Muthinja & another v Muthamia & 2 others (Civil Case 16 of 2018) [2022] KEHC 11504 (KLR) (30 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11504 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL CASE 16 OF 2018

EM MURIITHI, J

MAY 30, 2022

BETWEEN

JOSEPHINE MUTHINJA ..... 1ST PLAINTIFF

GODFREY MUTHINJA ..... 2ND PLAINTIFF

AND

LILIAN MUTHAMIA ..... 1ST DEFENDANT

NICHOLAS MWENDA ..... 2ND DEFENDANT

KENYA WOMEN FINANCE BANK LIMITED ..... 3RD DEFENDANT

JUDGMENT

1. By an amended plaint dated 11/5/2017, the plaintiffs sued the defendants seeking the following orders:

   a) "A declaration that the defendants' actions were illegal and inimical to good order in the Society and/or conduct of business relationships.

   b) General and punitive damages for illegal attachment, loss of income and/or mesne profit.

   c) Return of plaintiffs' goods as set out in the plaint.

      i) An order for compensation for the value of the items taken from the plaintiffs being Ksh.6,326,350.

      ii) Loss of income at Ksh.1,308,037 for 12 years totaling to Kshs.15,696,448.

      iii) An order for compensation for the loss of user and wastage of Buildings at Ksh.6,555,000.

   d) Any further and/or better orders and/or declaration as will meet the ends of justice

e) Costs of the suit and interests.

2. The 1st plaintiff averred that sometimes in November 2011, she was extended a financial accommodation to the tune of Ksh.500,000 by the 3rd defendant which inter-alia deals with lending business loans to women in Kenya and that the aforesaid financial accommodation was to be settled by monthly installments of Ksh.50,000. The 1st plaintiff further averred that she paid all the monthly installments when they became due and the current outstanding balance remains at Ksh.180,000. She averred that on 13/7/2012, the 1st and 2nd defendants in company of others broke into the school namely (St. Francis Day And Boarding School) run by the plaintiffs, paralyzed learning and other operations in the said school and took away (a) Water Storage Tanks (b) Livestock(one Green Calf) (c) Computers (d) Gas Cylinder (e) GAS Cooker (f) Sufurias (g) Drums For Water (h) School Bus in addition to many destructions like pouring down meals for students and water stored in the said tanks all valued at Ksh.3,000,000 (Three Million). She particularized all the items taken by the defendants whose grant total was Ksh.6,326,350. She averred that the defendants proceeded to her home, broke in their dwellings and took away all household goods which included (a) 2 TV Sets (b) Beddings (c) Clothing and other household goods not listed all valued in excess of Ksh.3,000,000. She averred that the actions of the 1st and 2nd defendants were malicious and illegal and were allegedly levied on behalf of the 3rd defendant as attachment of recovery of the financial accommodation extended to the 1st plaintiff by the 3rd defendant. She further averred that the actions of the 1st and 2nd defendants purporting to attach the plaintiffs' goods on behalf of the 3rd defendant were illegal for want of justification, procedure capacity and legal mandate. She averred that the 1st and 2nd defendants were officers employed and working for the 3rd defendant and being servants and/or agents for the 3rd defendant, the 3rd defendant was vicariously liable for the torts by the 1st and 2nd defendants. Over the matter aforesaid, the plaintiffs' school and their only source of livelihood was shut down and the plaintiffs suffered great losses and damage.

3. The defendants filed a statement of defence on 8/8/2012 and denied the claim.

Evidence

4. PW1 Josephine Muthinja, the 1st plaintiff herein and a teacher by profession, adopted her witness statement as her evidence-in-chief. She proceeded to testify that, "I have seen the testimony of Joseph Kimanzi Syoki. He has stated 4 items as the ones that were removed from my custody. When the defendants came on 13/7/2012 to my premises, I was not there when they were taking my things neither did I see inventory? I see the defendant's bundle of documents. I see page 19 thereof. It is a sale agreement for motor vehicle Registration No. KAS 046 K. the agreement is dated 20/7/2012. The motor vehicle was a school bus. It was being sold for Ksh.150,000. It was an Isuzu model FRR 33L/. Body was bus/coach (without engine and Gear box). This vehicle was owned by me. It is the vehicle they took on the material day. It was operational on 13/7/2012 and in good condition. On 13/7/2012 when it was attached, it was operational. The previous day it had ferried children to their home and had brought them form school that morning. Before 20/7/2012, the defendant did not ask me to buy it back. I have not seen any valuation for that bus. I see pages 5 to 12 of the defendants bundle Dexh. 1. At page 9. The value of the motor vehicle was Ksh.1,610,000 as at 1/3/2012. This is what they sold at 150,000 4 months later. After this attachment, the school closed as the transport systems got paralyzed."

5. On cross examination, she stated that, "my school was called Kieni Karaja primary. Currently I am not teaching. I retired in 2018 June from a government school. In 2012, I was working for the government. I could not be managing the school. I was managing it partly with my husband. It is allowed by TSC.

On the date of attachment, I was not present. I brought the claim myself in 2012 alone. The 2nd plaintiff came in after 5 years through an amendment in 2017. The suit is based on agreement I had with the 3rd defendants. The 2nd plaintiff executed a chattels mortgage with the 3rd defendants. I see page 5 Dexh 1 it is a chattels mortgage. I see paragraph 10 at page 8. It says that all disputes be referred to arbitration. This dispute was not referred to arbitration in terms of that clause. In these two documents loan agreement and the chattels mortgage no mention of school is made. When I filed the suit in 2012, I assessed the value of the items at Ksh.3 Million. In 2017 I valued them at Ksh.6 Million. The change was because after taking the school bus a parents refused to bring children as I did not have any transport system. In 2012, I just approximated the value. I am not an accountant. I looked for one to do it for me. I got the bus at 5 million. I have no valuation to show that the items were valued at Kshs 6 million in 2017. I see paragraph 9 of the further amended plaint (c). I state that the monthly installments were honored. My son paid money through Mpesa. I have monthly arrears of Ksh.12,000. According to me, I did not have arrears. I see my witness statement paragraph 3. I have stated that as at 30/6/2012. I have arrears of Kshs 12,000. I see paragraph 12 page 3 sets out what the action the 3rd defendant is to take in case default. They could sell the chattel. I see the amended plaint paragraph 6. The outstanding amount was Kshs 180,000. There was no requirement for a valuation in the agreement. According to me, you have to tell me the arrears. I have and informed me when you are to come to take my things. I do have evidence that I was involved in the running of the school. I am the wife of the managers of the school. We built the school together. I was the matron and I was controlling everything in the kitchen. There are documents in my bundle but have authored none. I had rented the land but I put up the premises. We both leased the land. I see page 39 of Pexh 1. It is a lease agreement dated 22/2/2007 between Teresia Mbaa and the 2nd plaintiff. He is my husband. I did not sign it. The structures were to be temporary. I am not in any documents of registration. I have a marriage certificate for my marriage with him. I see page 1 of the Pexh 1. The manager of the school was my husband. The maximum number of students allowed was 370 students. I was still working as a teacher for TSC but a matron of this school. The bus was not registered in the name of the school. I have not availed any inspection sticker to show that this but was ferrying the pupils. I did not have the receipts for advance tax to show that the bus was inspected. It had insurance but I have not put it in the bundle. I have no sale agreement to show that the bus was bought for Ksh.5 Million. In the chattels mortgage, the value of the bus was given as Ksh.1,610,000. Motor vehicle appreciated with time. I had 2 motor vehicles. I do not know if the auditor would include my vehicle to the audit of the school. The 2nd plaintiff has 2 other vehicles. I don't know the percentage of insurance premium. I do not understand the audit report. The accountant knows. It is my husband who knows how many children he informed the ministry we enrolled. There is no document from the ministry showing the enrollment of the school but she knew the ministry had records of the students. I see page 53 of the Pexh 1. These are photographs showing the damages caused by the defendants i.e Bus (subject), poured porridge to carry the containers, chairs and pouring water from the drums. These photographs were taken by Mr. Nyaga. I am not sure when the photos were taken. It was between 7 am and 10 am. The camera was not properly set. It was set for 27/1/2012. I deny that the photos were crafted for this case. I am not the one who took the photographs. I see paragraph 7 of the plaint. I have indicated 3 grade cows each worth Ksh.300,000. I do not have details from the veterinary showing the details of the cows. At page 9 we had pledged 6 cows valued at Ksh.210,00. This is when we bought the cows. The time they took the cows, they had already grown Two television at Ksh.100,000. I have no receipts. At page 9 the TV was a 21 inch sony of Kshs 8,000. By the time they took 2 flats screen. I don't have the serial numbers. I don't have any documents to show that the items in paragraph 7 existed. The school was making profits. The school was making profits. I was not keeping records. The school had a bank statement. I don't know how many employees we had and how much were paying to NSSF and NHIF. I don't know any paye that was paid. The school had a gate. There was a gate keeper. I have not brought the visitors book. You looted all the things from my house.

My house was in the school. No report was made to the police. I went to see my lawyer as I knew who took my things. David was the gate keeper. It is not true that the 3rd defendant called me to tell me that we were in arrears and we told them to come and pick the items. The 2nd plaintiff was in Nairobi. It is not true that the bus had no engine. It was towed. It had ferried the children in the morning. Kimathi my driver had the keys. The installments were payable on the 17th of every month."

6. On re-examination, she stated that, "when the auctioneers came on 13/7/2012, I paid them in cash Ksh.13,500. That was enough to clear the arrears. They should not have proceeded to take anything from me. Over and above Ksh.13,500, my son through Mpesa Godwin Muthinja paid Ksh. 4,000 and Ksh.19,000. That was Ksh.23,000. I see Dexh 1. Page 13 bank statement. I was never served with any bill showing the expense incurred. I have never been served with any towing charges. In paragraph 7 and 8 of my amended plaint it was in excess of Ksh.3 Million. I was never called to the offices of the 3rd defendant and given notice in default."

7. PW2 Boniface Mutisya, a certified public accountant, after adopting his witness statement dated 8/12/2018 as his evidence-in-chief continued on oath to state that, "I was asked to adopt loan statements with KWFT. I did the analysis. I prepared an opinion on the clients. The date of the opinion 7/11/2018. Auditor's financial statements at the list of documents No.5. I was required to establish the loan balance as at 30/6/2012. The statement in KWFT was done on 17/7/2012. I am aware that there was repossession after 30/6/2021. It was on 13/7/2012. As at 30/6/2012, the amount computed was 12,200 as per my analysis. In my experience, extended right of the defendant with 2-3 months of communication between the borrower and the lender. I wish to produce the report dated 8/12/2018. PEXH No.1 at P.50 of the list of documents. I prepared the audited books, signed and stamped them."

8. On cross examination, he stated that, "The borrower of the loan was Josephine, the 1st plaintiff herein. At the time I prepared the report, she ran a school. I got the information when I received the documents. PW1 is a teacher employed by Teachers Service Commission. I did not get his details as to her employment by T.S.C. each person must file tax return. I did not carry the tax returns. I did not know whether she paid tax returns. If one got returns one can't get the income. But section 3 of the *income Tax Act*, one cannot tell what business. My issue was strictly the school business. I don't deal with taxes and Josephine as an individual. Loan account January report at the list of documents. I based the report on loan statements. The loan statement was agreement. The report does not include the loan statements, the loan agreement is not in the list documents. There is also no chattels report. There is no supporting documents. Is there any mention of a school in the loan agreement? There is no reference to any school. The contract does not mention any school. Audit report is referenced to St. Francis Primary and Boarding School. I insured report on 8/12/2018. It refers to years 2010, 2011 and 2012. I am not the one who conducted audit for 2010, 2011 and 2012, I did not see any rating for the year. I do not know whether that school paid any rates for 2010, 2011 and 2012. The report shows the school was doing well in 2010, 2011 and 2012. The incident is almost the same for this period. Whether tax returns printed? If I were engaged to file returns. I could have looked at all income. The claimant was interested in audit of the business income only. The report for a particular year could give an idea as to the amount of tax but there could also be another source of income. Registration documents for the school. I also note attachment. I now see certificate of registration at page 1 and 2. The proprietor is the 2nd plaintiff Geoffrey Muthinja. Geoffrey Muthinja was not the borrower. I did not see any document that Josephine was a proprietor of the school. How many vehicles were at the school? I think they were two or three. I think they were two or three. I do not have the working papers, Audit report does not show all the assets. Report indicate the value of motor vehicles and depreciation as at 31/12/2012 the value was at book 3,304,000. The net book value is an accounting value. I looked at the purchase documents but the source documents are not in the report. Schedule of Administration expenses. It

includes motor vehicle. In 2011, the value of insurance was 38,200. The insurance cover may give value of the property. The rate of insurance ranges from 3.5 to 5% presently in approximately.

Loan Account Summary

Rate of interest is shown as 17%. It is in loan statement. Penalties for late payment is not factored. The loan installment per month 48,750. The loan payment is given to the last date of 17/10/2012.

Schedule of the particular dates paid?

From the loan summary I did not attach the details. We attach a summary. Can you tell how many students paid and at which date? The amount is there it is not indicating whether they were paid on time. We did not show details.

Court cannot verifying her report?

The court needs to refer to the documents and not working papers. If the person was given the same documents. The Audit Report needed have appendix indicating source documents. The present report produced in court is dated on an ungiven date in 2018. It is not signed by Josephine."

9. On re-examination, he stated that, "It was auditing to establish the amount in default as at 30/6/2012. I was supposed to check interest and penalties charged as of 30/6/2012. The report showed as at 30/6/2012 here was an unpaid amount. We looked at loan agreement, bank statements of proprietor and loans, statement and due sum amount, in deposit slips to arrive at the balance. Standard interest not in source document are not supposed to be attached in financial statements. I have not received any request to supply the source documents. I prepared the report. I was not requested as a tax adviser which is a separate engagement. The issue of all her source documents. I saw the documents before I prepared the report."

10. PW3 Benson Nyaga Ndegwa, a teacher by profession, adopted his witness statement as his evidence in chief. He added that, "I am aware of paragraph at P 54 of record. The photographs were taken by me. The date was taken by me on 27/01/2012. The camera had no settings for the date because it was new and it was an urgent case so I just adjusted the camera and started taking photographs."

11. On cross examination, he stated that, "I was a teacher and then retired. I do not have a letter of appointment in school my salary is Kshs. 20,000 per month. My salary was not deducted for P.A.Y.E. there was a 400 deduction for N.S.S.F No deduction of N.H.I F. I have not produced a payslip before this court. I was the deputy head teacher. I have seen certificates for the school registration. I do not recall the details or address of the school. The school belonged to Josephine Muthinja. Josephine was managing the day to day operations of the school. She had an office at the school. I am speaking the truth. Josephine said she was employed by TSC teaching at Embu School. I am aware that Josephine was teaching at Embu School. I used to report to Josephine and her husband. Her husband had office at the school. He told me to go to school at nights. I was the Deputy Head teacher. They was a head teacher, Felix Maku Makunda. On 13/7/2012, the head teacher was present. Logbook at the school? We had a Visitor's book retained by the Head Teacher. I have the procedure for the visitor's book. On the material date, the Head teacher was aware for a few minutes that we returned. The school had a gate but there was alongside a small gate for pedestrians, there was no gateman. If a visitor had a vehicle he need hoot and somebody who opened the gate was also a worker he guarded on the compound. There is a bus which was taken. Was it a shell? The bus was in good working order. It was in operation. The driver is Mr. Kimathi. At the time, the driver had parked and left. The working hours of the driver were up to 7.30 am and later about 4.00 pm. When he had taken the children back. The incident happened between 10.00 am to 1.00 pm. The key for the vehicle was left usually at the head teacher's office. No one gave the key to the person who took the bus. It was towed. No one opened the gate. The gate was

not locked with a padlock. Godfrey Muthinja was present and he is the one who gave the vehicle to the Auctioneer and he was not forced? No. It is not true. There were many, more than 6 and it was chaotic. I tried to talk to them and one whom I talked to said there was nothing to talk about. I did not call the police. This matter had never been reported to the police. I called Josephine. The Manager. I do not know whether she called the police. Did the school have any other vehicle? I worked for 3 years, it had another small minibus. I did not know where it was that time. The van did not come later. I worked from the school upto October,2012. When class 8 exams started I was not at the school. I terminated my services on 31/10/2012. After I left work were 2 workers left at the school. They were Felix and the other was Faith. When the school was opened before I left there were 11 teachers. After 31/10/2012 only the 2 Felix and Faith were left. During the KCPE examination the teachers were not required at the school. During the examination teachers would be at home if they were not required. I got the news of failure of the school while at home. I am not related to Josephine other than as employer and employee."

12. On re-examination, he stated that, "the bus was not a shell. It was a bus. The bus was not handed over by Mr. Muthinja to the Auctioneers. It was towed at the school."

13. DW1 Joseph Kimanzi, the regional manager working for the 3rd defendant, adopted his witness statement dated 22/1/2018 as his evidence in chief. He proceeded to testify that, "the plaintiffs are my customers. I have a customer - bank relationship with the plaintiff. In 2011, the plaintiff sought a loan of 500,000. The loan was to be repaid in 12 equal installments of Ksh.49,000 ending October 2012. The plaintiff entered at an agreement with the defendant. It is Agreement Exh No.1 on the list of documents dated. There was a registration of Chattels Mortgage Exh No. 2 in favour of the defendant. Money was dispatched to the plaintiffs. The plaintiffs and the defendants had a Customer-Bank relationship. There was no relationship between the Bank and the School. The documents in the list of documents are the documents examined between the plaintiff and the defendant.

14. On cross examination, he stated that, "I confirm with the directions of the 1st defendant several items were repossessed. It was the express witness of the Bank as per the loan Agreement. Lilian Muthamia was then the Brank Manager, Maua, Nicholas Mwenda was Sales representative. He is the same person as Nicholas Murithi, a Sales representative. Those were the people who were the payee for the bank. Apart from those two, I cannot confirm whether there were other persons. I can only speak to the bank. It is not true that the two did not record the items taken by the bank. I have not produced a list for the items taken in repossession.

Did you give the plaintiffs an opportunity to recovering his arrears?

The bank gave an opportunity. It is there in the way the payment was done. On the specific day. It was for repossession. There is an implied notice from the Agreement of the loan was supposed to be paid on the 17th of every month. We repossessed on 13th after defeat on the 17th of the previous month.

Did you give opportunity on 13th to pay before repossession?

When we appeared at her plaintiff's place we told them they could pay the money and we would not repossess. It was the representatives of the Bank. They are no witnesses for the defendant.

Did you issue a notice that the plaintiffs, were in arrears so that they may pay before repossession?

We did not write as the agreement did not require it. If money is paid on the date of repossession we do not proceed with repossession. As at 13/7/2012 the arrears were 19,000 as per my record. If we received 19,000 on 13/7/2012 we would not have repossessed the property.

DEx. No 3 statement of account. Witness is referred to P.3

On 17/7/2012 posting of transaction of 14/7/2012 (value date) a sum of Ksh.36,500 is paid. The Bankslip of 36,500 is not availed. I have availed an agreement of sale cow of 13/7/2021 at Doc. No. 4 on list of documents. The money was recovered on 14/7/2012 and posted on 17/7/2012. There was no mobile banking services available. The loan officer received the money at the Regional Öffice at Meru. Posting to the system is done at the Regional office at Meru.

Ksh.36,500?

I do not know that the money was paid on 13/7/2012 to stop repossession.

[Witness is referred to plaintiff's statement]. That 2nd defendant did not post the payment for 13/7/2012 until 17/7/2012.

I stated that the source of the funds was a cow while plaintiff claims to have paid the money to the 2nd defendant.

The source is very important. The money was paid after repossession. It is not Faith who paid the money. I can show that the money came from the sale.

If the money was paid the Bank could recall the loan as the agreement had been already in breach. I refer the Agreement. The agreement forms the basis of the contract. If the customer makes good a default we repossess because these had been breach.

The cow was sold on 13/7/2012 for 50,000 from the sale of cow. It was not credited to loan account on the same day.

Document No. 3 statement of account. 17/7/2012 there is no entry for 50,000. The entry is from 36,500. The bank has mandate to recover costs on repossession. That is the explanation for the difference between 50,000 and 36,500.

Do you less deductions before posting in account, who gave authority to take 13,500 costs? To which account was the money entered?

There were costs. That is not the policy of the bank not to reflect the whole amount. It is not the posting of Bank to take the money before accounting. If there were costs it is prudent to sort out before entry.

Is it proper practice?

In this scenario the source of the fund in important. The entry does not show the source of the funds.

On 17/7/2012, the Bank recovered 36,000 from the account towards repayment of the loan. The instalment for July 2012 was falling due. By the time of posting the amount, the other instalment was falling due. We took the 4 items:-

1. Motor Vehicle,
2. Cow,
3. Tank and
4. Gas Cylinder.

The items were sold in an Auction. There is the agreement of the sale of Tank and gas cylinder. We have not shown how much this were sold for.

Paragraph 3 of witness statement.

It was a Private treaty not Public Auction.

Chattels Mortgage

Value of Motor Vehicle is given 1,610,000. There is no valuation report done. The vehicle was sold on 16/7/2012. Agreement was written on 20/7/2012. We did not conduct a valuation during sale, we did not advertise the sale. There are no photographs of the condition of the motor vehicle at the time of sale. There is no expert report to show that there was no engine or gear box. The agreement states that the items were not there.

Ksh.150,000 from the vehicle is not shown in the 1st plaintiff's bank account. The amount was not posted at once. As per the agreement we cannot show the money at once as the money was paid at different times. The 18/7/2012 shows 50,000 posted on 24/7/2012. The balance of Ksh.100,000/- is shown as 15,700 on 18/7/2012; 26,000 on 18/7/2012; 20,000 on 25/7/2012 and 30,000 on 26/7/2012.

You have availed information to explain variance in deposits in plaintiffs account? 1 think here is an issue to do with time frame as to how we stored the documents.

Loan agreement paragraph 2 loan was to attach fixed interest at 17% p.a. At paragraph 4 it indicates 585,000 total principal and interest. Did you charge of penalties?

From the Bank statements one cannot see any charge of penalties. I confirm that the 4 items were taken for the plaintiffs."

15. On re-examination, he stated that, "the bank instructed to do the attachment on 13/7/2012, its bank offices the Branch Manager at Maua called Nicholas Mwenda of the Branch. The items attached were 4 and they were sold. In the documents only the cow and the car were sold. The plaintiff were given opportunity to redeem. They failed to do the same and we had no option but to attach the property.

> 36,500 was received on 13/7/2012. The money was from the deposit of the cow (livestock). If the plaintiff had paid the amount in default, if the client is paying or servicing the loan properly there is no point of attachment.
>
> Instalment due on 17/7/2012.
>
> After the 36,500 was deposited, there was a balance due and that is why we went ahead and attached the property. Chattels Mortgage was signed on 17/2/2012, it was 4 months before the Auction. Advertising of items sold was not done."

Submissions

16. The parties filed their respective submissions on 20/9/2021 and 22/10/2021. The plaintiffs submitted that the defendants were not entitled to attach the properties listed at paragraph 7, 8 & 9 of the amended plaint, as the 1st plaintiff had paid a total of Ksh.36,500, on 13/7/2012, which was enough to settle the arrears which stood at Ksh.12,000. They submitted that no notice before attachment was produced to show what money was in arrears from the plaintiffs. They submitted that the rules of justice demanded that before the plaintiffs lost their properties, a notice ought to have been given showing the money in arrears and giving the plaintiffs reasonable time to rectify the same. They submitted that the 3rd defendant's actions were not only cruel but they completely obliterated the plaintiff's right of redemption. They submitted that since the defendants were not entitled to attach the plaintiffs' properties, then their actions of taking and selling them amounted to an act of conversion, and supported their assertion with the Court of Appeal case of *Atogo v Agricultural Finance Corporation* (1911) KLR. They submitted that the defendants were guilty of the tort of conversion and were liable to compensate the plaintiffs for their value as well as pay general damages as was held in *Kenya Women Finance Trust v Judith Achieng Obudho* (2014) eKLR. They urged the court to award general damages for conversion of Ksh.12,000 as they lost properties worth Kshs. 6,326,350.

They submitted that the chattels mortgage was void for want of proper identification and urged the court to nullify it in terms of section 24 of The Chattels Transfer Act. They submitted that since the evidence of PW2 was not controverted or shaken by cross examination, there was no doubt that they suffered loss as a result of closure of their school. They submitted that they specifically pleaded their claim and they proved the same on a balance of probabilities and urged the court to allow the suit with costs. They also relied on *Charlady, Hellen Cherubet & 4 others v Simon Kiptoo Kimoso* (2020) eKLR and Rachael Wambui Nganga & Anor v Rahab Wairimu Kamau(2020) eKLR in support of their submissions.

17. The defendants submitted that the plaintiffs' suit was time barred, as under section 4(2) of the *Limitation of Actions Act*, the limitation period for a tort was 3 years, and the same had lapsed on 13/7/2015 and the plaint was amended on 11/5/2017. The Court observes that the allegation is misleading and unfounded as the original plaint was lodged on 17/7/2012 which was within the limitation period. They urged the court to strike out the special damages of loss of income and loss of user and wastage of buildings because, as the same were not pleaded and particularized in the amended plaint, but they were only set out in the prayers. They cited *Douglas Kalata Ombev v David Ngama* (2013) eKLR and *Cecilia W. Mwangi & Another v Ruth W. Mwangi* (1997) eKLR, on the need to specifically plead and strictly prove the claim of loss of earning. They submitted that the evidence tendered on behalf of the plaintiff was at best hearsay evidence which is not admissible. They urged the court to dismiss prayer c in its entirety on the ground that the evidence adduced to support it was hearsay and inadmissible. They submitted that the plaintiffs' claim lacked merit as the attachment was lawful. They submitted that the defendants' witness was able to demonstrate that the attachment of the pledged chattels was lawful and therefore the suit before the court lacks merit.

Analysis and determination

18. Before delving into the merits of the case, it is convenient to address the issue whether the dispute herein ought to have been referred to arbitration. Clause 10 of the Chattels Mortgage provided that all disputes between the parties would be referred to arbitration. PW1 conceded that the dispute herein was not referred to arbitration when she stated that, "I see paragraph 10 at page 8. It says that all disputes be referred to arbitration. This dispute was not referred to arbitration in terms of that clause."

19. In the cases of *Eslon Plastics Of (K) Limited v National Water Conservation & Pipeline Corporation* [2014] eKLR;*Gatobu M'Ibuutu Karatho v Christopher Muriithi Kubai* [2014] eKLR and *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd and another* (2002) EA 503, it was held that –

> "a court of law cannot rewrite 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. This does not however take away the duty of a party that alleges to prove. The respondent had a duty to prove how the sum due increased from Kshs. 2.226, 750.00 to Kshs. 6,248,724.00."

20. However, there is a procedure for referring matters to arbitration. section 6(1) of the *Arbitration Act* provides:-

> "(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or(b)that there is not in fact any

dispute between the parties with regard to the matters agreed to be referred to arbitration."

The defendants herein only entered appearance and filed a statement of defence. They did not make an application under section 6(1) of the *Arbitration Act* for stay and referral of the matter to arbitration.

21. In the case of *Kenya Pipeline Company Limited v Datalogix Limited and Another* Nairobi HCCC No. 490 of 2004 [2008] 2 EA 193, where Warsame, J (as he then was) held that:

> " It is clear from the reading of section 6(1) that the decision to refer the matter to arbitration is left to the discretion of the court and the court must give effect to the terms of the contract which provide for arbitration and as a matter of course the court has a duty to honour the plea of the parties so as to give effect to the wishes of the parties and their contractual relationship. Arbitration is a modern way of resolving disputes quicker, amicably and in a friendly environment and manner. It is for that reason that the court would always endeavour to encourage parties to resolve their disputes through arbitration. It is against public policy to deprive parties of their choice and hinder their attempt to resolve their disputes through arbitration...Our system of law and dispute resolution should not countenance the existence and continuation of two parallel processes in respect of the determination of an issue arising between the same parties or parties claiming under them over the same subject matter."

22. The defendants herein only entered appearance and filed a statement of defence. They did not make an application for stay and referral of the matter to arbitration as provided under section 6(1) of the *Arbitration Act*, and therefore, the plaintiff's case is properly before this court.

Issues for Determination

23. The broad issues for determination are whether 1st plaintiff had defaulted in her loan repayment to justify the subsequent attachment by the defendants, and whether she is entitled to the reliefs sought.

Burden and Standard of Proof

24. The Plaintiffs are the claimants were under a duty to prove their case to the civikl standard of proof on a balance of probability. The test of balance of probability was considered by the House of Lords *in Re H & R (minors)* [1996] AC 563, [1995] UKHL 16, [1996] 2 WLR 8, [1996] 1 All ER 1, where Lord Nicholls of Birkenhead said:

> " The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

25. Section 107 and 108 of the *Evidence Act* places the burden and incidence of proof on the plaintiffs as the parties who desire that the court gives judgment as to liability dependent on the existence of facts which they assert in the suit and who would fail if no evidence was led on either side.

Validity of the Chattels mortgage

26. The Plaintiffs contended that the Chattels mortgage was void for want of proper identification and thus it ought to be nullified in terms of section 24 of The *Chattels Transfer Act*. That section provided that, "Where stock are comprised in an instrument, they shall be described or referred to therein or in the schedule thereto by some brand or brands, earmark or earmarks, or other mark or marks upon them or shall be so described or referred to by sex, age, name, colour or other mode of description as to be reasonably capable of identification, otherwise the instrument shall be void as against the persons mentioned in sections 13 and 14, so far as regards such or so much of such stock as are not so described or referred to or are not reasonably capable of identification; and the land or premises on which the stock are or are intended to be depastured or kept shall be described or mentioned in the instrument or schedule."

27. The Chattels mortgage was between the 1st plaintiff as the Borrower, the 2nd plaintiff as the Grantor and the 3rd defendant as the Grantee. It was also executed by both the Grantor and the Borrower. Clauses A and B of the Chattels Mortgage provide that, "The Grantor is the absolute owner of all the chattels specified in the Schedule hereto (hereinafter collectively and individually referred to as "the chattels"); The Grantee has agreed at the request of the Grantor to make available to the Grantor and/or Borrower a loan of Kenya Shillings Five Hundred Thousand (Kshs.500,000) and/or to forbear to sue or demand immediate repayment of the loan."

28. It is clear from the said schedule that almost all the items allegedly attached by the 3rd defendants are all listed there. The failure to identify the cows, one of which was attached in recovery is not fatal to the Chattels Mortgage herein as it would only be "void as against the persons mentioned in sections 13 and 14" of the Act.

29. The Plaintiffs are not persons mentioned in section 13 or 14 of the Chattels Transfer Act not being official receiver or trustee in bankruptcy or a bona fide purchaser or mortgagee or other creditor for value, and the provisions of section 24 as read with sections 13 and 14 of the *Chattels transfer Act* are not applicable to a registered Chattels mortgage. The Chattels Mortgage herein was registered and good for the attachment of the goods.

30. Clause 5 of the Chattels mortgage herein provides that, "the Grantor and/or Borrower hereby agree(s) that the Grantee may at any time without notice notwithstanding any settlement of account or other matter whatsoever combine or consolidate all or any of his/her then existing accounts including accounts in the name of the Grantor and/or Borrower or Grantor/Borrower jointly with others (whether current, deposit, loan or of any other nature whatsoever whether subject to notice or not and whether in Kenya Shillings or (so far as permitted by the laws of Kenya and if so maintained by the Grantor and/or Borrower) in any other currency) wheresoever situate and set-off or transfer any sum standing to the credit of any one or more such accounts in and towards satisfaction of any obligations and liabilities of the Grantor and/or Borrower to the Grantee whether such liabilities be present, future, actual, contingent, primary, collateral, several or joint."

Notice before Attachment

31. When DW1 was cross examined on whether the 3rd defendant gave the plaintiffs any notice before the attachment, he stated that, "Did you issue a notice that the plaintiffs, were in arrears so that they may pay before repossession. We did not write as the agreement did not require it."

32. In the event of default, Clause 7 of the Third Schedule of the Chattels Transfer Act gives the grantee express authority to exercise its statutory power of sale, without any further consent by the grantor,

and without giving to the grantor any notice, or waiting any time. It is thus clear that no notice was required before the attachment.

Default

33. The dispute herein arose out of a loan that had been advanced to the 1st plaintiff by the 3rd defendant. The 1st plaintiff was at first quite evasive as to whether she had defaulted in the repayment or not but on cross examination, she admitted that, "I have monthly arrears of Ksh.12,000. According to me, I did not have arrears. I see my witness statement paragraph 3. I have stated that as at 30/6/2012. I have arrears of Kshs 12,000."

34. That evidence was corroborated by PW2, the public certified accountant who testified that, "I was required to establish the loan balance as at 30/6/2012....As at 30/6/2012, the amount computed was 12,200 as per my analysis.

35. When DW1 was cross examined, he stated that, "Did you give the plaintiffs an opportunity to repaying his arrears? The bank gave an opportunity. It is in the way the payment was done. On the specific day. It was for repossession. There is an applicant notice for the Agreement of the loan was supposed to be paid on the 17th of every month. We repossessed on 13th after default on the 17th of the previous month. Did you give opportunity on 13th to pay before repossession? When we appeared at her plaintiff's place we told her they could pay the money and we could not repossess. It was the representatives of the Bank. They are not witnesses for the defendant.....If money is paid on the date of repossession we do not proceed with repossession. As at 13/7/2012 the arrears were 19,000 as per my record. If we received 19,000 on 13/7/2012 we would not have repossessed the property."

Power of attachment and sale

36. The financial transaction between the plaintiffs and the 3rd defendant was governed by the Chattels Mortgage and Loan Agreement which the 3rd defendant strictly enforced. Clause 6 of the Chattels Mortgage provided the action the 3rd defendant would take in the event of default. The Clause provided that, "in the event that default is made by the Borrower and/or Grantor:

    (a) in payment of any of the principal or interest money hereby covenanted to be paid on the day on which they ought to be paid according to the terms hereof;

    (b) or in the observance or performance of any of the covenants, conditions or agreements herein expressed or implied;

    (c) or if the Borrower and/or Grantor becomes bankrupt;

    (d) or if at any time execution or distress is levied against the Chattels or goods of the Grantor and that execution or distress is not stayed or satisfied within ten(10) days; THEN the Grantee either by its officers or by its agents or servants shall without further consent by the Grantor or without giving the Grantor any notice exercise all the rights provided by Clause 7 of the Third schedule of the Chattel Transfer Act which include the rights to enter upon any lands or premises whereon the Chattels may be; (i) and take possession, sell or dispose of them or any part thereof by private sale or public auction or in such manner as Grantee deems expedient; (ii) undertake all deeds and actions in regards to the Stocks and/or Crops as provided in Clause 10 and 11 of the Third Schedule of the Chattels Transfer Act. AND it is hereby declared and agreed that Grantee shall stand possessed of the proceeds of any such sale upon trust, after paying the costs, charges and expenses of and incidental to taking possession of such Chattels, sale thereof and to apply them in reduction of the moneys then owing on the security of this

instrument, including all moneys herein covenanted to be paid, notwithstanding that they may not have become due, and to pay the balance to the Grantor. These powers are applied in addition to all other powers of the Grantee provided under Clause 7 of the Third Schedule of the Chattels Transfer Act Cap 28 of the Laws of Kenya."

37. Clause 7 of the Third Schedule of the *Chattels Transfer Act* provides that:

> " Powers Implied in Instruments
>
> 7. Provided always, and it is hereby declared and agreed, that if default is made by the grantor in payment of any of the principal or interest moneys hereby covenanted to be paid on the day on which they ought to be paid according to the terms hereof, or in the observance or performance of any of the covenants, conditions or agreements herein expressed or implied, and on the grantor's part to be observed and performed, or if the grantor becomes bankrupt, or if at any time execution is levied against the goods of the grantor that execution is not stayed or satisfied within ten days, then and in that case the grantee, either personally or by his agent or servants may immediately thereupon or at any time thereafter, without any further consent by the grantor, and without giving to the grantor any notice, or waiting any time, and notwithstanding any subsequent acceptance of any payment of any money due on this security, enter upon any lands or premises whereon the chattels for the time being subject to this security may be, and take possession thereof, and sell or dispose of them or any part thereof by private sale or public auction, separately or together, in such lots and generally in such manner in every respect as the grantee deems expedient, with power to allow time for payment of purchase-money, or to buy in the chattels or any part thereof at the auction, and to rescind or vary the terms of any contract or sale, and to resell without being answerable for any loss or expense occasioned thereby, and to execute all such assurances and do all such things for giving effect to any such sale as may be necessary or proper; and the receipt of the grantee or his agent shall be a sufficient discharge to any purchaser at the sale for any of the purchase-money; and upon any sale purporting to be made in exercise of the powers herein expressed or implied no purchaser shall be bound to inquire as to the propriety or regularity of any such sale, or be affected by notice express or constructive that any such sale is improper or irregular. And it is hereby declared and agreed that the grantee shall stand possessed of the proceeds of any such sale upon trust, after paying thereout the costs, charges and expenses of and incidental to taking possession, sale, and the preparation and registration of this instrument, to apply them in reduction of the moneys then owing on the security of this instrument, including all moneys herein covenanted to be paid, notwithstanding that they may not then have become due, or that any promissory notes or bills of exchange may then be current for them, and to pay the balance to the grantor."

38. The import of that clause is that the grantee can both personally or by its agents or servants enter upon the grantor's premises and seize the chattels subject of the security; No notice to the grantor and/or Borrower or their consent will be required; Sell or dispose of them or any part thereof by private sale or public auction, separately or together without being answerable for any loss or expense occasioned

thereby. The plaintiffs cannot complain that there was no notice or that the there was no public auction of the attached property.

Special Damages

39. The plaintiffs' claim was in part for an order of compensation for the value of the items taken from them being Ksh.6,326,350; loss of income at Ksh. 1,308,037 for 12 years totaling to Ksh. 15,696,448 and an order for compensation for the loss of user and wastage of Buildings at Ksh.6,555,000. Those are all special damages and the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing.

40. In *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, the Court of Appeal reiterated the fact that, it is a legal requirement that apart from pleading special damages, they must also be strictly proved with as much particularity as circumstances permit.

41. The plaintiffs pleaded that as a result of the defendants' actions, their school and their only source of livelihood was shut down and they suffered great losses and damage. In her evidence, PW1 testified that "After this attachment, the school closed as the transport systems got paralyzed." She admitted in her evidence that, "The motor vehicle was a school bus. It was being sold for Ksh.150,000. It was an Isuzu model FRR 33L. Body was bus/coach (without engine and Gear box)." If the school bus had no engine or gear box, it was thus not operational even before the attachment. In that regard therefore, its attachment could not be the sole cause of the closure of the school.

42. As regards the value of the items taken by the defendants, PW1 on cross examination stated that, When I filed the suit in 2012, I assessed the value of the items at Ksh.3 Million. In 2017 I valued them at Ksh.6 Million. The change was because after taking the school bus, parents refused to bring children as I did not have any transport system. In 2012, I just approximated the value. I am not an accountant. I looked for one to do it for me. I got the bus at 5 million. I have no valuation to show that the items were valued at Kshs.6 million in 2017."

43. The plaintiffs did not produce any documents to prove the pleaded special damages. There were no receipts or experts reports to show that the plaintiffs incurred any costs which they now want the defendants to reimburse them. The plaintiffs did not further take any reasonable steps to mitigate the losses, if any.

44. Apart from listing the alleged loss and damage, the plaintiffs neglected to lead any evidence in support of the alleged loss and damage. As it were, the plaintiffs merely threw figures which they plucked from the sky to the court and asked it to award them. There was no credible documentary evidence in support of the alleged special damages. In *Bonham-Carter v Hyde Park Hotel Ltd* (1984) 64 TLR at 178, Lord Goddard CJ held that:

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

45. Loss of earnings is equally special damages which must be pleaded with particularity and strictly proved. In *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that: "Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and

proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically." The plaintiffs' claim for special damages wholly fails for want of proof.

46. Moreover, it has long been established since the Court of Exchequer decision in *Hadley v. Baxendale* [1854] EWHC J70, (1854) 156 ER 145, 9 ExCh 341, (1854) 23 LJ Ex 179, 18 Jur 358, [1843-60] All ER Rep 461 that the consequential special damages that may recovered for breach of contract are only those losses that the contracting parties should have foreseen at the time of contract, but not any losses that could not have been foreseen on the information available at the time of contract. The plaintiffs' case herein is based on a loss related to alleged closure of a school, which was not in contemplation of the parties at the time of contract in loan agreement and the Chattels Mortgage. In cross-examination, the 1st Plaintiff admitted, significantly, that-

> " In these two documents loan agreement and the chattels mortgage no mention of school is made. When I filed the suit in 2012, I assessed the value of the items at Ksh.3 Million. in 2017 I valued them at Ksh.6 Million. The change was because after taking the school bus a parents refused to bring children as I did not have any transport system. In 2012, I just approximated the value. I am not an accountant. I looked for one to do it for me. I got the bus at 5 million. I have no valuation to show that the items were valued at Kshs 6 million in 2017."

Clearly, the Plaintiffs' damages sought to be recovered by this suit were too remote, apart from being unproven estimation of loss.

Conclusion

47. It was clear that the plaintiffs' evidence by borrower PW1 was largely hearsay, and that the auditor PW2 who testified as to his calculations on loan account as at 30/6/2012 and the retired head teacher PW3 who testified as to the operations of the school before the repossession were procured to suit the Plaintiff's case before the court. The 2nd Plaintiff who was said to have been at the site of repossession on the material day was not called as witness. On the balance of probabilities test (see Re H & R (minors) [1996] AC 563), the Plaintiffs required to establish the claim that the bank had acted outside the provisions of the Chattels Mortgage by cogent evidence. The Court found it, on the evidence, more likely than not that the defendants complied with the terms of the Chattels Mortgage as testified by the 3rd Defendants' Regional manager, DW1. The Court must find that, on a balance of probabilities, the Plaintiffs who had the burden of proof under sections 107 and 108 of the *Evidence Act* have failed to prove their case against the defendants, jointly or severally.

48. The Chattels Mortgage, having been duly registered was a binding contract between the parties. The court finds that the 3rd defendant was justified to recall the loan, attach the plaintiffs' items as listed in the third schedule of the Chattels Mortgage and subsequently sell them in a bid to recover its money. On a balance of probability, the court finds on the evidence that the plaintiff PW1 was in default on the loan agreement for arrears of Ksh.12,000/- as she has admitted and supported by her auditor PW2.

49. In view of the default, the power of attachment and sale under Clause 6 of the Chattels Mortgage Agreement herein and Clause 7 of the Third Schedule of the Chattels Transfer Act crystallized, and the 3rd defendant Bank became entitled to recall the loan, repossess and sell the chattels given as security for the loan. The defendants acted within the provisions of the Chattels Mortgage agreement between the parties and the applicable provisions of Chattels Transfer Act, and the Plaintiffs are, consequently, non-suited.

Orders

50. Having found that the attachment and the subsequent sale of the plaintiffs' properties was lawful, the remedies sought are not available, and cannot issue. Accordingly, for the reasons set out above, the Plaintiffs' suit is dismissed with costs to the defendants.

    Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF MAY, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mwirigi Kaburu & Co. Advocates for the Plaintiffs.

M/S Magee Wa Magee & Co. Advocates for the Defendants.