Mau Narok Nissan and Co-operative Society Ltd v Langas & 3 others (Civil Appeal E011 of 2021 & E007 of 2022 (Consolidated)) [2023] KEHC 26039 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CIVIL APPEAL E011 OF 2021 & E007 OF 2022 (CONSOLIDATED)

F GIKONYO, J

NOVEMBER 28, 2023

BETWEEN

MAU NAROK NISSAN AND CO-OPERATIVE SOCIETY LTD ..... APPELLANT

AND

SAMMY P. LANGAS ..... 1ST RESPONDENT

PARSALOI OLE SAPURR ..... 2ND RESPONDENT

OLOORU OLE NTETE ..... 3RD RESPONDENT

EQUITY BANK, NAROK BRANCH ..... 4TH RESPONDENT

(Being an appeal from the judgment and decree of Hon. G.N. Wakahiu (CM) delivered on 28.07.2021 in NAROK CMCC No.75 of 2018)

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. 75 of 2018 delivered on 28.07.2021. The trial court entered judgment for the respondents against the appellant and made the following specific orders;

    i. An order that permanent injunction is denied.

    ii. An order that mandatory injunction is denied.

    iii. An order for a declaratory relief is denied.

    iv. A declaration that all money collected since 1st 2018 March till the hearing and determination of the case be deposited in court for onward handing over to the appellant as enumerated at No. 7B is denied.

v. A declaration that the 4th respondent reimburses and or compensates the appellant for all the money lost by the appellant since inception of account number 0360xxxxxxx is denied.

vi. An order that the plaintiff is not entitled to special, general, and exemplary damages.

vii. An order that the cost of the suit is awarded to the respondents.

2. The memorandum of appeal dated 11.11.2021 cited the following ten (10) grounds of appeal: -

i. That the learned magistrate erred in fact and in law when he did not find that the 1st to 3rd respondents were estopped from using the agreement dated 16.02.2010 when in part they had breached the same.

ii. That the learned magistrate erred in fact and in law when he found that fraud and forgery are strictly criminal while as much as allegations of fraud must strictly be proved, and though standards of proof in criminal and civil matters on fraud are totally different, as in criminal matter the standard is beyond reasonable doubt and in civil matters the standard of proof on a balance of probabilities.

iii. That the learned magistrate erred in fact and in law when he found that fraud is a criminal issue and neglected all evidence placed before him, though, in the view of the appellant, they discharged the burden of alleging.

iv. That the learned magistrate erred in fact and in law when he did not draw an adverse inference against the 1st to 3rd defendants who had declined to comply with the demand letter dated 22.04.2016 by the firm of Waiganjo & co. advocates.

v. That the learned magistrate erred in fact and in law when he held that the appellant's claim of trespass on their transport vehicle business by the 1st-3rd respondents is denied by the absence of ownership, yet later on affirming that interference with lawful possession is sufficient to prove trespass.

vi. That the learned magistrate erred in fact and in law to strictly construe and interpret trespass to be only applicable to land ownership whereas there are all manner of trespasses.

vii. That the learned magistrate erred in fact and in law when he failed to consider the evidence tendered by the appellant of lawful possession of the stalls via an operating license issued by the county government.

viii. That the learned magistrate erred in facts and in law when he misconstrued the period of agreement between the appellant and the 1st-3rd respondents. The agreement between the parties spanned 16.02.2010 to 22.04.2016, a period in which the respondents breached the terms of the agreement by withdrawing their vehicles.

ix. That the learned magistrate erred in facts and in law in finding that the appellant did not do equity before seeking equity. In particular, the magistrate did not consider the warning letter sent to the respondents following their interference with the appellant's business in the judgment, in apparent contradiction, the judgment affirms the respondents' breach of the by-laws.

x. That the learned magistrate also erred in facts and in law in denying the declaratory reliefs sought even after finding that the 1st-3rd respondents breached the appellant's by-laws in their refusal to produce any vehicles and open a bank account for purposes of accountability.

3. In the end the appellant urged this court to allow the appeal; reverse and set aside the judgment and decree of the honourable G.N. Wakahiu delivered on 28.07.2021; and the appellant be awarded costs of this appeal.

Directions of the court

4. On 16/11/2022 this court ordered HCCA No. E011 of 2021(this file) and HCCA no. E007 of 2022 be consolidated. This is the pilot file.

5. The appeal be canvassed by way of written submissions.

Appellant's Submissions

6. The Appellant submitted that there was a minuted agreement between the appellant's officials and the 1st to 3rd respondents on 16.02. 2010. That in the minutes of the agreement there were irreducible minimums to the agreement that both sides were to observe.

7. The appellant submitted that it is trite law that a party in a contract (1st, 2nd, and 3rd respondents) cannot take advantage of their own wrong to seek a benefit against the appellant. The appellant relied on the case of Alghussein Establishment V Eton College (1991) 1ALL ER 267, Cheall V Association of Professional Executive Clerical and Computer Staff (1983) 1ALL ER, C.M.A.W.M. V P.A.W.M. Civil Appeal No. 2 of 2014; [2014] eKLR(CA).

8. The appellant urged this court to draw an adverse inference on the 1st to 3rd respondents as not only did they defy lawful demand from the firm of Waiganjo and company advocates but were also in material breach of the contract/ agreement. The appellant relied on the case of National Bank of Kenya Ltd Versus Pipe Plastic Samkolit (K) Ltd & Another [2011] eKLR, New Zealand Shipping V A M Satterthwaite & Co. Ltd (1971) 1 All ER 267 and In Given Okallo V Housing Finance Company of Kenya [2007] eKLR.

9. The appellant submitted that it is trite law that a party cannot unilaterally alter the terms of the contract. The appellant relied on Civil Suit 606 Of 2003, Gimalu Estates Ltd & 4 Others Vs International Finance Corporation & Another [2006] eKLR, Halsbury's Laws of England, Vol 4, 4th Ed (Supra), Housing Finance Co. Of Kenya Limited Vs Gilbert Kibe Njuguna.

10. The appellant submitted that, by forging the receipt books and the letterhead together with the account name, the 1st to 3rd respondents departed from the agreement and it's requirements of them. The appellant relied on Bullen, Leake & Jacobs on pleadings 13th edition, R V Gambling [1974] 3 All ER 479, the black's law dictionary, (9th edition, 2009) at page 1535.

11. The appellant contends that the 1st to 3rd respondents are well aware the business of the appellants is the matatu business.

12. The appellant submitted that the balance of convenience tilts in favour of the appellant who has proved that it is legalized to do business on behalf of its members. The appellant relied in the case of Jambo Biscuits (k) Ltd v Barclays Bank of Kenya Ltd. Andrew Douglas Gregory and Abdul Zahir Sheikh (2003) 2 EA 434.

13. The appellant submitted that this court should issue a declaration that the 4th respondent reimburses and/or compensates the appellant for all the money lost by the appellant since the inception of account number 0360195059112. The appellant relied on the Central Bank of Kenya guidelines on Proceeds of Crime and Money Laundering (Prevention) (CBK/PG/08; Guidelines 4.1(a), trustees of the catholic diocese of Machakos V Benjamin Mwanzia Muoki [2019] eKLR, Anastasios Thomos V

Occidental Insurance Company Limited [2017] eKLR, The Court Of Appeal In Standard Chartered Bank Limited Vs Intercom Services Ltd & 4 Others [2004] eKLR, The Commissioner Of Taxation Vs English Scottish And Australian Bank Ltd [1920] AC 683 at page 689, Marfani & Co. Ltd Vs Mindland Bank Ltd [1968] 2 All ER 573, Ellinger's Modern Banking Law, 4th edition, at page 639, Printwell Industries Limited Vs Barclays Bank Of Kenya Limited (2013) eKLR, A&A Jewelers Limited Vs Royal Bank Of Canada (2001) CAN LII 24012(ON CA), Kenya Grange Vehicle Industries Ltd Vs Southern Credit Banking Corporation Ltd [2014] eKLR.

The 1st, 2nd and 3rd Respondent's Submissions,

14. The 1st, 2nd, and 3rd respondents submitted that the trial court rightly found that the agreement was valid between the parties and capable of being enforced. The 1st, 2nd, and 3rd respondents relied on the cases of Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR.

15. The 1st, 2nd, and 3rd respondents submitted that the magistrate did not set the standard of proof any higher as if it was a criminal matter but on a balance of probability which the appellant failed to demonstrate. The 1st, 2nd, and 3rd respondents relied on sections 107(1), 109, and 112 of the *evidence act*, the case of Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another [2004] eKLR.

16. The 1st, 2nd, and 3rd respondents submitted that the learned magistrate categorically stated in his judgment that interference must be with the property over which the plaintiff has lawful exclusive possession and not just ownership. The appellant had not demonstrated interest as articulated under Article 24 of the *Land Registration Act* No. 3 of 2012.

17. The 1st, 2nd, and 3rd respondents contend that the collecting of money from vehicles leaving for Nakuru was expressly sanctioned by minute 8 of the said agreement dated 16.02.2010. The 1st, 2nd, and 3rd respondents discharged their obligation in the matatu business arrangement.

18. The 1st, 2nd, and 3rd respondents submitted that the appellant never produced any agreement that revokes the partnership agreement executed by the parties on 16.02.2010.

19. The 1st, 2nd, and 3rd respondents submitted that the trial magistrate explained in his judgment that the appellant canceled the membership of the respondents without giving them an opportunity to be heard which is against the principle of natural justice. Therefore, the magistrate rightly held that the appellants must have done equity before seeking equity. The 1st, 2nd, and 3rd respondents argued that the court couldn't issue an equitable remedy to the appellant who had not proved their case on a balance of probability. The 1st, 2nd, and 3rd respondents relied on the case of Kenya Power and Lighting Co. Limited Vs Sheriff Molana Habib (2018) eKLR.

20. The 1st, 2nd, and 3rd respondents submitted that the learned magistrate was right in making the finding that the appellants do not deserve the reliefs sought as they did not prove their case on a balance of probabilities. That the allegations by the appellant are criminal offences that ought to be pursued in the right forum. Further, the 1st, 2nd, and 3rd respondents argued that the special, general, and exemplary damages remedies were not proved to the required standard. The 1st, 2nd, and 3rd respondents relied on the case of Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another(supra), Godfrey Julius Ndumba Mbogori & Another V Nairobi City County [2018] eKLR, Order 2 Rule 10, Ouma v Nairobi City Council [1976] KLR 304, Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited V Janevams Limited [2015] eKLR, Constitution of Kenya, civil procedure rules 2010, Co-Operative Societies, *Evidence Act*.

21. The 1st, 2nd, and 3rd respondents submitted that the learned magistrate was right to dismiss the appellant's suit with cost. The 1st, 2nd, and 3rd respondents relied on the provisions of section 27 of the *Civil Procedure Act*.

The 4th respondent's submissions.

22. The 4th respondent submitted that the appellant made unfounded assertions and adduced no evidence against the 4th respondent. The 4th respondent produced evidence to respond to claims against them by the appellant. The 4th respondent relied on the cases of Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR, section 45(1) (a) of *Proceeds of Crime and Anti-money Laundering Act*, 2013, (PROCAMLA), Sections 107(1) and 108 of the *Evidence Act*

23. The 4th respondent prayed that the appeal be dismissed in its entirety costs being borne by the appellant.

Analysis and Determination

Duty of court

24. Under Section 78(2) of the *Civil Procedure Act*, the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

25. The first Appellate Court should, therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.

Issues

26. The appellant, the 1st, 2nd, and 3rd respondents, and the 4th respondent filed their respective written submissions, which this court has considered. The broad issues for determination relate to;

    i. The kind of relationship between the 1st, 2nd and 3rd respondents, on the one hand, and the appellant, on the other.

    ii. The nature of actions by the 1st, 2nd and 3rd respondents in the running of the business of the appellant- whether they were fraudulent and ultra vires their powers as officials of the appellant. Breach of contract will also feature prominently and be determined accordingly.

    iii. Whether the 4th respondent is liable.

    iv. The kind of reliefs to be granted?

i) The relationship among the 1st, 2nd and 3rd respondents and the appellant

27. The appellant argued that, the 1st, 2nd and 3rd respondents were- officials as well as members of the appellant by virtue of the agreement dated 16.02.2010. According to the appellant, the vehicles of the 1st, 2nd and 3rd respondents were to operate under the appellant-this made them members of the appellant. However, towards the end of the year 2010, the respondents withdrew their vehicles with which they had sealed the agreement. Therefore, by pulling out their vehicles from the appellant's business, they automatically ceased to be members of the appellant.

28. According to PW1, the chairman of the appellant, they agreed that the 1st, 2nd and 3rd respondents will manage the appellant's stage at Narok and open an account in the name of the appellant. He stated that

according to the by-laws of the appellant, a person will cease to be a member if he stays for six months without a vehicle operating under the appellant. The respondents sold their vehicles and the appellant instructed their advocate to demand of the respondents to cease operations as officials of the appellant. The respondent ceased operations until 2018 when they came and illegally took over the office of the appellant at Narok stage, opened an account in their names, chased away the workers of the appellant, installed their own workers in the office of the appellant, and pretended to operate under the name of the appellant but which was corrupted as Mau Narok Nissan Sacco (Narok). The appellant was operating as Mau Narok Nissan Sacco. He stated that the three respondents were collecting stage fee of Kshs. 300 per vehicle per day which money was due to and was to be collected by the appellant. He therefore, asks the court to order reimbursement of the money collected from 2018 to date.

29. According to PW2, the respondents were operating the business of the appellant illegally using the corrupted name and receipts.

30. The 1st, 2nd and 3rd respondents were of a different view; that they are not members of the appellant but partners in business. They urged that the appellant invited them to expand the Sacco to Narok and were therefore their business partners in the Narok office.

Essence and purport of the agreement dated 16.2.2010

31. At the center of the controversy between the parties is the agreement dated 16.2.2010. Each party has assigned its own interpretation or construction. The tension raises three relevant but inextricable issues. One; what the said agreement entails. Two; the nature of the agreement. And, three; the relations created by the agreement among the 1st, 2nd and 3rd respondents and the appellant.

32. The said agreement entails the following: -

33. Minute 1- states that persons present from Narok are the officials in Narok under and for the appellant society.

34. Minute 2- gives these officials mandate of the society to determine fitness of the workers.

35. Minute 3-stickers- all vehicles under the appellant to have a sticker of the appellant.

36. Minute 4-stage commitment-Narok officials to ensure the stage runs smoothly and officially

37. Minute 5- stage maintenance-receipt books to have letter head of the appellant and be printed by officials from Nakuru.

38. Minute 6-operational area-officials from Narok to look for operational space for the appellant

39. Minute 7-emphasizes on discipline amongst the officials and members of the appellant

40. Minute 8-finance-money collected from the stage be used to cater for office use, salary for workers and stage maintenance. Narok officials to open account and deposit stage money daily. The account to be opened in Equity Bank in the name of the appellant, Narok Branch.

The 1st, 2nd and 3rd respondents as officials

41. A claim has been made that the three respondents were initially officials of the appellant. The appellant is registered as a cooperative society under the Cooperatives *Societies Act*. Under the said Act an officer of the society is described as follows:

> " officer" includes a chairman, vice-chairman, secretary, treasurer, committee member, employee, or any other person empowered under any rules made under this Act, or by-laws of a co-operative society, to give directions in regard to the business of the society;

42. The agreement in question clearly designated the 1st, 2nd, and 3rd respondents as officials of the society in Narok Branch. The agreement also empowered them with defined duties and power to give directions in regard to the business of the society including; looking for operational space or office at the stage, stage management, opening of society account with Equity Bank, collection of stage fee and depositing it in the said society's account, using the stage fee collections to pay salaries to the workers.

43. Accordingly, the court finds that the 1st, 2nd, and 3rd respondents were officials and employees of the appellant and were empowered as such officials to run and give directions in regard to the business of the appellant.

Of partnership

44. The 1st, 2nd and 3rd respondents claimed that the said agreement created a partnership between them, and the appellant.

45. Under Section 3(1) of the Partnership Act: -

> " Partnership is the relation which subsists between persons carrying on business in common with a view of profit.'

46. Even with extreme ingenuity or craft, it is not possible to imply that the said agreement intended to make the 1st, 2nd, and 3rd respondents, partners with the appellant in the business of the appellant society. The agreement does not even evince sharing of profits of the business of the appellant. Therefore, the court finds that the said agreement does not create a partnership among the 1st, 2nd, and 3rd respondents and the appellant.

47. The 1st, 2nd, and 3rd respondents did not tender in court any other formal partnership deed showing that the 1st, 2nd and 3rd respondents and the appellant were carrying out business in common with a view of sharing profits.

Trial court did not appreciate nature of the agreement in question

48. The essence and purport of the agreement dated 16.2.2010 was to open a branch of the appellant at Narok with the 1st, 2nd, and 3rd respondents as its officials. It also assigned the duties and operations of the said branch of the appellant to the 1st, 2nd, and 3rd respondents as its officers. The agreement was not a partnership deed or agreement.

49. The linchpin issue around which all the other issues rotated was the kind of relationship the parties stood with each other. Each side of the divide heavily relied upon the agreement dated 16.2.2010 as the basis to justify the type of relationship they believed they stood with each other. Yet, the trial court completely failed to appreciate the essence and purport of said agreement in determining the legal relationship amongst the parties, their status, rights and obligations, thereby, veering off-course.

Of membership in the society

50. The Cooperatives *Societies Act* defines member as follows: -

> "member" includes a person or a co-operative society joining in the application for the registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws;

51. Every cooperative society is guided by its bylaws as established under the Cooperative *Societies Act*.

52. In the present case, the by-laws of the appellant specify that a member must be within the field of membership consisting of the following bond Mau-Narok-Naivasha-Narok-Bomet-Kisii-Kericho-Kisumu-Eldoret. Must also pay the entrance fee and share capital as prescribed in the by-laws.

53. From the evidence adduced, other than formal requirements above and registration of membership, committing one's vehicle to, and obtaining the appellant's sticker and placing it on the vehicle was one of the ways of membership in the appellant society. The agreement of 16.2.2010 also clearly stated this.

54. According to the appellant, the 1st, 2nd, and 3rd respondents were members of the appellant and had their vehicles operating under the appellant except they later withdrew them, thereby, automatically ceasing to be members of the appellant. The evidence adduced is that, a person ceases to be a member of he stays for over six months without a vehicle operating under the appellant.

55. The 1st, 2nd and 3rd respondents confirmed that they were members of the appellant but stated that they were later arbitrarily striped of their membership by the appellant. According to the 1st, 2nd and 3rd respondents, they mutually agreed with the appellant to sell off the old vehicles and purchase new vehicles as competition was high. But, upon disposal and acquiring new vehicles, the appellant declined to register them as part of their fleet.

56. The 1st, 2nd and 3rd respondents alleged that the cancellation of their membership was unlawfully done since they were not afforded an opportunity to be heard as the law requires.

57. The 1st, 2nd and 3rd respondents argued that they bought new vehicles and paid for the Sacco stickers in compliance with the traffic rules. The appellant started taking the respondents in circles and did not want to issue them with TLB licences but later cleared them. The respondents stated that they have vehicles and are compliant with the conditions set by the appellant but the only issue in contention is the management of the Narok stage.

58. From the material before the court and averments by the parties, the 1st, 2nd and 3rd respondents were members of the appellant at the material time. The court has already found that they were also officials of the appellant and not partners in the business of the appellant at all material times. Claims have been made that the three respondents ceased to become members at some point. But, it also appears that the new vehicles were registered with the appellant much later and after much struggle, and so, the issue of membership is moot.

59. The court notes a copy of the 3rd respondent's application for membership form dated 19th March 2019, a copy of a signed agreement between the appellant and the 3rd respondent signifying the 3rd respondent's membership dated 19th March 2019. Noted also is an undated application letter to allow the 1st respondent to operate Mau Narok Nissan, a letter from the appellant accepting the request of the 1st respondent to join the appellant society with vehicle KCS 935T, and a signed agreement between the appellant and the 1st respondent signifying the 1st respondent's membership.

60. It is not surprising that the 1st, 2nd and 3rd respondents have stated that the only issue in contention is the management of the Narok stage.

Interference with the business of the appellant

61. This claim took several forms discussed below.

62. The appellant through the firm of Waiganjo and company advocates wrote a demand letter dated 22.04.2016 demanding/warning the 1st, 2nd and 3rd respondents to desist from interfering with the business of the appellant. The instructions were given by the appellant-see PW1- on the basis that the 1st, 2nd and 3rd respondents had extinguished their rights as and ceased from being members of the appellant.

63. The appellant alleged that the 1st, 2nd, and 3rd respondents disappeared from 22.04.2016 to 18.03.2018 when they resurfaced and forcefully took over the operations of the appellant notwithstanding the demand letter which the 1st, 2nd and 3rd respondents failed to respond to.

64. See evidence of PW1.

65. This allegation will be determined within the other strands falling below.

Of fraud

66. Fraud has been claimed. On fraud the trial magistrate stated as follows;

> " I have perused the entire file and I have been unable to lay my hands on any opposition filed by the defendants on this issue. From the evidence on record and exhibits produced by the plaintiff, I opine that the plaintiff has failed to meet the necessary legal threshold by failing to avail cogent evidence in proof of its allegations of money laundering. Under section 2 of the POCALMA 2009, " money-laundering" is stated to mean an offence under any of the provisions of section 3,4, and 7 of the act. The present issue is an issue in rem (against property) and all that is supposed to be shown is whether the funds sought to be forfeited are proceeds of the crime. It therefore ought to have been proved through an investigation carried by the police in respect to the defendants' accounts. On this I cite section 92(4) of POCAMLA which provides that, "the validity of an order under subsection (1) is not affected by outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is associated'. In my reading of the above provision, I am of the view that legislators intended to ensure that in a money laundering offence both the actus reus and mens rea of the principal offences were strictly proven by the prosecution. The plaintiff having failed to demonstrate that the defendants committed an offence under section 2 of POCAMLA or that the funds in the subject bank accounts are proceeds of the crime, it does not deserve to be granted a declaratory relief"

67. The appellant accused the trial court of error in principle in holding that the appellant needed to prove the offence of money-laundering in order to get a declaratory relief from court. It suffices to state that; a civil cause of action may be founded on criminal conduct, and such civil relief does not depend on a criminal conviction. The distinction between conviction-based and non-conviction-based recovery or confiscation is important knowledge here. The former is done within a criminal trial and is dependent upon conviction of the defendant, and the latter is in an independent civil suit or process which is not dependent upon conviction of the defendant. The burden of proof of such civil claim lies with the

person alleging. And, the standard of proof is intermediate standard of proof- above the balance of probabilities but not as high as beyond reasonable doubt. Therefore, the trial court erred in making a criminal conviction for money-laundering a condition precedent to relief of civil nature founded on a criminal conduct.

ii) Actions by the 1st, 2nd, 3rd respondents ultra vires.

a) Of tenancy in stalls nos. 94 and 96.

68. The 1st, 2nd, and 3rd respondents contend that in compliance with minute 6 of the agreement, they looked for an operation area that was allocated to them by the defunct Narok town council at the main stage. The parties operated smoothly until March 2018 when the appellant wanted to short-change the respondents by taking over the Narok office.

69. The 1st, 2nd, and 3rd respondents contend that the Narok county government from the minutes held with the transport stakeholders held that the Narok office is to be managed by the officials and the Nakuru office. Further, the Narok officials are the ones who were allocated the stage space and the Narok office to be managed by the Narok officials and the Nakuru office to be managed by the Nakuru office.

70. DW-1 Mr. Olooru Ntete stated that the respondents held legal and binding lease agreements with the allottees of stall number 96 being David Mpatiany who is the allottee and Oloishuro Nchoe who is the allottee of stall number 94.

71. The 1st, 2nd, and 3rd respondents produced a lease agreement between the said respondents and the bona fide allottees Mr. David Mpatiany executed on 22.02.2010 for stall no. 94 and Mr. Oloishuro Ole Nchoe were executed on 05.02.2018 for stall no. 96 respectively.

72. According to minute 6 of the agreement, the 1st, 2nd and 3rd respondents who, according to minute 1 thereof, are officials of the appellant in Narok branch, were tasked to look for an operational area for the appellant. The court therefore, finds that the 1st, 2nd and 3rd respondents looked for the stalls-operational area or space- as officials of the appellant on behalf of the appellant. As such officials, it was a breach of the duty and terms of engagement for the 1st, 2nd and 3rd respondents to have obtained leases of the operational spaces of the appellant in their personal names. The three now seems to stake their wrongdoing and breach of duty to derive a benefit. The law will not permit them to benefit from their breach and wrongdoing either as a cause of action against the appellant, or as a defence to a legal claim by the appellant.

b) Of trespass

73. The appellant stated that the 1st, 2nd, and 3rd respondents having ceased to be members of the appellant and thus having waived their right as bona fide officials of the appellant at Narok office decided to trespass on the appellant's vehicles.

74. The 1st, 2nd, and 3rd respondents contend that the appellant was required to prove exclusive possession of the property and not just ownership. The appellant did not demonstrate interest as articulated under section 24 of the *Land Registration Act*.

75. The 1st, 2nd, and 3rd respondents argued that vide the agreement the respondents had authorized entry, and therefore the said entry cannot be said to be trespass. Further, there has never been any agreement amending or revoking the agreement dated 16.02.2010.

76. According to minute 6 of the agreement, the 1st, 2nd, and 3rd respondents who are officials of the appellant from Narok were to look for an operational area. The court has found that the 1st, 2nd, and 3rd respondents were officials of the appellant and their initial entry into the operational space or offices of the appellant, Narok branch was lawful. However, the question is; whether, their re-entry into and taking over of the appellant's offices/operational space or area in 2018 after leaving office at the end of 2010 was still authorized entry?

77. The re-entry into the appellant's operational space and taking over of the business of the appellant when the respondents were not officials of the appellant is unlawful and unjustified in law, and a sort of trespass. This question has been determined under interference with the business of the appellant; the three respondents cannot lawfully carry out the business of the appellant in Narok Branch. The appellant made it clear they had no authority to run the business of the appellant. Any continued operation of the business of the appellant by the three- the 1st, 2nd, and 3rd respondents-without express authority from the appellant in accordance with its by-laws and the relevant national legislation on cooperatives societies, is unlawful and a trespass upon the by-laws and national laws governing cooperatives societies.

78. At this juncture, it is appropriate to state that, although trespass is most commonly associated with land, there other types of trespass.

79. Property does not refer to only real or landed property. Property includes incorporeal, chattels, intellectual property and such like. Accordingly, there is trespass to chattels or goods or personal property.

80. Trespass may also mean unlawful act causing injury to the person, or rights of another-privacy, dignity, liberty etc., committed with or without force or violence, actual or implied. This category is trespass to person.

81. Trespass also bears literary or archaic meaning, say, offending the law-trespass to law- or offending a person in the sense of sin or moral depravity etc.

82. However, the essential elements and scope of the tort of trespass may vary from jurisdiction to jurisdiction.

83. Accordingly, there is no point in attempting to limit trespass to unlawful entry upon land or building only. Such narrow sense of application and scope of trespass is unfortunate.

c) Of Operating licence

84. The 1st, 2nd and 3rd respondents contend that the issuance of the operating licence by the county government in the name of the appellant was because the 1st, 2nd, and 3rd respondents are bona fide members of the appellant.

85. The 1st, 2nd, and 3rd respondents contend that it is the respondents who are paying for the operating licence through the money collected from the stage. The court has found that they were running the business of the appellant as officials of the appellant and any money collected belongs to the appellant. The licence also belongs to the appellant. This was part of their duty as the Narok officials to ensure that the stage complies with the county government regulations.

86. Therefore, the court finds that it was the obligation of the officials of the appellant to ensure the stage was running smoothly and officially under minute 5 of the agreement. Except, they did so for the appellant and not of their individual gain or accord. Therefore, the licence was issued to the appellant and the business was appellants.

d) Of payment of salaries for workers and stage maintenance

87. The appellant argued that the 1st, 2nd, and 3rd respondents used fake, copied, forged, and falsified receipts under the name and style of Mau Narok Nissan-Narok to collect money from the appellant's passengers who boarded the appellant's vehicle. The 1st, 2nd, and 3rd respondents collected Kshs. 300 in the guise of paying for stage money. The appellant insisted that it has been the sole responsibility of the appellant to pay the stage fee of Kshs. 300.

88. The 1st, 2nd, and 3rd respondents contend that the collection of money from vehicles leaving for Nakuru was expressly sanctioned by minute 8 of the said agreement (P EXH10). The money ought to be used to pay salaries for employees, payment of the office costs and maintaining the stage. Therefore, they discharged their obligation in the matatu business arrangement.

89. According to min 8 of the agreement, the money collected from the stage should be used to cater for appellant's office use, pay salaries for appellant's workers, and stage maintenance. This was to be done for the appellant.

90. According to minute 5 of the agreement, the receipt book should have the letterhead of Mau-Narok Nissan and be printed by the Nakuru officials.

91. From the evidence adduced, the court finds that the 1st, 2nd, and 3rd respondents violated minutes no. 8 and 5 and acted fraudulently in using fake, copied, forged, and falsified receipts in the name and style of Mau Narok Nissan-Narok to collect money from the appellant's passengers who boarded the appellant's vehicle. The three respondents acted stealthily by attempting to corrupt the name of the appellant to justify their illegal and fraudulent operation of the appellant's business. Official business of a registered society or company is not taken-over in the kienyeji manner the three respondents adopted. A proper take-over or acquisition of the business of a registered society or company is regulated by and in accordance with the relevant laws and by-laws.

e) Of the bank account and its operations.

92. The appellant further argued that from the agreement entered into by the 1st, 2nd, and 3rd respondents, all the receipt books were to come from Nakuru (the main office) and to have letterhead of Mau-Narok Nissan Sacco. The 1st, 2nd, and 3rd respondents were to open the account in the name of Mau -Narok Nissan Sacco.

93. The appellant contends that the 1st, 2nd, and 3rd respondents departed from the agreement and what is required of the 1st, 2nd, and 3rd respondents by forging the receipt books and the letterhead together with the account name.

94. The appellant discovered that the 1st, 2nd, and 3rd respondents had secretly opened an account with the 4th respondent in 2018 and were depositing and withdrawing money belonging to the appellant in the account name of Olooru Ntete And Others. The signatories were the 1st, 2nd, and 3rd respondents of account number 036019505112.

95. The appellant contends that the 4th respondent was negligent in its actions of allowing the 1st, 2nd, and 3rd respondents to open account number 036019505112 and that it is the duty of the 4th respondent to satisfactorily establish and verify the customer's true identity. The 4th respondent failed to carry out an official search at the business names registry or companies' registry to verify the authenticity of the certificate of incorporation for Olooru Ntete And Others a business name traded under by the 1st, 2nd, and 3rd respondents.

96. Mr. Stanley Kiberenge, an officer of the 4th respondent testified that the identification documents of the 1st, 2nd, and 3rd respondents were not only verified against the original copies but also through a government-managed digital framework. The same was also supported by the provision of passport-sized photos taken during registration of the 1st, 2nd, and 3rd respondents to properly and adequately identify them.

97. The 4th respondent adduced the personal/joint account opening form used to open an account for the 1st, 2nd, and 3rd respondents in their list of documents dated 24.02.2020. The 4th respondent satisfied the lower court that indeed the 1st, 2nd, and 3rd respondents created a personal account in their joint names and not for any business or company as was alleged by the appellant. Indeed, searches in the company registry before the creation of the account for the 1st, 2nd, and 3rd respondents were not necessary.

98. It is the court's finding that the 1st, 2nd and 3rd respondents opened aforesaid bank accounts knowing very well that the agreement they signed stipulated otherwise. They did so in violation of the very agreement they have relied upon to justify their illegal and fraudulent actions. The 1st, 2nd, and 3rd respondents were not upfront with the 4th respondent regarding the source of the monies and did not disclose that indeed the monies belonged to the appellant. This allegation has not been controverted by the 1st, 2nd and 3rd respondents.

99. The account opening form, indicates that the 1st, 2nd, and 3rd respondents intended to open a personal account jointly held by the three. They never indicated that they wished to open the account on behalf of a business or cooperative society or any other legal entity.

100. Thus, the court finds that the 4th respondent was not negligent in carrying out its operations with the 1st, 2nd and 3rd respondents. But, as part of 'know your customer', and 'customer due diligence' obligations, the bank should inquire for details of a person's occupation, employment or contractual or agency employment as well as source of funds.

iii) What reliefs should be granted?

101. The appellant in its amended plaint dated 20.01.2020 sought the following orders;

a) Permanent injunction restraining the 1st, 2nd, and 3rd respondents from operating, trespassing, collecting fare, receiving money for sending parcels, or collecting money from the passengers within the appellant's vehicles/ business premises/office at Narok county.

b) An order of mandatory injunction compelling the 1st, 2nd, and 3rd respondents, whether by themselves, their agents, servants, and/ or another person whosoever, to forthwith not interfere, threaten to attack, ambush, shoot, burn the plaintiff's vehicles.

c) A declaration that the 1st, 2nd and 3rd respondents are not members of the appellant.

d) A declaration that all the money collected since 1st March till the hearing and determination of the case be deposited in court for onward handing over to the appellant as enumerated at no. 7B.

e) A declaration that the 4th respondent reimburse and or compensate the appellant all the money lost by the plaintiff since the inception of account number 0360xxxxxxx.

f) Special damages

g) General damages

h) Exemplary damages

i) The cost of this suit.

j) Any other relief the honourable court may deem fit to grant and just to grant.

102. The appellant argued that the 1st, 2nd, and 3rd respondents fundamentally breached and repudiated the very contract that they purport to enforce against the appellant. By forgery, falsehood, and impunity, the 1st, 2nd, and 3rd respondents from 1st March 2018 were collecting money meant for the appellant from over sixty (60) vehicles belonging to the appellant at Kshs. 300.00 per vehicle daily which money was being banked with the 4th respondent in account number 0360xxxxxxxx and as a consequence the appellant suffered loss and special damages. The hardship affected the members of the appellant who had obtained loans from the bank guaranteed by the appellant. The appellant therefore urged this court to issue an injunction and removal of the 1st, 2nd, and 3rd respondents from the appellant's business.

103. The appellant urged this court to find that the 4th respondent was negligent and should therefore reimburse/compensate the appellant all the money lost by the appellant since the inception of account number 0360xxxxxxxxx. The appellant tabulated the losses and special damages at Kshs. 12,732,000.

104. The 4th respondent contends that the evidence confirmed their full compliance with the Central Bank of Kenya's set guidelines and regulations in carrying out due diligence.

Special damages

105. Special damages must not only be specifically pleaded but also be strictly proved. However, the particularity of proof depends on the circumstances of the case. (See Capital Fish Limited v Kenya Power and Lighting Company Limited [2016] eKLR).

106. The appellant claims that the 1st, 2nd, and 3rd respondents have been collecting money from over sixty-three vehicles belonging to the appellant at Kshs. 300 per vehicle daily to date which money is fraudulently banked with the 4th respondent. As a result, the appellant claims loss and special damages from the year 2018-2021. The appellant supported the claim by producing a bundle of stage contribution receipts. The evidence was not controverted.

107. The court finds and holds that the special damages pleaded were particularized and proved to the required standard. Judgement is entered in the sum of Kshs. 12,732,000 for the appellant and against the 1st, 2nd and 3rd respondents jointly and severally.

Of general damages

108. In Kenya Tourist Development Corporation v Sundowner Lodge Limited (supra), the appellant had agreed to give the respondent a loan of Kshs, 15,000,000 for the construction of a hotel. However, the appellant unilaterally withdrew that offer. The respondent filed a suit claiming general damages of Kshs. 421,760,000 in the form of opportunity costs and loss of business following a breach of contract. The High Court awarded general damages of Kshs. 30,000,000 for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he has lost by the breach.

109. In Dharamshi v Karsan [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And Securicor Courier (K) Ltd v Benson David Onyango & another [2008] eKLR, the Court of Appeal reiterated

that general damages are not awardable for breach of contract. (See also Provincial Insurance Co. EA Ltd v Mordechai Mwanga Nandwa, (KSM Civil Appeal No 179 of 1995,)

110. On the basis of the law and the circumstances of the case where judgment for the specific loss arising out of the breach has been entered, the appellant is not entitled to general damages for breach of contract.

Of exemplary damages

111. Exemplary damages are also known as punitive damages and are awarded in two instances.

112. First, where the action or conduct complained of is oppressive, arbitrary or unconstitutional.

113. Second, where the defendant has calculated that its conduct will result in a profit for himself and may exceed the compensation payable to the claimant (see D. K. Njagi Marete v Teachers Service Commission NRB CA Civil Appeal No. 316 of 2013 [2020] eKLR, Obonyo and Another v Municipal Council of Kisumu [1971] EA 91 and Godfrey Julius Ndumba Mbogori and Another v Nairobi City County NRB CA Civil Appeal No. 55 of 2012 [2018] eKLR).

114. The court has considered the evidence and record. In light of the award of compensation, there is no basis for further punishment of the 1st, 2nd and 3rd respondents in exemplary or punitive damages.

Conclusions and orders

115. In the upshot the court makes the following specific findings and orders;

i) That the 1st, 2nd, and 3rd respondents were officials of the appellant and conducted the business of the appellant. In that capacity, they; entered into a tenancy agreement in stalls Nos.94 and 96; obtained relevant license from the county government of Narok for the business; collected stage money; paid salaries on behalf of the appellant.

ii) That, in their initial entry, the 1st, 2nd, and 3rd respondents did not trespass in the appellant's suit premises. But, they later trespassed upon the business and business premises for the appellant when they unlawfully took over the business and business premises of the appellant.

iii) That the 1st, 2nd, and 3rd respondents violated minutes no. 8 and 5 by using fake, copied, forged, and falsified receipts under the name and style of MAU NAROK NISSAN-NAROK to collect money from the appellant's passengers who boarded the appellant's vehicle.

iv) A declaration is hereby issued that the appellant is entitled to special damages of kshs.12,732,000/=. And judgment is entered for the appellant for the sum of Kshs, 12,732,000 with interest at court rates from March 2018 till payment in full against the 1st, 2nd and 3rd respondents jointly and severally.

v) That the equity bank account number 0360xxxxxxx is frozen. No activity will take place in the said account. The bank has the authority to transfer any sum in the account in satisfaction of the decree.

vi) A permanent injunction is hereby issued restraining the 1st, 2nd, and 3rd respondents from operating, trespassing, collecting fare, receiving money for sending parcels, or collecting money from the passengers from the appellant's vehicles or business or within the appellant's premises/office at Narok county.

vii) An order of mandatory injunction is hereby issued compelling the 1st, 2nd, and 3rd respondents, whether by themselves, their agents, servants, and/ or another person whosoever, to forthwith stop interfering with, threatening to attack, ambush, shoot, burn the plaintiff's vehicles.

viii) It appears the membership issue of the 1st, 2nd and 3rd respondents in the appellant society has been resolved amongst the parties.

ix) A declaration is hereby issued that all the money collected from 1st March 2018 by the 1st, 2nd and 3rd respondent to current in the running of the business of the appellant belongs to the appellant and shall be paid over to the appellant by the three respondents in accordance with this judgment.

x) The appellant shall have costs of the lower court as well as the appeal as against the 1st, 2nd and 3rd respondents jointly and severally.

xi) A declaration that the 4th respondent reimburse and or compensate the appellant all the money lost by the plaintiff since the inception of account number 0360xxxxxxxx is denied.

xii) Thus, the appeal is dismissed against the 4th respondent. However, in light of the circumstances of this case, the 4th respondent shall bear own costs of the lower court and appeal,

xiii) Claims for general damages and exemplary damages are denied.

xiv) Any prayers which have not been specifically granted in the judgment are deemed to be denied.

xv) The judgment of the trial court is set aside.

116. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAM APPLICATION, THIS 28TH DAY OF NOVEMBER, 2023.

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HON. F. GIKONYO M.

JUDGE

In the presence of:-

1. Mr. Muraguri – C/A

2. Mr. Masikonde for 1st -3rd Respondents

3. Mr. Okumu for Appellants