000/=. They were unable to raise the amount. It is their case that they paid 12,000/= in December. The year is not indicated. It was her case that they had not refused to pay. On re-examination she stated that she wanted to reconcile accounts first.

Analysis

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

13. In the case of Mbogo and Another vs. Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

14. Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, stated as follows:-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

15. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held:

> This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

18. In Nkube v Nyamiro [1983] KLR 403, court of Appeal posited as doth: -

> "A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

19. I need to point out that the court below allowed the suit as prayed. That is a dangerous way. There must be a specific finding on each of the prayers to avoid going on a frolic of its own.

20. There are no issues that the amounts are due and virtually admitted. The 3 questions that I need to deal with are:-

    a. Whether Kshs.1,020,000/= or part thereof was proved.

b. Whether interest of Kshs. 297,500/= is due and payable.

c. Whether the court erred in awarding Kshs. 1,000,000/= in general damages.

The debt

21. The Respondent proved that a sum of Kshs. 1,020,000/= was due and owing. Cheques bounced but the amounts were not pleaded. On specific aspects of the case, where a party seeks special damages he must not only plead them but also prove the same. They cannot be thrown to the court.

22. The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

23. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR the court, Justice Luka Kimaru, as he was then, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> > "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence 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 nature of the acts themselves."

24. In the case of David Bagine vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages

in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write 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"

25. A claim must be set out to exactitude for amount specifically owed. This is known as a liquidated demand. In Sichuan Huashi Enterprises Corporation (East Africa) Limited v Capital Realty Limited; Jacinta Muthoni Machua & another (Interested Parties) [2020] eKLR, the court stated as follows: -

> 14. In Cimbria East Africa Limited vs. Kenya Power & Lighting Company Ltd [2017] eKLR, Ochieng, J stated as follows:
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> "Black's Law Dictionary defines Liquidated Claim thus;
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> '1. A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties agreement.
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> 2. A claim that was determined in a judicial proceeding'.
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> 25. Meanwhile, Halsbury's Laws of England, 4th Edition Vol. 12, at paragraph 1109 says;
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> QUOTE
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> '....In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated'.

Nonetheless, it is to be noted that;

> 'A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.'

I adopt the following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33;

> 'A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'...'

The words 'debt' or 'liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure. Per Ringera J. (as he then was) in TRUST BANK LIMITED Vs ANGLO AFRICAN PROPERTY HOLDINGS LIMITED & 2 OTHERS HCCC No. 2118 of 2000."

26. On the other hand a party who says he does not owe must show that he never owed or has paid. It is not enough to make a general denial. In Muguga General Stores v Pepco Distributors Limited (1988-1992) 2 KAR 89 where the Court said: -

> " First of all a mere denial is not a sufficient defence in this type of case. There must be some reasons why the defendant does not owe the money, either there was no contract or it was

not carried out or it could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

27. The amounts of Kshs. 1,020,000/= were pleaded and proved. The bouncing of the cheque for 26/5/2018 was proved. The Respondent was not cross examined and the debt was admitted. The Appellant was duty bound to show how the debt was paid. A general denial does not suffice. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
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> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

28. There was an attempt to question the name of the Respondent. However this was not a pleaded issue. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
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> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

12. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

29. Though charges for bounced cheques were proved they were not pleaded. They were not awarded and I shall not belabor the point. The award of Kshs. 1,020,000/= was thus proved. This amount being a liquidated sum, shall attract interest from 12/6/2019, the date of filing. An appeal against Ksh. 1,020,000/= is dismissed in limine.

Interest

30. Interest for a liquidated claim is payable from the date of filing not before. There was no contract for payment before 12/6/2019. There was no express and registered agreement for charging of interest. Contracts are binding upon parties. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):
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> > "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

31. We cannot interfere with contract between parties. The court was plainly wrong in awarding interest of Kshs. 297,500/= to the Respondent. I therefore set aside the award of Kshs. 297,500/= as accrued interest.

General damages

32. The claim of general damages was not proved. General damages are not payable for breach of contract. In any event there was no proof of breach of contract. In Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC delivering the judgment of the supreme court of Nigeria stated:

> I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

33. In the case of *Barclays Bank of Kenya Limited v Mema (Civil Appeal E011 of 2021)* [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment), Majanja DAS, J, as he then was, stated as hereunder: -

> " 20. In Dharamshi v Karsan [1974] EA 41, the Court of Appeal for East Africa held that general damages for breach of contract are not allowed in addition to quantified or special damages. The legal position on this issue has been restated several times by the Court of Appeal in the cases cited by the Bank and others including Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies NRB CA Civil Appeal No. 625 of 2019 [2021]eKLR. As to the nature of the damages awarded in cases of breach of contract, I summarized

the position in Consolata Anyango Ouma v South Nyanza Sugar Company Limited MGR HCCA No. 53 of 2015 [2015]eKLR as follows:

> 15. The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))."

34. In the circumstances there can be no damages for breach of contract. In any case neither damages nor breach were pleaded and or proved.

35. . The only deviation was nonpayment which is a special or liquidated claim. There is no basis for award of general damages for breach of contract. In the circumstances I set aside the award of Kshs.1,000,000/ = as general damages.

Costs

36. Section 27 of the *Civil procedure Act* provides as follows: -

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

37. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

38. The results are a mixed basket. The order that is appropriate is therefore for each party to bear its costs.

Determination

38. In the circumstances I make the following orders:-

    a. The appeal on Kshs. 1,020,000/= is dismissed. The said amount is due and payable attracting interest from 12/6/2019, the date of filing.

    b. The appeal on Kshs. 297,500/= is allowed. The sum is set aside and the claim dismissed in its entirety.

    c. The award of Kshs. 1,000,000/= as general damages is untenable. The same is set aside in its entirety.

    d. Each party to bear its costs.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI, ON THIS 30TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Miano for the Appellant

Amuka for the Respondent

Court Assistant – Jedidah