



Al-Riaz International Limited v Ganjoni Properties Limited & another (Civil Suit 24 of 2018) [2024] KEHC 14497 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 24 OF 2018
JK NG'ARNG'AR, J
NOVEMBER 21, 2024**

BETWEEN

AL-RIAZ INTERNATIONAL LIMITED PLAINTIFF

AND

GANJONI PROPERTIES LIMITED 1ST DEFENDANT

MAKURI AUCTIONEERS LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff's claim is anchored in the plaint dated 9th April 2018. The Plaintiff states that they were predominantly engaged in the business of motor vehicle importation and sale while the 1st Defendant was their landlord at the premises referred to as Mombasa/Block XX/340 Mombasa Island which was later incorporated as Mombasa/Block XX/350 Mombasa Island.
2. That a Plaint was filed on 31st December 2014 where the Plaintiff sued the 1st Defendant seeking for a declaration that the tenancy as stated hereinabove between the Plaintiff and the 1st Defendant is a controlled tenancy as defined in the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and that the terms thereof cannot be altered unless with the approval of the Business Premises Rent Tribunal and an injunction order to restrain the 1st Defendant from evicting the Plaintiff from the subject premises.
3. That contrary to the spirit of the agreement in place, on 21st December 2017, the 1st Defendant through the 2nd Defendant proceeded to the premises and proclaimed a total of 18 motor vehicles stored at the subject premises by the Plaintiff and on 5th January 2018 proceeded to attach a total of 30 more motor vehicles with a total estimated value of Kshs. 146,865,000 on account of alleged rent arrears allegedly owed by the Plaintiff to the 1st Defendant in the sum of Kshs. 14,900,000, a figure which was disputed by the Plaintiff. That on 7th January 2018, the Plaintiff was evicted from the premises but through a Notice of Motion application dated 15th January 2018 and granting of orders on 16th



January 2018 was to the effect that the status quo be restored. That an illegal auction was conducted on 20th January 2018 where the 2nd Defendant proceeded to dispose off the attached motor vehicles. That several applications dated 19th January 2018, 29th January 2018, 1st February 2018 were filed, orders extracted and served upon the Defendants for the status quo to be maintained and for the Plaintiff to gain access of the premises. That the Defendants were in defiance and as a result, the Plaintiff suffered substantial irreversible loss, injury and damage.

4. The Plaintiff prayed that judgment be entered against the Defendants jointly and severally for special damages of Kshs. 146,865,000, general damages for illegal/unlawful eviction, general damages for illegal/unlawful auction sale, general damages for lost business/income, costs of the suit, interest on special damages at the commercial rate with effect from 7th January 2018 until payment in full, and any other/further relief the honourable court may deem fit and just to award in the circumstances.
5. The 1st and 2nd Defendants entered appearance and filed their defence. The 1st Defendant in their Defence under Protest dated 3rd June 2020 averred that the suit is based on a false verifying Affidavit as there are other suits including HCCC No. 158 of 2014 involving the same parties over the same subject matter. That this suit is sub-judice with the suits pending between the Plaintiff, the Plaintiff's directors and the first Defendant, which include Mombasa HCCC No. 158 of 2014, Al-Riaz International Ltd v Ganjoni Properties Limited, HCCC No. 158 of 2014 which has another party, Fuji King Motors Limited, the Interested/Affected Party who is not a party in this suit but should have been enjoined, Mombasa ELC No. 20 of 2018, Fuji Motors Limited v Ganjoni Properties & Al-Riaz International Limited, and Mombasa ELC No. 458 of 2017, Ganjoni Properties Limited v Al-Riaz International Limited, Rehan Riaz Malik & Usman Riaz Malik. That this suit is res judicata as it concerns Plot No. Mombasa/Block XX/350 which is the subject of Mombasa CMCC No. 317 of 2016, Ganjoni Properties Limited v Al-Riaz International Limited, which was determined in favour of Ganjoni Properties Ltd on 6th October 2017. That the suit is sub judice in so far as it relates to Plot No. Mombasa/Block XX/350 which is the subject of ELC Miscellaneous Civil Application No. 44 of 2017, Al-Riaz International Limited v Ganjoni Properties Limited.
6. That the 1st Defendant entered into a consent with the Plaintiff in Mombasa HCCC No. 158 of 2014 on 14.12.2016 that the Plaintiff must pay mesne profits in the sum of Kshs. 360,000 per month and in default the 1st Defendant would be at liberty to levy distress. That the Plaintiff defaulted in compliance with terms of the consent and every other order made concerning payment of the mesne profits. That the Plaintiff kept obtaining multiple orders from this court in HCCC No. 158 of 2014 to occupy the suit premises without payment of any rent which conduct constituted a violation of the 1st Defendant's right to property guaranteed by Article 40 of *the Constitution*.
7. The 2nd Defendant in their Defence dated 21st April 2018 stated that they received instructions to levy distress for rent arrears which was in the normal course of its duty and in compliance with the requisite statutory provisions. That as an auctioneer and court bailiff, the 2nd Defendant was the 1st Defendant's agent acting for disclosed principal and with no knowledge and not party to the differences between the 1st Defendant and the Plaintiff. That the Plaintiff is unnecessarily dragging the Defendant into proceedings and differences that he is not privy to. That the Plaintiff's claim and allegations have no basis and has no justiciable cause of action against the Defendant and this suit ought not to be entertained or at all. The 2nd Defendant prayed that the Defendant's suit be dismissed with costs.
8. The Plaintiff filed a Reply under protest to the 2nd Defendant's Defence dated 30th April 2018 where the Plaintiff joined issues with the 2nd Defendant's Defence and reiterated the entire contents of the plaint and further denied each and every allegation contained in the defence as if the same were set out



- verbatim and traversed seriatim. The Plaintiff prayed that the 2nd Defendant's defence be struck out with costs and judgment be entered for the Plaintiff against the Defendants as prayed in the Plaint.
9. The matter proceeded to hearing and the Plaintiff called two witnesses who testified. PW1, Rehan Riaz Malik, adopted his witness statement dated 9th April 2018 and a further statement dated 6th October 2023 as evidence in chief. He produced documents in the list of documents dated 9th April 2018 as Exhibits 1-19 and a further list of documents dated 6th October 2023 as Exhibit 20. PW1 was cross examined by Mr. Kinyua Advocate for the 1st Defendant and Mr. Osewe Advocate for the 2nd Defendant. PW2, Richard Kasyoki, the valuer working with Strategic Automobile Valuers and Loss Assessors Limited also testified and produced a witness statement which was adopted as evidence in chief, and a bundle of documents which were produced as exhibits 21-26. PW2 was cross examined by Mr. Kinyua and Mr. Osewe Advocates for the 1st and 2nd Defendants respectively.
 10. The Defence tendered its evidence in court where DW1, Kamlesh Pandya, the Director of the 1st Defendant, adopted his witness statement dated 6th March 2023 and a further witness statement dated 13th July 2023 as evidence in chief. He produced documents 1-11 in the bundle of documents as exhibits and was cross examined by Mr. Mwanzia Advocate for the Plaintiff.
 11. The court gave directions for parties to file their submissions. The Plaintiff in their submissions dated 15th October 2024 submitted that they abandoned challenging the alleged rent arrears of Kshs. 12,960,000 in this suit and he is only seeking to recover the surplus of the proceeds of the public auction sale conducted by the 2nd Defendant and that the issue before court is purely commercial. The Plaintiff relied on Section 26 of the *Auctioneers Act* and that the issue of jurisdiction raised by the 1st Defendant is totally unwarranted and misguided.
 12. On whether the Plaintiff is entitled to a refund of Kshs. 116,940,000 being the surplus of the sale proceeds after deducting the alleged rent arrears and the Auctioneer's costs, the Plaintiff submitted that it is not in dispute that vide a proclamation of Distract of Movable Property dated 21st December 2017, the 1st Defendant instructed the 2nd Defendant to levy distress for alleged rent arrears of Kshs. 12,960,000 plus the auctioneer's costs of Kshs. 2,000,000. That the 2nd Defendant proceeded to recover and advertise 48 motor vehicles as set out in the Public Notice issued by the 1st Defendant. That according to the valuation reports by Strategic Automobile Valuers and Loss Assessors Limited, the value for the motor vehicles was Kshs. 131,900,000.
 13. The Plaintiff relied on the holding in *Dick Omondi Ndiewo t/a Ditch Engineering Service v Cell Care Electronics (2015) eKLR* that the evidence of the expert (valuer) could only be challenged by the evidence of another expert. That the Defendant did not produce copies of valuation done before the public auction the Memorandum of Sale for the 48 vehicles to controvert the values given by Strategic Automobiles Valuers. The Plaintiff placed reliance on Article 46 of *the Constitution* as well as holdings in *NCBA Bank PLC v Cyrus Ndung'u Njeri t/a Digital Tours and Logistics (2021) eKLR* and *Zum Zum Investments Ltd v Habib Bank Ltd (2014) eKLR*. That the Defendants should only have deducted Kshs. 14,960,000 from the sum of Kshs. 131,900,000 and reimburse the Plaintiff the sum of Kshs. 116,940,000.
 14. On whether the suit against the 2nd Defendant is merited, the Plaintiff submitted that an agent of a known principal ought not to be sued. However, the 2nd Defendant is not an ordinary agent and that he undertakes his duties according to the Auctioneer's Act. That the 2nd Defendant was therefore a necessary party and it was right for the Plaintiff to sue the 2nd Defendant together with the principal.
 15. On whether the Plaintiff is entitled to the award of costs and interests, the Plaintiff relied on Section 26 (2) and 27 (2) of the *Civil Procedure Act*. That the Defendants sold the suit vehicles way back in 2018



- and refund of the surplus ought to have been done then. That the Plaintiff equally took time before filing the suit and this is a claim for special damages. They therefore urged that interest be awarded from the date of filing the suit.
16. The 1st Defendant filed submissions dated 30th October 2024 and argued that this court is prohibited from exercising jurisdiction in respect of matters to be determined in the Environment and Land Court pursuant to Article 165 (5) (b) of *the Constitution*. That the Plaintiff has attempted to bypass the Article in arguing that the cause of action is limited to the refund of what it claims to be the surplus of the proceeds of sale of motor vehicles after the 1st Defendant levied distress for rent. That parties are bound by their pleadings and that in its plaint, the Plaintiff claims for special damages of Kshs. 146, 865,000 arising from the distress for rent, general damages for illegal eviction, general damages for illegal/unlawful auction sale, and general damages for lost business/income consequent upon alleged eviction.
 17. That without prejudice on whether this suit is sub judice and if so whether the court is expressly barred under Section 6 of the *Civil Procedure Act* from hearing and determining the suit, the 1st Defendant submitted that this court cannot determine a suit it is barred from hearing and cannot stay a suit it had already heard. That the doctrine of sub judice is also raised upon the footing that at the time the Plaintiff filed this suit, there were two separate suits between the same parties pending in the Environment and land court. That without prejudice, and whether this suit is res judicata, the 1st Defendant submitted that the Court of Appeal in its judgment in Civil Appeal No. 14 of 2018 delivered on 12th July 2018 directed the High Court to determine the issue of jurisdiction. That the High Court failed to determine jurisdiction and chose to continue with contempt of court proceedings and that triggered the filing of Civil Appeal No. E090 of 2022. That within that appeal, Ganjoni Properties Limited and others sought and obtained stay of further proceedings in Mombasa HCCC No. 158 of 2014. That when proceedings in a suit are stayed, the Plaintiff cannot file or continue other proceedings in a different suit between the same parties arising from the same cause of action.
 18. On whether the Plaintiff's suit is merited, the 1st Defendant submitted that there are 46 assorted motor vehicles in paragraph 25 (iii) of the Plaint, in paragraph 11 of its submissions dated 15th October 2024, the Plaintiff has given a description of 30 motor vehicles thereby reducing the number of those vehicles by 16, and the police abstract under OB No. 15 of 7/1/2018, only 16 vehicles were removed. That the amount claimed as the value of the motor vehicles, Kshs. 131,900,000 is not proved. That if the Plaintiff could not determine how many vehicles were attached and sold, then they could not be specific on the value claimed. That the Plaintiff called PW2 who alleged that he valued the vehicles in 2023.
 19. The 1st Defendant submitted that in purported discharge of the Plaintiff's duty to prove special damages, they called PW2 who alleged that he valued the vehicles in 2023. That the witness did not undergo formal training as a valuer and that he learned on the job. That the valuation report used the exact same values in the Plaint and it is therefore questionable how in April 2018 the Plaintiff knew it would obtain exact values for valuation reports in October 2023. That therefore, PW2 did not inspect or value the vehicles. That the only person who valued the vehicles before they were sold on auction is the auctioneer, though not part of this suit, provided values of those vehicles in the proclamation notice dated 21st December 2017 in the 2nd Defendant's List and Bundle of Documents. That the document was produced by consent of the Plaintiff who saw no need to cross examine the maker. That the values of those vehicles are the values stated in the proclamation and any difference between values in the proclamation and those given by PW2 should be resolved in favour of the 2nd Defendant as the values in the proclamation are not challenged.



20. The 1st Defendant maintained that nobody goes to an auction to purchase anything at the market value. That the Plaintiff should have produced import documents for each of the motor vehicles in question including the supplier's invoices, evidence of settlement of those invoices, the bills of lading and import declaration forms and customs entries. That the Plaintiff did not produce any management accounts, audited accounts, profit and loss accounts, and tax returns to prove the alleged loss of income of Kshs. 8,000,000 per month and loss of business at an average of Kshs. 36,000,000 per month. That the court was not provided with any evidence of the fixtures and fittings said to be valued at Kshs. 14,965,000. That it is trite law that special damages must be specifically pleaded and strictly proved.
21. On what the value of the subject matter is, the 1st Defendant argued that the monetary value of the subject matter is Kshs. 2,330,865,000 which are damages that the Plaintiff seeks in the Plaintiff. That the claim that the 1st Defendant defended and has been resisting from 2016 up to the Court of Appeal is Kshs. 2,330,865,000.
22. On who should pay costs of the suit, the 1st Defendant contended that under the proviso to Section 27 of the *Civil Procedure Act*, costs of any action, cause or any other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. That from the evidence of the Plaintiff, it abandoned the bulk of its claim limiting it to Kshs. 116,940,000. That there is nothing in the Civil Procedure known as abandonment. That the bulk of the Plaintiff's claim is deemed to have been withdrawn with costs.
23. The 1st Defendant urged the court to strike out the Plaintiff's suit with costs under Article 165 (5) (b) of *the Constitution* and Section 6 and 7 of the *Civil Procedure Act*. That should the suit not be struck out, the 1st Defendant urged the court to find that the Plaintiff had failed to prove their case on a balance of probabilities and to dismiss the same with costs.
24. The 2nd Defendant filed submissions dated 28th October 2024 and argued that according to Edwin Peel in the 'Law of Contract' 12th ed., Sweet & Maxwell at page 752 and 777, agency is a relationship which arises when one person, called the principal, authorizes another, called the agent, to act on his behalf, and the other agrees to do so. That generally, the relationship arise out of an agreement between the principal and agent. That additionally, a disclosed principal, is one whose existence a third party is aware of. The 2nd Defendant relied on the holding in the Court of Appeal in *Anthony Francis Wareheim t/a Wareham & 2 Others v Kenya Post Office Savings Bank (2004) eKLR* and *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another (2016) eKLR*. That the agency relationship is not disputed by the 1st Defendant herein and that the Plaintiff's suit against the 2nd Defendant should be dismissed with costs.
25. After considering the pleadings, proceedings, and submissions of the parties, the issues for determination are: -
 - a. Whether this court has jurisdiction to hear and determine the suit herein
 - b. Whether the 2nd Respondent was properly enjoined in the suit
 - c. Whether the Plaintiff's suit is merited
 - d. Who should pay costs and interest of the suit
26. On whether this court has jurisdiction to hear and determine the suit herein, the Plaintiff stated that they abandoned challenging the alleged rent arrears in this suit and they are only seeking to recover the surplus of the proceeds of public auction conducted by the 2nd Defendant, that the issue before court is purely commercial and that this court is seized of jurisdiction.



27. The 1st Defendant on the other hand had a contrary opinion that this court is prohibited from exercising jurisdiction in respect of matters to be determined in the Environment and Land Court. That the Plaintiff has attempted to bypass Article 165 (5)(b) of *the Constitution* yet the claim in the Plaintiff point towards the Environment and Land Court as the proper jurisdiction.
28. The 1st Defendant also raised the doctrine of sub judice on the basis that the Plaintiff filed this suit when there were two separate suits between the same parties pending in the Environment and Land Court. The 1st Defendant further submitted on res judicata and that a stay of further proceedings was sought in Mombasa HCCC No. 158 of 2014 and that when proceedings in a suit are stayed, the Plaintiff cannot file or continue other proceedings in a different suit between the same parties arising from the same cause of action.
29. The issue of jurisdiction is fundamental, as a court must first establish its authority to hear and determine a matter before proceeding to its merits. The court pronounced itself on the subject in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR as follows: -
- “Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
30. This court notes that the issue of jurisdiction was raised in a Notice of Preliminary Objection dated 16th April 2018 and the court pronounced itself in a ruling dated 13th May 2020 by Hon. Lady Justice D.O. Chepkwony. That no evidence was furnished to the court to substantiate the allegations in the preliminary objection. It was therefore found to have no merit and was dismissed.
31. However, be that as it may, Jurisdiction of the Environment and Land Court (ELC) is provided for under Article 165(5)(b) of *the Constitution* as follows: -
- The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).
32. Article 162(2) of *the Constitution* establishes courts with the status of the High Court to hear and determine disputes relating to the environment and the use, occupation, and title to land. The *Environment and Land Court Act*, Section 13(2), provides: -
- In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes relating to environment and land, including disputes —
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting enforceable interests in land.”



33. In *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 Others* (2017) eKLR, the Court of Appeal addressed the issue of jurisdiction, distinguishing between disputes involving land use and disputes arising from contractual obligations. The court held: -
- “The mere fact that the subject matter of a dispute involves land does not automatically bring it within the jurisdiction of the Environment and Land Court. Where the primary issue concerns enforcement of contractual obligations or commercial transactions, it falls within the jurisdiction of the High Court.”
34. Further, in *Republic v Karisa Chengo & 2 Others* (2017) eKLR, the Supreme Court provided guidance on jurisdictional boundaries, stating: -
- “Jurisdiction is determined by the nature of the dispute and the relief sought. Matters that are predominantly commercial or contractual fall outside the jurisdiction of the Environment and Land Court.”
35. The primary issue in this case is whether the Plaintiff is entitled to a refund of surplus auction proceeds and damages for actions allegedly conducted unlawfully. These claims are commercial in nature and are not related to land use, ownership, or title. The presence of a tenancy agreement does not, by itself, place the matter within the jurisdiction of the ELC.
36. The Supreme Court’s decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR emphasized: -
- “Jurisdiction flows from *the Constitution* or statute, and a court cannot arrogate to itself jurisdiction beyond that which is conferred upon it by law.”
37. This court, therefore, finds that it has jurisdiction to hear and determine this matter.
38. On whether the 2nd Respondent was properly enjoined in the suit, the Plaintiff submitted that an agent of a known principal ought not to be sued. That however, the 2nd Defendant is not an ordinary agent and that he undertakes his duties according to the Auctioneer’s Act. That the 2nd Defendant was therefore a necessary party to the suit. This position was contrary to the 2nd Defendant’s position that the agency relationship is not disputed by the 1st Defendant herein and that the Plaintiff’s suit against them should be dismissed with costs.
39. Order 1 Rule 10(2) of the Civil Procedure Rules provides: -
- ...The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added ...
40. The Black’s Law Dictionary defines a ‘necessary party’ as a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.
41. Auctioneers are not liable for contracts entered into on behalf of a disclosed principal. However, the Auctioneer’s Act holds auctioneers liable where they breach statutory duties. It is not in doubt that



the Auctioneer attached motor vehicles which action the Plaintiff is now claiming were illegal. This court therefore finds that the auctioneer a necessary party to the suit.

42. On whether the Plaintiff's suit is merited, it is the position of the Plaintiff that it is not in dispute that distress was levied for alleged rent arrears of Kshs. 12,960,000 plus auctioneer's costs of Kshs. 2,000,000. That according to the valuation report by Strategic Automobiles Valuers and Loss Assessors Limited, the value for the motor vehicle was Kshs. 131,900,000. That the Plaintiff is therefore entitled to a refund of Kshs. 116,940,000 being the surplus of the sale proceeds after the deductions.
43. According to the 1st Defendant, there was a contradiction in the Plaintiff's Submissions and the Police Abstract in the number of motor vehicles attached and sold. That the amount claimed as the value of the motor vehicle was not proved and that if the Plaintiff could not determine how many vehicles were attached and sold, they could not be specific on the valued claim. That it is not possible for the valuation report in April 2018 to have the exact values as the valuation report in October 2023. That the auctioneer provided value of the vehicles in the proclamation notice dated 21st December 2017 and that the document was produced by consent of the Plaintiff who saw no need to cross examine the maker. That the value of the vehicles is therefore stated in the proclamation. That further, the Plaintiff did not produce any document to show ownership and value of the motor vehicles, proof of the alleged loss of income and loss of business and evidence of the value of fixtures and fittings.
44. The Plaintiff bears the burden of proving the claimed value of the motor vehicles, ownership, and entitlement to the alleged surplus. That it is trite law that he who alleges must prove as provided for under Section 107 and 108 of the *Evidence Act* as follows: -

Section 107 provides: -

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108 provides: -

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

45. The Halsbury's Laws of England, 4th Edition, Volume 17 states: -

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence



given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

46. Upon perusal of the evidence on record, this court notes that the number of vehicles claimed by the Plaintiff are 46 in the Plaint, 16 in the Police Abstract and 36 in the Submissions. This therefore casts doubt on the total value of the motor vehicles claimed by the Plaintiff.
47. Further, this court notes that there is a similarity in the value of the motor vehicles in the valuation reports prepared on 2nd October 2023 and the value of the motor vehicles in the Plaint filed on 9th April 2018. It is common knowledge that the value of motor vehicles depreciates with passage of time. Therefore, it is far from possible that valuation of the motor vehicles conducted by Strategic Automobiles Valuers and Loss Assessors Ltd are credible, considering PW2, the valuer in his evidence in court admitted to having not been professionally qualified and that his skills were learnt on the job. This court is further inclined towards the position that the price of motor vehicles purchased at auctions are lower than the market value. The Plaintiff in their list and bundle of documents dated 9th April 2018 filed alongside the plaint consists of a copy of the proclamation showing the value of the attached motor vehicles which ranges between Kshs. 250,000 and 500,000.
48. The Plaintiff claimed special damages in the Plaint. In *Hahn v Singh, Civil Appeal No. 42 of 1983* (185) KLR 716 the court held that: -
- “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.”
49. The Plaintiffs have not attached receipts of financial records as proof of the amount claimed in special damages.
50. On who should pay costs and interest of the suit, Section 27(1) of the *Civil Procedure Act* provides: -
- Costs shall follow the event unless the court or judge shall for good reason otherwise order.
51. In *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others* (2014) eKLR, the Supreme Court explained: -
- “The purpose of costs is to indemnify the successful party for expenses incurred in pursuing or defending a claim. However, courts retain discretion to consider the conduct of the parties and the circumstances of the case in determining costs.”
52. Based on the foregoing analysis of issues, the set threshold has not been attained. The Plaintiff has failed to prove its case on a balance of probability. This suit is therefore dismissed with costs to the defendants.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF NOVEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Mwanzia Advocate for the Plaintiff



Muyaa Advocate for the 1st Defendant

Osewe Advocate for the 2nd Defendant

Court Assistant – Mr. Samuel Shitemi

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