REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 14 OF 2020

KENYA WOMEN MICROFINANCE LTD.....APPELLANT

VERSUS

MARTHA WANGARI KAMAU.....RESPONDENT

(Appeal against Judgment and Decree dated 12th May 2020 (Hon. M. Kasera, SPM) in CMCC No. 272 of 2016 at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The respondent filed an amended plaint before the Chief Magistrate's Court at Kajiado dated 9th May, 2018, claiming general damages for negligence and special damages of Kshs. 8, 470,000 for loss of business. She also sought a declaratory order that she was the registered owner of motor vehicle registration number KAZ 824 L, and compensation for the said motor vehicle or damages for the value of the vehicle, costs of the suit and interest.

2. The respondent's case was that the appellant had advanced the respondent a loan facility of Kshs. 3,000,000 on 29th January, 2015 which was to be repaid within Sixty (60) months at an interest rate of 11.46 % on a reducing balance. The respondent was to use the loan to expand her curio and transport businesses. She was to service the loan with proceeds from the businesses. She offered her motor vehicles registration Numbers KBL 991 Z and KAZ 824 L as security for the loan mortgage.

3. The appellant later issued instructions for repossession of the vehicles for alleged default in loan repayment. The vehicles were repossessed and sold prompting institution of the suit before the trial court.

4. The appellant filed an amended defence dated 29th May, 2019 denying the respondent's claim that it acted unlawful or negligently. It stated that the vehicles were lawfully repossessed to recover outstanding loan arrears since it had a right under the chattels mortgages created over the motor vehicles. It also raised a counterclaim for outstanding arrears of Kshs. 3, 175, 913. 70.

5. The suit was heard by **Hon. M. Kasera, (SPM),** and in a judgment delivered on 12th May, 2020, the learned magistrate found that the appellant had acted unlawfully in repossessing and selling one of the respondent's vehicle, and had negligently managed the respondent's account. She awarded the respondent general damages of Kshs. 7,000,000 and special damages of Kshs. 8, 470,000 as pleaded in her amended plaint. She also awarded costs and interest at court rates from the date of the judgment. She struck out the appellant's counterclaim for not being accompanied by a verifying affidavit as required by Order 4 rule 2 of the Civil Procedure Rules, (2010).

6. Aggrieved with that judgment, the appellant a lodged a memorandum of appeal dated 20th May, 2020, raising the following grounds, namely:

> ***a) The learned trial magistrate erred in law and in fact in wholly disregarding the evidence adduced and the submissions adduced by the appellant herein.***
>
> ***b) The learned trial magistrate erred in law and in fact in completely disregarding the appellant's counterclaim for Kshs. 3, 175, 913. 70 which was admitted by the respondent.***
>
> ***c) The learned trial magistrate erred in law and in fact in striking out the appellant's counterclaim for Kshs. 3, 175, 913. 70 a draconian step which drove the appellant away from the seat of judgment unjustifiably and in breach of Article 159 of the Constitution which posits that justice must be administered without undue regard to procedural technicalities.***
>
> ***d) The learned trial magistrate erred in law and in fact by not observing that the respondent's plaint dated 18th May, 2018 was accompanied by a defective verifying affidavit which was not executed and neither dated but in a quick differential treatment of the appellant's counterclaim, struck it out for lack of a verifying affidavit therefore arriving at an unfair decision.***

e) The learned magistrate erred in law and in fact in observing that there were conflicting bank statements therefore amounting to material misapprehension of the evidence and arriving at an erroneous quantum of damages.

f) The learned magistrate erred in law and in fact in failing to observe that the plaintiff/ respondent did not prove the special damages and had not particularized the same to the required legal threshold and in particular failed to observe that;

i) The respondent did not prove illegal deduction of Kshs. 37,000/- being auctioneers' fees

ii) The respondent did not prove a whooping Kshs. 3, 780,000/- being loss of business for courier supply

iii) The respondent did not prove through a valuation that motor vehicle KAZ 824L and KBL 991Z was valued at Kshs. 4,100,000/-

iv) Unlawful freezing of shares worth Kshs. 300,000/- was not proved

v) Over calculation of interest in excess of Kshs. 121, 612/- was not proved

vi) The respondent did not prove loss of curio and bus transportation for 18 months' worth Kshs. 16, 200,000/-

g) In awarding sum of Kshs. 8,470,000/- the learned magistrate erred in law and in fact as the same was not proved and neither was it particularized.

h) The learned magistrate erred in law and in fact in taking into account irrelevant factors using wrong principles and misapprehended wholly the evidence adduced therefore reaching in a wholly erroneous and inordinately high award of general damages for Kshs. 7,000,000/-

i) The learned magistrate erred in law and in fact in failing to find that the contract between the parties evidenced by the letter of offer dated 29th January 2015 and perfected by the various chattels mortgages which were admitted by the respondent was one of Financier and Borrower for which the respondent had breached and such could not attract an award of general damages.

j) The learned magistrate erred in law and in fact in failing to apply the provisions of the Chattels Mortgage between the parties inter alia allowing realization of the chattel mortgage upon the incident of default by the respondent.

k) The learned magistrate erred in law and in fact in relying on unauthenticated "expert" opinion of an auditor who was not called to testify in the case and which expert opinion was not corroborated in material particulars.

l) The whole of the judgment was against the law, the weight of the evidence adduced, erroneous and unfair.

7. Parties agreed to dispose of this appeal through written submissions.

Appellant's submissions

8. The appellant filed written submissions dated 3rd September, 2020 and supplementary submissions dated 23rd November, 2020. It submitted that it did not act irregularly or unlawfully when it repossessed and sold motor vehicle Nos. KBL 991 Z and KAZ 824 L. It further submitted that it did not breach its contractual obligations towards the respondent's loan account and faulted the trial court for finding that it wrongly sold the motor vehicles.

9. The appellant maintained that the vehicles were offered as security for the loan and chattels mortgage created over them in its favour, thereby creating a valid contract between it and the respondent which the respondent breached when she defaulted in loan repayment. It was the appellant's case that it was entitled to repossess and sell the vehicles to recover the debt owed to it. It relied on ***Kings Group of Schools Limited & another v Kenya Women Microfinance Bank Limited*** [2018] eKLR**;** ***Nakan Trading Co. Ltd v Coffee Marketing Board*** (1990-1994) EX 448; ***National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another (***NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR and ***Hyundai Motors Kenya Limited v East African Development Bank Ltd*** [2007] eKLR, to support its position.

10. It was the appellant's further submission that under rule 10 of the Auctioneers Rules, the respondent could have applied for valuation of the vehicles if she wished, asserting that it did not owe the respondent a duty of care under the Chattels Transfer Act, it was exercising its statutory power of sale. It did not, in the circumstances, act negligently to entitle the respondent to damages either for negligence or breach a duty of care. It relied on ***Kings Group of Schools Ltd & another* v K*enya Women Microfinance Bank Limited*** (supra).

11. Regarding the amount recovered from sale of the motor vehicles, the appellant submitted that KAZ 824 L had been vandalized and attached photographs in its list of documents before the trial court to show the state of the vehicle and letter from the auctioneer to confirmed that KAZ 824L could not have fetched more than Kshs. 100,000 since it had been vandalized and was a shell. The other vehicle, KBL 991Z was sold at Kshs. 350,000. It argued that the respondent's allegation that the two vehicles were sold at a throw away price had no basis. It maintained that it acted lawfully and in accordance with the chattel mortgages dated 25th March 2015 and 10th October, 2016, as well as the loan agreement dated 29th January, 2015.

12. The appellant faulted the trial court for striking out its counterclaim for not being accompanied by a verifying affidavit, but spared the

respondent's amended plaint dated 9th May 2018 despite the fact that the verifying affidavit filed with that amended plaint was neither signed nor dated which rendered it defective. It relied on ***Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others.*** (Civil Application No. 26 of 2018) [2018] eKLR in support of its argument that there was no verifying affidavit to the amended plaint.

13. In that case, the Supreme Court held that an affidavit must clearly state the place and date where it was made and it must be made before a Magistrate or a Commissioner for oaths. I have perused the trial court's file and noted that the amended plaint dated 9th May 2018 and filed on 25th May 2018 was accompanied by a verifying affidavit by the respondent. The affidavit was date 9th May 2018, was signed and sworn before a commissioner for oaths.

14. The appellant further argued the trial court should not have struck out its counter claim and relied on Article 159 of the Constitution to contend that courts should administer justice without undue regard to procedural technicalities. It cited ***Personal Representative of the Estate of Daudi (Deceased) v Simon Nganga & 2 others*** (Machakos Civil Suit No. 5 of 2015) for the proposition that the court ought to have given it an opportunity to file a verifying affidavit to remedy the anomaly rather that use a technicality to strike out its counterclaim. It maintained that by striking out its counterclaim the court created a loophole to benefit the respondent. It relied on ***Peter Kipyegon Kirui v Agricultural Development Co-operation & 2 others*** [2007] eKLR to support this argument.

15. It was the appellant's argument that the counterclaim and the documents would have proved that the respondent was in arrears. However, expunging those documents from the record meant it was condemned unheard and the trial court failed to take into account the overriding objectives in section 1A of the Civil Procedure Act.

16. The applicant relied on ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others*** [2013] eKLR and ***Kiai Mbaki & 2 others v Gichuhi Macharia & another*** [2005] eKLR to argue that lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical.

17. Regarding the award of general damages, the appellant argued that the award of Kshs. 7,000,000 was unjustified, excessive, and oppressive. It faulted the trial court for considering irrelevant factors; wrong principles and misapprehending the evidence on record. According to the appellant, the trial court failed to consider that although the loan advanced was Kshs. 3,000,000, the securities were sold for Kshs. 450,000, thereby leaving an outstanding balance. The appellant further faulted the trial court for awarding general damages for breach of contract which was not proper in law. It relied on ***Kenya Tourist Development Corporation v Sundowner Lodge Limited*** [2018] eKLR and ***Kemfro Africa Ltd t/a "Meru Express Services (1976)" & Another v Lubia and Another*** **(No. 2)** [1985] eKLR.

18. On the award of special damages of Kshs. 8, 470,000, the appellant argued that they were not proved and the trial court erred in allowing the claim. It relied on ***David Njuguna Ngotho v Family Bank Limited & another*** [2018] eKLR.

19. It also faulted the trial court for failing to find that the respondent did not prove alleged illegal deduction of Kshs. 37,000 as Auctioneers fees; loss of business of Kshs. 3,780,000, value of the motor vehicle of Kshs. 4,100,000 or any other special claim. It relied on ***Kimani v Attorney General*** [1969] EA 502 and ***Mrao Ltd v First American Bank of Kenya Ltd*** [2003] KLR.

20. The appellant went on to argue that it was not enough for the respondent to produce receipts without verification by credible witnesses; that the financial standing of her business was not particularized and proved, and the audit report by MMPATE & Associates dated 23rd April, 2019 should not have been allowed without calling the maker and, therefore, the respondent did not prove special damages. It relied on ***National Social Security Fund Board of Trustees v Sifa International Limited*** [2016] eKLR and ***Ryce Motors Ltd & another v Elias Muroki*** [1996] eKLR.

Respondent's submissions

21. The respondent filed written submissions dated and filed on 8th October, 2020. She submitted that an appellate court should not readily interfere with a trial court's exercise of discretion unless there are grounds to do so. She relied on ***Mbogo & another v Shah*** [1968] EA, 93**.**

22. It was her submission that the appellant did not produce any chattel mortgage agreement and that the one it produced in court listed household items as security in the schedule. She argued that her motor vehicles were illegally attached and sold at throw away prices but the proceeds were not credited into her loan account, thus occasioning her loss.

23. On whether the verifying affidavit accompanying her amended plaint was signed and commissioned, she submitted in the affirmative, that it was duly signed and properly commissioned and was in the trial court's record.

24. Regarding the striking out of the appellant's counterclaim, she argued that the trial court right because it contravened Order 4 rule (2) it did so after hearing the case and submissions by parties. She relied on ***Priska Onyango Ojuang' & another v Henry Ojwang Nyabende*** [2018] eKLR and ***Galerius Investments Limited v County Government of Mombasa & another*** [2020] eKLR.

25. On whether the trial court was right in allowing her claim for special damages the respondent submitted that she pleaded and particularized her special damages claim of Kshs. 8,470,000 in her amended plaint and proved through the documents she attached. She maintained that the appellant acted negligently and mismanaged her loan by failing to keep proper accounts and was, therefore, in breach of contractual terms as evidenced through production of different statements of account.

26. She also submitted that although motor vehicle KAZ 824 L was valued 4,000,000 at the time of taking the loan, (2015) it was sold at Kshs. 100,00, a gross under sale, thus the appellant was in breached its duty of care to her. She also argued that the illegal repossession of her

motor vehicles and blacklisting her with Credit Reference Bureau as a loan defaulter, occasioned her great loss and irreparable damage. She had to close shop and was unable to service the loan.

27. Regarding the award of general damages, she argued that the award of Kshs. 7,000,000 was reasonable, was neither inordinately high nor excessive and was based on the evidence on record, the law and the doctrine of equity. She relied on ***Otieno-Omuga & Ouma Advocates v CFC Stanbic Bank Limited*** [2015] eKLR, where an award of Kshs. 6,000,000 was made. She urged the court to dismiss the appeal with costs.

Determination

28. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see ***Selle v Associated Motor Boat Co Ltd & Others*** [1968] EA 123).

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

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

30. In ***Nkube v Nyamiro*** [1983] KLR 403, the same court stated:

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

31. The respondent testified, adopting her witness statement filed together with her plaint, that she took a loan from the appellant in 2014 which she was to repay in six months. She later got a top up of Kshs. 3,000,000 and the appellant used that amount to offset the earlier loan and gave her the difference. She used the loan to expand transport and curio businesses. She was to repay the loan by monthly instalments of Kshs. 152,000 by depositing money into the account and the appellant would deduct the loan instalment from the account. She gave log books for motor vehicles KAZ 824 L, a bus and KBL 991 Z, a van, as security.

32. However, the appellant unlawfully repossessed the van even though she had not defaulted and had money in her account. The vehicle was however released three months later after the appellant realized that she was not in default. The vehicles were again repossessed and sold on allegations that she was in default. The bus, KAZ 824 L, which was earning Kshs. 180,000 per month and had been valued at Kshs 2,000,000 at the time she took the loan, was sold at Kshs. 100,000. The van KBL 991Z which had been valued at Kshs. 1,100,000 at the time of taking the loan, was sold for Kshs. 350,000.

33. She stated that the bank statements the appellant gave her were different from those it produced it had in court. She denied that motor vehicle KAZ 824 L was in a garage or that the bus was in a bad state when they were repossessed. She also denied owing the appellant Kshs. 3, 175, 913 claimed in its counterclaim. She produced the documents in her list of documents as exhibits as exhibits and prayed for damages.

34. **Junior Bundi Nyangeri**,(DW1) an employee of the appellant, testified, adopting his witness statement dated 6th June, 2019, 2019, that the respondent was their customer at Kitengela Branch. He admitted that the appellant had earlier repossessed the respondent's motor vehicle No KBL 991 Z, but it was released after she settled the then outstanding arrears. However, the loan fell into arrears again. She pleaded with the appellant on several occasions for time to repay. The appellant issued instructions for repossession of the vehicles. The respondent hid the vehicles but were traced and repossessed. This was according to the letter dated 8th April 2016 from Integra actioners.

35. It was his evidence that all the money the respondent deposited into her loan account was properly applied for loan repayment which was clear in their statements of account. He maintained that when the loan fell into arrears, the respondent pleaded with the appellant for time to repay but she did not, forcing the appellant to take action to repossess the motor vehicles. According to him, when motor vehicle KBL 991 Z was first repossessed the loan was in arrears and the vehicle was only released after the arrears were settled.

36. It was his evidence that when the vehicles were finally repossessed they did not attract bidders for six months. One was sold for Kshs. 350,000, while the other was sold for Kshs. 100,000. Both vehicles were sold after the auction had been advertised but did not attract bidders as quickly as was expected. One of the vehicles had been vandalized.

37. He stated that the audit report referred to 2013 when the application for the loan was being appraised and could not support the respondent's case. He maintained that the bank statements were authentic and correct.

38. From the evidence on record and submissions, the issues that arise for determination are, whether the trial court was right in striking out the appellant's counter claim; whether the respondent was entitled to general damages and whether she proved her claim for special damages.

Whether it was proper to strike out the counterclaim.

39. The appellant faulted the trial court for striking its counterclaim for the reason that it was not accompanied by a verifying affidavit. It

submitted that it should have been given an opportunity to file a verifying affidavit to remedy the omission rather than striking out its counter claim. In its view, striking out its counterclaim amounted to condemning it unheard since the counterclaim would have proved that the respondent was still indebted to it. The respondent supported the trial court's action of striking out the appellant's counterclaim arguing that it was done after parties had argued their respective cases before the trial court.

40. I have considered respective parties' arguments on this issue and perused the trial court's judgment. Dealing with this issue, the trial court stated in its judgment that the counterclaim was not accompanied by verifying affidavit and, therefore, contravened Order 4 rule (2) of the civil Procedure Rules and for that reason, struck it out.

41. Order 4 rule 2 provides that the plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained as required by in rule 1(1)(f). Rule 1(1) (f) requires a plaint to contain an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the parties over the same subject matter and that the cause of action relates to the plaintiff named in the plaint. Sub-rule (5) states that the provisions of sub-rule (3) and (4) apply *mutatis mutandis* to counterclaims.

42. Rule 1(1)(f) was introduced to cub the tendency of parties to file multiple suits in different courts without the knowledge of respondents and therefore, Order 4 rule (6) allows the court on its own motion or on the application by a party, to strike a plaint or defence for not complying with sub rules (2),(3),(4) and (5). That is the rule that the trial court invoked in striking out the appellant's counter claim.

43. I have perused the appellant's amended defence and counterclaim date 29th May 2019 and filed before the trial court filed on 11th June 2019. It is true that the counterclaim was not accompanied by a verifying affidavit. The suit proceeded to hearing and parties submitted at the end of the hearing. The court rendered its final judgment and one of its orders was striking out the counterclaim for not complying with the rules. This was a final decision as opposed to an interlocutory order.

44. In faulting the trial court, the appellant argued citing Article 159 of the Constitution that the courts should administer substantive justice and determine case without undue regard to technicalities of procedure. The appellant also relied on sections 1A and 1B of the Civil Procedure Act on the overriding principles otherwise known as the **"Oxygen Principle."**

45. Section 1A provides that the overriding objective of the Act and rules made thereunder is to facilitate just, expeditious, proportionate and affordable resolution of the civil disputes. In doing so, the Court should, in the exercise of its powers under the Act or in interpreting any of its provisions, give effect to the overriding objective. Sub section (3) places a duty on the parties to civil proceedings or their advocates to assist the Court in furthering the overriding objective and to comply with the directions and orders of the Court.

46. On the other hand, section 1B states that for purposes of furthering the overriding objective, the Court should handle all matters presented before with a view to attaining, the just determination of the proceedings; efficient disposal of its business; efficient use of the available judicial and administrative resources and timely disposal of the proceedings, and all other proceedings in the Court, at affordable cost.

47. The trial court heard evidence from parties and rendered its final judgment. The appellant did not seek leave of court to file a verifying affidavit to remedy the anomaly once the issue was raised before the trial court and before it rendered its final decision. The appellant now faults the trial court for striking out its counterclaim and for not allowing it an opportunity to file a verifying affidavit. The appellant's argument, if sustained, would not advance the overriding objective of the same law it seeks to rely on since the law requires courts to act with speed and dispose of business efficiently.

48. In ***Nicholas Kiptoo Arap Korir Salat -Vs- Independent Electoral and Boundaries Commission & Others*** [2013] eKLR, the Court of Appeal stated with regard to the application of the overriding objective principle:

> ***The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder…The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it… the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness…[T]he "O2" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process. (See the case of Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR) 62 of 2010.***

49. I do not think Article 159 would come to the appellant's aid in the circumstances of this case. The Article is not the solution to all procedural faults that parties find themselves in. It should be called into aid in exceptional circumstances and not in all cases of default.

50. In ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** [2013] eKLR, the Court of Appeal observed:

> ***In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.***

51. The counterclaim contained averments that the appellant was to verify through a verifying affidavit as required by the rules but did not. In the circumstances, I am unable to agree with the appellant that the trial court was wrong when it struck out its counterclaim for failing to comply with the rules. I find not fault on the part of the trial court and dismiss the appellant's complaint.

Whether the respondent was entitled to general damages

52. The appellant argued that the trial court was wrong in awarding general damages for breach of contract. According to the appellant, it neither owed the respondent a duty of care nor was such duty, if any, breached. The appellant took issue with the award of Kshs. 7,000,000 which, it argued, was unjustified, excessive and oppressive. According the appellant, the trial court considered irrelevant factors; Misapprehended the evidence on record and applied wrong principles, thus fell into error.

53. The respondent on her part argued that the appellant mismanaged her loan account. She argued that the bank statements dated 18th November 2015 and 20th March 2019 the appellant supplied her on her account were in contrast with the one it produced. This, she contended, proved that the appellant did not properly maintain her account. She also argued that the appellant owed her a duty of care when selling the motor vehicles but breached that duty because it sold the vehicles at low prices and without valuations.

54. On this issue, the trial court held that the appellant's impounded the respondent's vehicles without any cause, resulting into the loss and damage listed in her plaint, and that the vehicles were disposed of without valuation reports. It was the trial court's view, that the appellant breached its obligation to the respondent for failing to keep proper accounts and unlawfully sold her vehicles, thus occasioning loss and damage to her. On that basis, the trial court awarded her general damages of Kshs. 7,000,000.

55. I have considered respective parties' arguments on this issue. Award of damages involves exercise of discretion by the trial court. In that regard, the law is settled that an appellate court will not readily interfere with exercise of that discretion unless it was wrongly; was based on no evidence or the court considered irrelevant facts or failed to consider relevant factors which resulted into an injustice.

56. In ***Mbogo & Another v Shah*** [1968] EA 93, the Court, **(Sir Newbold, P.**) stated at page 96:

> ***A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.***

57. In ***Kenya Tourist Development Corporation v Sundowner Lodge Limited*** (supra), it was emphasized that an appellate court should pay some deference to decisions made in exercise of discretion but should not follow them slavishly. Where there is a basis for upsetting such decisions, the court should do so if the findings in question are based on no evidence, or a misapprehension of the evidence; consideration of irrelevant matters or failure to consider what ought to have been considered. The court will interfere if it is shown demonstrably that the court acted on wrong principles in reaching a particular finding of fact or conclusion of law or if the decision is generally perverse and unsupportable.

58. On whether an appellate court should interfere with an award of damages by a trial court, it was stated in ***Kemfro Africa Ltd t/a "Meru Express Services (1976)" & Another v Lubia and Another*** **(No.2)** [1985] eKLR:

> ***The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.***

59. And in ***Johnson Evan Gicheru v Andrew Morton & Another*** **[2005] eKLR,** the Court of Appeal stated:

> ***It is trite that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.***

60. The trial court awarded general damages for breach of obligation in relation to the respondent's loan account and duty of care when the motor vehicles were sold. The law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.

61. 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 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 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.

62. 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***,)

63. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.

64. Flowing from the above principles of law, the respondent was not entitled to damages for breach of contractual obligations, having raised a specific claim for special damages. The trial court applied wrong principles, and misapprehended the evidence, thus fell into error in awarding general damages to the respondent. This award must be set aside in entirety.

Whether the respondent proved special damages

65. The appellant argued that the trial court was wrong in allowing the respondent's claim for special damages of Kshs. 8,470,000 as was pleaded in her amended plaint. It denied that the respondent suffered the particularized loss and maintained that she did not strictly prove those itemized claims as required by law. The respondent maintained that she proved the claims and the trial court was right in allowing the whole claim as pleaded.

66. The special damages particularized in the respondent's amended plaint were;

-illegal deductions of auctioneers fees Kshs, 37,000

-loss of curior business for 18 months Kshs. 3,780,000

-unlawful repossession and sale of motor vehicles KAZ 824L and KBL 991Z

-disposing the vehicles at Kshs. 100,000, despite being valued at Kshs. 4,100,000

-unlawful freezing of her account with Kshs. 300,000 and shares worth Kshs. 33,000

-Over calculation of interest and payable monthly instalments in excess of Kshs. 121,612

-unjustified listing her with CRB, thus lost an opportunity to get a loan from Faulu Bank

-loss of curior and transport business for 18 months, worth Kshs. 16,200,000.

67. On the last claim of lost curior and transport business, the respondent had claimed that she lost curior business for 18 months, worth Kshs. 3,780,000., thus it was duplication to include it with transport business.

68. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. (See ***Capital Fish Limited v Kenya Power and Lighting Company Limited*** [2016] eKLR).

69. In ***Provincial Insurance Co. EA Ltd v Mordekai Mwanga Nandwa, (supra)***, the court stated:

> ***It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.***

70. I have considered the evidence on record on this issue. The respondent pleaded that she suffered loss due to the appellant's action. She pleaded loss of curio shop and transport businesses, among others losses. However, she did not place before court what she was making before the closure of those businesses. With regard to all the particularized losses, she merely attached documents such as copy of motor vehicle transport lease, copies of bank statements, copy of Sacco membership certificate, copy of curio supply certificate, and copy of declaration for curio import, which did not show how they proved her specific claims.

71. A claim for special damages is in the nature of restitution and, where proved, it is meant to restore the claimant to the position he would have been save for the action complained of. The documents the respondent placed before the trial court did not show what, if anything, the businesses used to earn or bring and, as a result of the appellant's actions, she lost that income which the trial court was to restore her to.

72. The respondent's evidence was in general terms without any specificity on the losses. For instance, she did not explain why the amount in her particulars of special damages was more than what she prayed for in the reliefs. She did not demonstrate through evidence that she was unable to access a loan from Faulu Bank. Similarly, she did not tender documentary evidence to show how much the curior and transport businesses were generating, if any, or that that her shares were frozen.

73. What the respondent did, was to put forward documents without demonstrating to the court what they stood to prove and how. This was a clear case of the respondent throwing documents at the court on the loss she thought she had suffered and expected the court award her damages. This did not discharge the legal burden of proof placed on her to strictly prove her special damages claim. The many documents she placed before court not even referred to in evidence to assist the court on how they proved the particulars of special damages.

74. Addressing the situation similar this where a party merely listed special damages without proof and expected the court to allow them, the Court of Appeal stated in ***Capital Fish Limited v Kenya Power and Lighting Company Limited*** (supra):

> ***The appellant apart from listing the alleged loss and damage, it did not… lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.***

75. In ***David Bagine v Martin Bundi*** [1997] eKLR, the Court of Appeal cited the judgment by ***Lord Goddard CJ.*** in ***Bonham Carter v Hyde Park Hotel Limited*** (1948) 64 TLR 177)**,** where he that:

> ***[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.***

76. In ***Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell),*** **Cooke, J.A.** delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

77. In ***Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another*** (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), **Mahmud Mohammed, JSC.** delivering the judgment of the supreme court of Nigeria stated:

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

78. The principles that run through the decisions referred to above, are clear that special damages must be strictly proved and that courts must not relax this principle.

79. The respondent did not attempt to prove her particularized claims as required by law. She just put forward what she called exhibits but which were not consisted with the figures she pleaded in her amended plaint to enable the court to act on them. She did not attempt to show the court how each document proved her claims.

80. In ***Ryce Motors Limited & Another v Elias Muroki*** (supra), the Court of Appeal addressing the case of putting forward pieces of paper to prove loss where the respondent claimed his matatu earned income, it stated:

> ***These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety.***

81. It is clear from the evidence on record that the respondent largely made claims for special damages that she did not prove as required by law. She had the burden to strictly prove the loss she suffered if she expected to succeed. The trial court was in error for allowing special damages as pleaded. The trial court was required to determine whether the respondent strictly proved each of the particularized claims, allow those proved and dismiss those not proved. It was wrong for it to allow the claims as prayed even where they had not been strictly proved.

82. The respondent did not prove loss of curior and transport business, loss of opportunity to get a loan; freezing of shares and account; or even over calculation of interest. The trial court was, therefore, in error in allowing generalized claims for special damages without strict proof.

repossession and sale of motor vehicles KAZ 824L and KBL 991Z

83. There is, however, one aspect of the special damages claim that requires consideration in this appeal, namely attachment of the vehicles. The respondent admitted that she gave logbooks for the two vehicles to the appellant as security for the loan. As to whether there was default, the evidence was not clear. whereas the respondent argue that she was not in default, the appellant maintained that she was. As already pointed out earlier, both parties relied on bank statements they never took the court through to prove their claims. The respondent took a loan she was required to repay and it was her duty to show that indeed she repaid the loan as was required. It was the appellant's case that the respondent was in default and pleaded with it on several occasions for time to regularize the default which she did not, leading to the repossession of the vehicles.

84. It was on that basis that the appellant repossessed and sold the vehicles that had been given as security. It attached on its list of documents copies of chattel instruments dated and registered on 25th March 2015 and 10th October 2016 respectively, as evidence that the vehicles were indeed given as security for the loan and it had a right to repossess and sell them following the default. The copy of the chattels instrument dated 25th March 2015, both in the record of appeal and the trial court's file, had no schedule or inventory. The instrument dated 10th October 2016 and registered on the same day, had an inventory over house hold goods as security. It is, therefore, not clear what was given as security in the instrument dated and registered on 25th March 2015.

85. Section 4 of the Chattels Transfer Act provides that all persons are deemed to have notice of an instrument and the contents of that instrument once registered. In that regard, a registered instrument serves as a public notice of the registered instrument as to its contents. Section 5 requires that the instrument be registered together with the schedules endorsed thereon, while section 6 limits the period for registration to twenty-one days from the date of execution of the instrument. The High court may, however, extend the period for registration

if good cause is shown.

86. Section 13 provides that every instrument unless registered in the manner provided or the time for registration is extended by the court, becomes fraudulent and void as against among others:

> ***any person seizing the chattels or any part thereof comprised in the instrument, in execution of the process of any court authorizing the seizure of the chattels of the person by whom or concerning whose chattels the instrument was made, and against every person on whose behalf the process was made.***

87. The evidence on record showed that the chattels given in the instrument dated and registered on 10th October 2016, were in respect to household goods. There was no evidence that chattels instruments were created over the motor vehicles and registered as required by the law. In that regard, repossession of the vehicles could not be lawful if the instrument making them security was not registered as required by law. That was the only issue, in my view, on which the respondent could succeed. The only problem, however, is on the value of the motor vehicles.

88. The respondent relied on the value of the vehicles at the time she applied for the loan. The appellant, however, stated at the time of repossession, the vehicles were not moving because one had been vandalized while the other had been abandoned at a garage. It attached a letter from the auctioneers who repossessed the vehicles and the one who sold them, dated 8th April 2016 and 6th February 2017 indicating that indeed one of the vehicles was parked at a garage while the other had been vandalized. Photographs were also attached to show the poor condition of one of the vehicles.

89. The respondent did not seriously challenge the appellant's evidence on the conditions of the vehicles. For instance, she did not show that the vehicles were roadworthy and that they were in use at the time they were repossessed. Did they have valid insurance at the time? That would have been one way of showing that the vehicles were engaged and were bringing income. A mere agreement could not be deemed to be evidence that a vehicle was roadworthy and brought income.

90. That too would apply on the issue of the value of the vehicles. Where the value attributed to the vehicles was that prior to taking the loan, it could not automatically mean the value remained the same, given that the vehicles were meant to have been on the road. Their value and roadworthiness of a vehicle would be dictated by many factors, such as manner of use and accidents. The respondent sought to rely on photographs of the vehicles taken when she was applying for the loan. With due respect, that could not be assumed to be the condition of the vehicles at the time they were repossessed and sold.

91. Since the evidence on record was that the vehicles had been run down and were sold at Kshs. 350,000 and 100,000 respectively, the respondent's claim on this item could only succeed to that extent in the absence of any evidence to the contrary.

92. The respondent argued that Kshs. 37,000 was deducted as auctioneers' fees. There was however no concrete evidence on this. The fact tough remains that auctioneers were involved and must have been paid. Any such payment must have been deducted from the proceeds of sale. However, since the respondent gets back the proceeds of sale of the vhicles, she cannot get a refund of the auctioneers' fees as that would amount to double compensation.

93. In the end, having considered the appeal, submissions and the law, the appeal partially succeeds. The award on general damages is set aside in its entirety. The award for special damages of Kshs. 8,470,000 is also set aside. In place therefor, the respondent is awarded **Kshs. 450,000.**

94. This being a special damage claim the award of **Kshs. 450,000** shall attract interest at court rates from 25th May 2018, when the amended plaint was filed. The respondent shall also have costs before the trial court and in this appeal.

DATED SIGNED AND DELIVERED AT KAJIADO THIS 24TH SEPTEMBER 2021.

E C MWITA

JUDGE