Kimani v Vehicle and Equipment Leasing Ltd & 2 others (Civil Appeal E1147 of 2023) [2025] KEHC 12977 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1147 OF 2023

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

MERCY NJERI KIMANI .... APPELLANT

AND

VEHICLE AND EQUIPMENT LEASING LTD .... 1ST RESPONDENT

SAMWEL KARIUKI IRUNGU .... 2ND RESPONDENT

CITY STAR SHUTTLE LIMITED .... 3RD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.A. Opande, Principal Magistrate dated 5.10.2023 arising from Milimani CMCC No. 9505 of 2019.
2. The Memorandum of Appeal raises the following grounds:
    a. The learned magistrate erred in law and fact in finding that the Appellant had not proved the claim under subrogation.
    b. The learned magistrate erred in law and fact in disregarding the evidence in support of subrogation.
    c. The learned magistrate erred in law and fact in disregarding the evidence of negligence.
    d. The learned magistrate erred in law and fact in disregarding the submissions and authorities of the Appellant.
    e. The learned magistrate erred in dismissing the suit.

3. The Plaint dated 19.12.2019 claimed special damages of Ksh. 112,970/= following an accident that allegedly occurred on 25.12.2016 involving the Appellant's motor vehicle registration No. KBX 510Q and the 1st and 2nd Respondent's motor vehicle registration No. KCG 414Z.

4. It was averred that the Appellant was lawfully driving her said motor vehicle along the Eastern Bypass when the 2nd Respondent drove motor vehicle registration No. KCG 414Z negligently causing it to lose control and ram into the Appellant's motor vehicle and resulting in extensive damage. The Appellant pleaded the following as loss:

   i. Cost of repair Ksh 78,420 /-

   ii. Loss of user Ksh. 30,000/-

   iii. Assessment fees Ksh. 4,000/-

   iv. Copy of records Ksh. 550/-

   Total Ksh. 112,970/-

5. The 1st Respondent entered appearance and filed defence dated 24.2.2024 denying liability. It was its case that the motor vehicle registration No. KCG 414Z was leased to City Star Shuttle Limited on 24.7.2015 and it was not under agency and control of the 1st Respondent at the time of the accident.

6. There were third party proceedings and City Star Shuttle Limited was joined as third party who however denied liability on the defence that the accident motor vehicle had since been repossessed through Leaky Auctioneers. Ownership and insurance of the Appellant's vehicle were not in dispute at all.

7. The following was pleaded as special loss:

   i. Cost of repair Ksh. 78,420/-

   ii. Loss of use Ksh. 30,000/-

   iii. Assessment fees Ksh. 4,000/-

   iv. Copy of records Ksh. 550/-

   Total Ksh. 112,970/-

8. The court dismissed the suit and the Third-Party notice. Aggrieved by the finding of the lower court, the Appellant lodged a Memorandum of Appeal hence this appeal essentially challenging dismissal of the suit.

Evidence

9. PW1 was Vitalis June Masinde who introduced himself as Legal Assistant for ICEA Lion. It was his case that the Appellant was owner of KBX 510Q. That motor vehicle was driven by the Appellant's husband, one Patrick Mwangi Wanjeri at the time of accident. He relied on the claim form to testify that the Appellant as insured had taken a policy. On cross examination, he confirmed that there was no evidence how the motor vehicle was used to claim loss of user.

10. PW2 was one PC Daniel Kiarie of Embakasi Police Station. He produced the police abstract and testified that KCG 414Z was to blame for the accident.

11. PW3 was Patrick Mwangi Wanjeri. He was the spouse of the Appellant. He testified that he filed a report of the accident and was issued with the police abstract.

12. The 1st Respondent also called DW1, Patience Maingi. It was her case that KCG 414Z was leased to the 3rd Respondent who are the ones liable for the accident. On repossession, she testified that Leakey Auctioneers were instructed to repossess but it was not true that they repossessed the motor vehicle.

13. The 3rd Respondent called Meshack Kyengo. He testified that the motor vehicle was repossessed but he was not served with repossession order.

Submissions

14. The Appellant submitted that she proved that the accident was caused by negligence of the Respondents and she proved too the special damages as pleaded. She cited Sections 107, 108 and 109 of the *Evidence Act*.

15. On whether she was entitled to compensation under subrogation, she relied on Leli Chaka Ndoro vs Maree Ahmed & SM Lardhib (2017) eKLR to submit that the assured was entitled to be placed in the position of the assured after indemnity.

16. The 1st Respondent also submitted that it proved that the accident motor vehicle had been leased to the 3rd Respondent and was not in control of the motor vehicle and not agent of the 1st Respondent at the time of the accident. That as such, the 1st Respondent could not be held vicariously liable.

17. It was also submitted that subrogation was not applicable as there was no contract of insurance produced. The 1st Respondent cited a number of authorities which I have considered.

18. In its submissions, the 3rd Respondent's argument was that the 1st Respondent failed to prove a case against the 3rd Respondent under third party proceedings.

Analysis

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

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

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

21. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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 allowance in this respect..."

22. This appeal is on the award of damages for repair costs and loss of user. The issue is whether the learned magistrate erred in his assessment of the damages pleaded and proved by the Appellant.

23. The Appellant submitted that the lower court misapprehended evidence and ended up to dismissing her case erroneously. Fact finding is primarily the duty of the lower court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

24. The 1st Respondent joined a Third Party. Upon dismissal of the Third Party case there was no Appeal. Consequently, it is a moot issue. In any case, there was evidence of instructions to repossess, which were in the hands of the 3rd respondent. They could only be so, if the 1st Respondent had repossessed the said motor vehicle registration No. KCG 414Z. Nothing could have been easier than to call Leakey's Auctioneers to testify whether or not they had repossessed. It is only the instructing client who could do so. In this case the 1st Respondent.

25. The Appellant proved on the balance of probabilities that KCG 414Z wholly caused the accident. As was held in the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112 of the Act. In this case the appellants' case was that they were never notified of the meeting at which the resolution was passed. The respondents while insisting that there was in fact such a notice were unable to produce the same. In effect the appellants were alleging a negative. Since it was the respondents who were alleging a positive, pursuant to section 109 of the *Evidence Act*, it was upon them to prove that there was in fact such a notice. As was held by Seaton, JSC in the Uganda case of JK Patel vs Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:
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> "The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises. In general the rule which applies is ei qui affirmat not ei qui negat incumbit probatio. It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons... As applied to judicial proceedings the phrase "burden of proof" has two distinct and frequently confused meanings, (1) the burden of proof as a matter of law and pleading – the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond reasonable doubt; and (2) the burden of proof in the sense of adducing evidence..... The onus probandi rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced." See Constantine Steamship Line Ltd vs Imperial Smelting Corp [1914] 2 ALL 165 (H.L); Trevor Price vs Kelsall [1975] EA 752 at 761; Phippson on Evidence 12th Ed Para 91; Phippson at para 95."

26. The issue of liability for the accident as relates to fault appears settled. There is no contest that the Appellant's motor vehicle was negligently knocked but the dispute is as to who should bear responsibility. Having found so, I proceed to also find that it is the 1st and 2nd Respondents who were fully to blame. The respondents did not displace the Appellant's evidence. The appeal on liability is consequently allowed.

27. On the question of damages, the Appellant was under duty to prove the damage pleaded in respect of her motor vehicle. 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), that:

> ... 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.

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.

28. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough simply to aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial. In the case of Coast Bus Services Limited v Sisco E. Murunga Denyi & 2 Others C.A. No. 192 of 1992, the Court of Appeal stated as follows:

> " We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection it is not enough simply to aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit the special damages is not known with certainty then those particulars can only be supplied at the time of trial amending the plaint to include the particulars which were previously missing. It is only when the particulars of Special Damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars."

29. In this case, the receipts, invoices and payment vouchers were produced. On this court's reevaluation, it is settled that in a material claim, the claimant ought not prove by way of receipts all the expenses incurred. It is enough for the claimant to produce evidence that the item damages would require a given amount of money to be restored, as near as possible, to its prior form. The Court of Appeal faced with similar circumstances stated as follows in Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya [2010] eKLR:

> ...In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars

of damage and the value of the repairs were given with some degree of certainty. In Ratcliffe v. Evans [1892]2QB 524 Bowen L.J. said:

> "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pendantry."
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> ...Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counter checked and either accepted or disproved. The appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged and we think Onyancha J. was right in describing him as an expert, and his report as being opinion evidence. The court had the right to accept or reject his opinion if the circumstances so dictated. The respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to.

30. The Appellant proved repair costs of Ksh. 78,420/=, assessment fees of Ksh. 4,000/= and copy of records at Ksh. 550/= making a total of Ksh. 82,970/=. The Appellant called PW1 as legal officer from ICEA Lion who testified that the Appellant was the insured. The claim form produced in court showed that the vehicle was insured. The damage assessment originates from ICEA Lion and there is no contrary evidence that ICEA Lion was the insurer and entitled to bring the suit in the lower court case. In the case of Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:

> " The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured."

31. It is thus the finding of this court that the lower court erred in finding that only a logbook and policy document would establish that the Appellant was the owner of motor vehicle registration number KBX 510Q and that she had insured the said motor vehicle with ICEA Lion. These were not in issue. As the Appellant had demonstrated by evidence that ICEA Lion had recognized her as the insured, it was upon any party in doubt of this fact to prove otherwise. I say so because the presumption was that the insurance company would not insure persons who had no insurable interest in the motor vehicle and the evidence that the Appellant was the claimant was sufficient to justify that the Appellant could not have been insured if she was not the owner of the motor vehicle. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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>> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

> Where a party has custody or is in control of evidence that that party fails or refuses to tender or produce, the court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

32. The Respondents did not tender any contrary evidence that the Appellant was not the insured of the motor vehicle. What is the effect of failure by the Respondents to tender evidence in rebuttal? In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR Justice C. Kariuki, J, stated as doth: -

> " But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited vs County Government of Machakos [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.
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> 39. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

33. Therefore, the material in the claim form and payment vouchers originating from ICEA Lion were sufficient to establish a cause of action based on subrogation. The burden was a preponderance of probabilities and the Appellant achieved to tilt the scale above 50% that she had insured motor vehicle registration number KBX 510Q with ICEA Lion and she was the owner thereof. The fact that the transaction was performed on the part of the Appellant and ICEA Lion would, ipso facto, make it unrealistic to argue that there was no intention to enter into legal relations. I quote the very relevant words of Steyn LJ in G. Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyds Rep 25 where he said:

> " ...It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See Brogden –v- Metropolitan Railway [1877] 2 AC 666; New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd. [1974] 1 Lloyd's Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; Gibson v. Manchester City Council [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See British Bank for Foreign Trade Ltd. v. Novinex [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It

will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See Trollope & Colls Ltd. v. Atomic Power Constructions Ltd. [1963] 1 WLR 333."

34. What was important and the lower court ignored, was whether there was a binding contract between ICEA Lion and the Appellant which depended on what they had agreed. It depended not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that led objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law required as essential for the formation of legally binding relations. These was clearly contained in the claim form and payment vouchers. The Supreme Court of the United Kingdom later stated as follows in the case of RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45]:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

35. On the loss of user, the same is a special damage that must be specifically pleaded and strictly proved. The rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

36. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the trial court failed to award special damages that were pleaded and proved. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> "In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically

> pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities… Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court.

37. Regarding proof of loss, while it is true that it is trite law that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend on the circumstances, that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98, Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.

38. The Appellant failed in proving that the amount pleaded as Ksh. 30,000/= for loss of user was incurred. No material was placed before the court to inform the fact that the motor vehicle registration No. KBX 510Q was used for any commercial purpose or trade or any other loss as result of the motor vehicle not being in use. In Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR it was held as follows:

    (17) In Wambua v Patel & Another [1986] KLR 336, the High Court (Apaloo, J. as he then was), was faced with the problem of quantification of loss of earnings of a cattle trader who had been severely injured in a road traffic accident. Although the court in that case found that the evidence of the plaintiff's earnings to be very poor and that he had kept no books of account nor business books and had never paid any tax, the court said at p.346 para 25:

    > "Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method" ….and added at p. 347 para 1 "But a victim does not lose his remedy in damages because the quantification is difficult."

39. The Appellant pleaded that she earned Ksh. 3,000/= per day and was out of use for 10 days. This was not supported. The Court of Appeal in African Highland Produce Limited v John Kisorio [2001] eKLR stated as follows as regards the mitigation of losses:

> The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon

> the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See Halsbury's Laws of England Vol 11, Page 289, 3rd Edn 1955.

40. Similarly, no clear evidence was adduced to prove with certainty the length of time that was taken in repairing the vehicle vis a vis the purpose for which the motor vehicle was used to earn income that was lost when it was grounded. I am fortified by the reasoning of the court in George Gichanga Karanja & another v Mwangi Nderitu Ngatia [2018] eKLR as follows:

> Though the respondent claimed in his evidence that the vehicle resumed operations after 4 months, he did not adduce any evidence to substantiate this claim. The law is that he who alleges must prove. The accident assessment report indicated that repair work was estimated to take 7 days if 8 hours a day were expended on the repair work but no clear evidence was adduced to prove with certainty the length of time that was taken in repairing the vehicle. I therefore find the 30 day period adopted by the trial court to be reasonable in the circumstances. The award of KShs.120,000 for loss of use of vehicle is thus upheld.

41. The court below must have been aware that it is not the last court in the hierarchy of court. However, the court still chose not to assess damages. It is the cardinal duty of the court below, to assess damages even where the suit is being dismissed. These are not my words but the directive of the court of appeal in several matters. Both the trial court and this court must assess damages as they are not courts of last resort. To casually dismiss the suit without assessment of damages is both cavalier and a serious indictment on the part of the trial court. In Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

42. The trial court is under duty to assess damages even where a suit is dismissed. In the case of Christine Kalama v Jane Wanja Njeru & another [2021] eKLR, Justice Nyakundi stated as follows:

> " It is helpful to remind the Learned Trial Magistrate that procedural Law binds her to assess damages even if she is in doubt of proof of liability. As an appeal's Court the principles in Mwana Sokoni v Kenya Bus Services & Others {1982 – 1988} 1 KAR 870 are not applicable on account of the facts of this case where no assessment of damages was never undertaken by the Learned Trial Magistrate."

43. This is also the position taken by HM Nyaga J, in the case of Amukhuma v Valley Bakery Limited (Civil Appeal 46 of 2008) [2024] KEHC 9151 (KLR) (19 July 2024) (Judgment), where he posited as follows:

50. It is trite law that a trial court is under a duty to assess the general damages awardable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa vs Bhogals Garage Ltd (CA) [1993] KLR 448 where the court held as follows; "The judge was clearly under a legal to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this Court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment" ...

51. Also, in the case of Matiya Byabaloma & Others vs Uganda Transport Co. Ltd Uganda Supreme Court Civil Appeal No. 10 of 1993 IV KALR 138 the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim.

44. Luckily for special damages, the question is documents and not demeanor of witnesses. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

45. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

46. The amount of Ksh. 82,970/= was duly proved. There was no proof tendered in support of the claim for loss of user. In the circumstances, I allow the proven amount of Ksh. 82,970/=. The next issue is the question of costs. Costs are governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any

action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

47. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

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

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

49. In the circumstances the appeal is allowed with costs of Ksh. 55,000/=.

Determination

50. In the upshot, I make the following orders: -

a. The appeal is allowed in its entirety in that:

b. Judgment in the lower court is set aside and in lieu thereof, I enter judgment for the Appellant against the 1st and 2nd Respondents, at 100% liability.

c. The Third-party notice remains dismissed.

d. The Appellant is awarded special damages of Ksh. 82,970/=.

e. The Appeal against the finding on loss of user is dismissed.

f. The Appellant shall have the costs of the appeal assessed at Ksh. 55,000/= payable by the 1st and 2nd Respondents jointly and severally.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

Mose, Mose & Mose Advocates for the Appellants

Nyaanga & Mugisha Advocates for the 1st Respondent

K. M. Mburu for the 3rd Respondent

Court Assistant – Michael