



Lavington Security Limited & 2 others v Birundu & 2 others (Civil Appeal 704 & 757 of 2019 (Consolidated)) [2024] KEHC 212 (KLR) (Civ) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 704 & 757 OF 2019 (CONSOLIDATED)
CW MEOLI, J
JANUARY 19, 2024**

BETWEEN

**LAVINGTON SECURITY LIMITED 1ST APPELLANT
NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES 2ND
APPELLANT**

AND

**BONIFACE NYABENGI BIRUNDU 1ST RESPONDENT
TABITHA MORAA MOKAYA 2ND RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPEAL 757 OF 2019**

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .. APPELLANT

AND

**BONIFACE NYABENGI BIRUNDU 1ST RESPONDENT
TABITHA MORAA MOKAYA 2ND RESPONDENT
LAVINGTON SECURITY LIMITED 3RD RESPONDENT**

*(Being an appeal from the judgment of D.A. Ocharo, PM, delivered on
27th November, 2019 in Nairobi Milimani CMCC No. 5652 of 2014)*



JUDGMENT

1. Pursuant to the directions given by the court on 16th February, 2023, HCCA No. 704 of 2019 and HCCA NO. 757 of 2019 (hereafter the 1st and 2nd appeals, respectively) which involve the same parties and subject matter were consolidated. The 1st appeal was designated as the lead file for purposes of hearing and disposal. For ease of reference, the court will hereafter proceed to refer to the parties, in the following order:
 - i. Lavington Security Limited (the 1st Appellant)
 - ii. National Social Security Fund Board of Trustees (the 2nd Appellant)
 - iii. Boniface Nyabengi Birundu (the 1st Respondent)
 - iv. Tabitha Moraa Mokaya (the 2nd Respondent)
2. The two (2) appeals emanate from the judgment delivered on 27th November, 2019 in Nairobi Milimani CMCC No. 5652 of 2014. The suit was commenced by way of a plaint filed on 23rd September, 2014 by the 1st and 2nd Respondents against the 1st and 2nd Appellants. The claim was for general damages, the sum of Kshs. 1,940,000/- together with interest at the rate of 14% p.a. from 23rd March, 2014, costs of the suit and interest thereon. The claim was founded on negligence on the part of the Appellants and related to the KAW xxxU Toyota Land Cruiser (the subject motor vehicle) allegedly belonging to the Respondents.
3. The Respondents averred That the 1st Respondent purchased from the 2nd Appellant the property known as Residential House No. 59 situated on Land Parcel Number Nairobi/Block 93/1657 (the suit premises), consisting of a unit amongst other units situated in Hazina Estate South B (the estate), all of which had been developed and was managed by the 2nd Appellant at all material times. That among the services being offered by the 2nd Appellant was the provision of security to the suit premises and the entire estate and concerning which the 2nd Appellant had engaged the professional services of the 1st Appellant paid for through service charge payments by the Respondents and other residents.
4. The Respondents pleaded That the provision of security services by the 1st Appellant extended to the common areas and parking yards of the estate, and That it was the Respondents' expectation That the services rendered would be of the highest attainable standard of care and skill. The Respondents proceeded to plead That sometime on or around 23rd March, 2013 at about 4.00 am the subject motor vehicle was broken into and stolen from the estate parking. The Respondents attributed the loss/disappearance of the subject motor vehicle to negligence on the part of the Appellants and/or their agents/employees as particularized in the plaint. Consequently, the Respondents sought the sum of Kshs. 1,940,000/- being the value of the subject motor vehicle, among other reliefs.
5. The Appellants separately entered appearance and filed their statements of defence therein denying the key averments in the plaint. By way of its statement of defence dated 14th November, 2014 the 1st Appellant denied the existence of any agreement between itself and the Respondents, averring instead That a contract existed solely between itself and the 2nd Appellant. That as a result, it did not owe the Respondents a duty of care. The 1st Appellant further denied the particulars of negligence pleaded against it, as well as the claim for damages sought in the plaint.
6. The 2nd Appellant filed its statement of defence dated 23rd October, 2014 equally denying the particulars of negligence pleaded against it. The 2nd Appellant averred That while it had procured the



services of the 1st Appellant at all material times, it could not be held liable for any acts/omissions by the latter. It was further averred That any loss/damage in respect of the subject motor vehicle was attributable to negligence on the part of the Respondents and a breach of contract on the part of the 1st Appellant.

7. The suit proceeded to full hearing during which both parties adduced evidence. The 1st and 2nd Respondents testified, whereas the Appellants each summoned one (1) witness. In its judgment, the trial court found in favour of the Respondents, and entered judgment in the sum of Kshs. 1,940,000/- with costs and interest against the Appellants jointly and severally.
8. Aggrieved with the outcome, the 1st Appellant filed the memorandum of appeal dated 3rd December, 2019 challenging the decision of the trial court on the following grounds:
 1. “That the learned trial magistrate erred in law by applying wrong principles in holding the Defendants jointly and severally liable and as such entering judgment in favour of the Plaintiffs;
 2. That the learned trial magistrate proceeded on wrong principles in awarding Kshs. 1,940,000/= to the Plaintiffs as against the Defendants especially the 1st Defendant;
 3. That the learned trial magistrate erred in failing to scrutinize/evaluate the evidence tendered and to correctly relate the same to the case law cited to him;
 4. That the learned trial magistrate erred in law and in fact by failing to address himself on the issue of negligence and whether or not the 1st Defendant/Appellant was negligent in the provision of security services;
 5. That the learned trail magistrate erred in law and in fact by failing to address himself to the evidence and various issues adopted by the court thereby arriving at the erroneous judgment.” (Sic)
9. The 2nd Appellant on its part filed the memorandum of appeal dated 19th December, 2019 in the 2nd appeal raising the following grounds:
 1. “That the Honourable magistrate erred in law and fact by failing to consider the issues raised in the 2nd defendant/appellant statement of defence and written submissions.
 2. That the Honourable magistrate erred in law and fact by failing to consider the oral and documentary evidence adduced at the hearing by the 2nd defendant/appellant.
 3. That the Honourable magistrate erred in law and fact in failing to find That the plaintiffs had failed to prove their case on a balance of probabilities as against the 2nd defendant/appellant.
 4. That the Honourable magistrate erred in law and in fact by finding the defendants jointly and severally liable to the tune of Kshs. 1,940,000/= as pleaded in the plaint.
 5. That the Honourable magistrate erred in law and in fact by failing to consider issues canvassed during cross-examination by counsel for the 2nd defendant/appellant.
 6. That the Honourable magistrate erred in law by failing to follow and be bound by the principle of stare decisis.
 7. That the Honourable magistrate erred in law and fact by considering extrinsic matter and basing her entire judgment on the same.” (Sic)



10. The consolidated appeals were canvassed by way of written submissions. Counsel for the 1st Appellant anchored his submissions on the decision in *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR regarding the burden of proof in civil claims. Counsel further premised his submissions on the case of *Eastern Produce (K) Limited v Christopher Atiado Osiro* [2006] eKLR concerning the definition of the tort of negligence. It was counsel's submission That while there existed a contract between the Appellants herein for the provision of security services at all material times, the Respondents failed to prove the particulars of negligence and/or breach of contract pleaded against the 1st Appellant, arising from the alleged theft of the subject motor vehicle. Counsel therefore faulted the trial court's finding of liability against his client.
11. He asserted That the 1st Appellant ensured That its employees provided security services to the best possible standards and could not therefore be blamed for the theft which occurred on the material date. Counsel submitted That the principle of indemnity was inapplicable to the present circumstances as under the contract entered into between the Appellants, the 2nd Appellant could only claim indemnification from the 1st Appellant for any loss/damage to its property which subject motor vehicle was not. On That basis, the court was urged to allow the appeal and to set aside the decision by the trial court, substituting it with a finding of liability solely against the 2nd Appellant.
12. The 2nd Appellant also filed written submissions. Counsel for the 2nd Appellant based his submissions on the decisions rendered in *M'iruanji Muchai v Broadways Bakery & another* [1996] eKLR and *Miller v Minister of Pensions* [1947] AII ER 373 relating to the burden of proof in civil cases. He faulted the trial court for finding the 2nd Appellant equally liable for negligence and yet the provision of security services was the sole responsibility of the 1st Appellant. That no such duty extended to the 2nd Appellant as to give rise to a claim for negligence against it. Counsel further refuted the claims made by the Respondents to the effect That an agency relationship subsisted between the Appellants at all material times arguing instead That the 2nd Appellant had engaged the services of the 1st Appellant independently. Here referring to the decision in *Kenya Breweries Limited v Meshack Momanyi Osieno* [2018] eKLR on the doctrine of agency relationships.
13. It was submitted That in the absence of any proof by the Respondents to support the claim against the 2nd Appellant, the trial court erred in its finding on both liability and quantum, in respect of the said Appellant. For those reasons, counsel urged the court to set aside the trial court judgment against the 2nd Appellant, and to award it costs of both the suit and the present appeal.
14. The Respondents naturally defended the trial court's findings. Counsel submitted That the particulars of negligence had been proved against the 1st Appellant to the required standard, and That by virtue of the principal-agent relationship which existed between the Appellants, the 2nd Appellant being the principal, was rightly held equally liable for the negligent acts/omissions of its agent, the 1st Appellant. Here counsel refuting the submission That the 1st Appellant was merely an independent contractor of the 2nd Appellant.
15. Counsel cited the decision in *Consolidated Bank of Kenya Limited v Securicor Security Services Kenya Ltd* [2013] eKLR to contend That the standard of proof in civil cases is a balance of probabilities. He urged the court to consider the principles in the oft cited authority of *Mbogo v Shah* [1968] EA 93 in declining to interfere with the trial court's decision. The court was therefore urged to dismiss the appeal and to uphold the decision by the trial court.
16. The court has considered the grounds in the memoranda of appeal and records of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The



consolidated appeals constitute first appeals. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either That he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either That he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

17. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated That the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.
18. Upon review of the entire record before this court, it is the court’s view That both appeals turn on the twin issues being whether the trial court misdirected itself in finding the Appellants liable, and whether the trial court acted correctly in awarding the sums sought in respect of the subject motor vehicle. Pertinent to the foregoing are the pleadings, which formed the basis of the parties’ respective cases before the trial court. Hence a review thereof is apposite before dealing with evidentiary matters. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard That:

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally That in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging That burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles That only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

19. The Respondents by way of their plaint averred at paragraphs 10, 11 and 12 That:

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- “10. The 1st defendant was at all material times expected to provide security services at commercially acceptable standards of care and skill and at all material



times and invite its best business and professional Endeavour to carry out and perform the procured security services.

11. The 1st defendant owed a duty of care to the plaintiff in respect of its property situated at the parking yard and other common areas at all material times.
12. On or about the 23rd March 2013 at around 4. AM in the morning, the plaintiff's motor vehicle registration number KAW xxxU Toyota Prado was broken into and driven from the Parking Yard at Hazina Estate at the full glare, negligence and or recklessness of the defendant and or their employees, servants and or agents.

Particulars Of Negligence On The Part Of The Defendants, Their Directors, Servants And Or Its Employees

- i. Allowing Motor Vehicle Registration KAW xxxU to be driven from the premises without verifying the ownership details of the said Motor Vehicle.
 - ii. Recklessly and without any due care, allowing thieves and strangers to drive off with the plaintiff Motor Vehicle.
 - iii. Failing to prevent the theft of Motor Vehicle Registration KAW xxxU.
 - iv. Allowing thieves to ingress and egress the premises without any vetting or questioning.
 - v. Allowing thieves and drive off with the plaintiff's Motor Vehicle at 4 AM in the morning without any due care, checking and scrutiny.
 - vi. Failing to check and establish the person who was driving the subject Motor Vehicle at the wee hours of the morning.
 - vii. Failing to provide security to the plaintiff's property, and categorically the subject Motor Vehicle herein as engaged or at all.
 - viii. Failing, neglecting and or refusing to take the details of the strange driver of the subject Motor Vehicle yet it was their routine to do so.
 - ix. Neglecting, failing and or refusing to perform the contracted security services to the required standard of care hence exposing the plaintiff herein to loss of their Motor Vehicle.
 - x. Neglecting, failing and or refusing to vet their employees before offering them employment.
 - xi. Engaging employees of dubious characters and thereby exposing the plaintiffs to loss of its motor vehicle." (sic)
20. As earlier mentioned, the Appellants filed their statements of defence separately, denying the key averments in the plaint and liability. The trial court after restating and examining the trial evidence pronounced itself as follows:

"...In my view and so I hold, both defendants are liable to the 2nd plaintiffs for the loss of his motor vehicle registration number KAW xxxU Toyota Land Cruiser. The first defendant because he was contracted by the 2nd defendant to offer security services for the benefit of



the plaintiff, it breached in its provisions of those services and by such breach caused the 2nd plaintiff loss.

The 2nd defendant is liable because it had the primary responsibility as the landlord to offer services including security services to the plaintiffs for which it charged monthly service charge. The 2nd defendant cannot run away from liability merely because it had contracted a third party to offer services for which it levied charges. I find both defendants liable to the plaintiffs.

I therefore enter judgment for the Plaintiffs as against the defendants jointly and severally for the sum of Kshs. 1,940,000/= being the value of the stolen motor vehicle registration number KAW xxxU Toyota Land Cruiser. I award costs to the plaintiff and interest on the decretal sum from the date of this judgment.” sic.

21. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The duty of proving the averments contained in the plaint lay squarely on the Respondents. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated That:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though That burden may become easier to discharge where the matter is not validly defended and That the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest That before the trial court can conclude That the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied That the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court That on a balance of probabilities it proves the claim.” (Emphasis added)

22. From a reading of the pleadings, it is apparent That the Respondents’ cause of action was founded on negligence in respect both the suit premises and the subject motor vehicle. At the hearing of the suit, the 2nd Respondent who was PW1 adopted her signed witness statement and produced the Respondents’ bundle of documents as P. Exhibits 1-9 as her evidence-in-chief. In cross-examination, the 2nd Respondent stated That she had resided in the estate for several years and That among the policies applicable to residents of the estate was the requirement That all motor vehicles belonging to residents have a car sticker. She stated That even so, motor vehicles tended to be searched by security personnel irrespective of whether they had car stickers. The 2nd Respondent testified That her son, the 1st Respondent would drive the subject motor vehicle on most occasions and That the said vehicle had a security alarm installed in it prior to the theft incident.
23. The 1st Respondent testified as PW2. He equally adopted his signed witness statement as evidence before proceeding to give evidence That he too had resided in the suit premises for several years and That the 2nd Appellant at one point contracted the services of the 1st Appellant for the provision of security to the estate residents. He testified That on the date preceding the material day, he had carefully parked the subject motor vehicle in the estate, only to wake up on the material day to find it missing. That upon alerting the guard who was on duty That day, he was informed by the said guard That the subject motor vehicle had been driven out of the estate at about 4.30 am. Subsequently the 1st Respondent lodged a report with police, but soon after, the duty guard went missing. He testified That all vehicles entering or exiting the estate were subjected to official security searches.



24. Under cross-examination, the 1st Respondent stated That he realized That the subject motor vehicle had gone missing on the material day, at about 6.00 am and That he is the only person who had a key to the said vehicle. He further stated That he was not a party to the agreement entered into between the Appellants herein. In re-examination, he echoed the testimony by the 2nd Respondent regarding the requirement for car stickers for all motor vehicles belonging to residents of the estate.
25. The 1st Appellant called Kipkirui Langat as DW1. Upon adopting his witness statement as his evidence-in-chief, and the 1st Appellant's list and bundle of documents filed on 13th August, 2015 as D. Exhibit 1, the witness proceeded to testify That he worked for the 1st Appellant in the capacity of Operations Manager, at all material times. During cross-examination, it was his evidence That on the material day, about 18 guards working for the 1st Appellant had been deployed within the estate, and a guard by the name Kimani was manning the area from where the subject motor vehicle was said to have been stolen; and That the 1st Appellant did not take steps in tracing his whereabouts following his escape after the incident.
26. He testified That while motor vehicles bearing the relevant stickers did not ordinarily undergo searches, the particulars of vehicles driven by non-residents would be recorded as they entered and exited the estate. That either way, motor vehicles belonging to residents were not exempt from searches under the agreement entered into between the Appellants. That the theft of the subject motor vehicle was reported to the 1st Appellant and the same had not been traced at the time of his testimony. He stated That under the Appellants' agreement, the 1st Appellant was obligated to bear full responsibility for any loss/damage to the residents' properties but added That the 2nd Appellant equally ought to bear its share of responsibility.
27. For the 2nd Appellant, Isaac Tuwei Kosgey who testified as DW2 adopted his signed witness statement as his evidence-in-chief. In cross-examination, the witness stated That while the contract for provision of security services in question was entered into between the Appellants, the Respondents herein were entitled to the benefits arising therefrom, by virtue of their payment of due service charge. The witness further stated That the 2nd Appellant's representatives received word of the theft of the subject motor vehicle but maintained That the obligation lay with the 1st Appellant to compensate the Respondents for the resulting loss. Admitting That in his knowledge, the 1st Appellant had availed a reasonable number of guards to man the estate on the material day.
28. From the court's re-examination of the pleadings and material on record, it is not in dispute That the 1st Respondent was at all material times the registered proprietor of the suit premises pursuant to the Certificate of Lease issued on 3rd September, 2019 and produced as P. Exh 2. It is also not in dispute That the 1st and 2nd Respondents resided in the suit premises situated in the estate, and which premises and estate were managed by the 2nd Appellant at all material times. It is not in dispute further That a contract was executed on 31st December, 2011 (P. Exh 3) between the 1st and 2nd Appellants herein, for the provision of security services in respect of the estate, in exchange for payment which was derived from the service charge payable by the residents. It is also not in dispute That the said services were at all material times rendered by the 1st Appellant through its employees to the 2nd Appellant and for the benefit of the estate residents including the Respondents.
29. The court must determine the fundamental question whether the particulars of negligence were established against the Appellants. Upon re-examination of the record, it is not controverted That the subject motor vehicle belonging to the Respondents, was reported as having been stolen on the material date. The Respondents produced a copy of the police abstract issued on 23rd March, 2013 as P. Ex 1



confirming this position. Moreover, the witnesses on both sides collectively stated That the subject motor vehicle left the estate on the material date and That the theft was reported.

30. Regarding the first element of the tort of negligence, namely, the existence of a duty of care; the court upon studying the pleadings and evidence tendered, is of the view That notwithstanding the fact That the Respondents were not parties to the agreement for provision of security services by virtue of the same subsisting between the Appellants, they were direct beneficiaries of security services provided under the contract between the Appellants and for which made payments. Consequently, the court is satisfied That the 1st Appellant owed the Respondents a duty of care by virtue of the contract while the 2nd Appellant equally owed them a corresponding duty of care by virtue of its position as Manager of the estate.
31. On the element of breach of the duty of care, the evidence tendered at the trial particularly admissions by the 1st Appellant's witness (DW1) demonstrates That the subject motor vehicle was driven out of the estate during the watch of the 1st Appellant's guards and soon after a report was made, the guard responsible for manning the suit premises disappeared. According to the testimony of DW1, no proper search for either the driver of or the subject motor vehicle was conducted while exiting the estate on the material date. Based on the foregoing, and in view of the obligations bestowed upon the 1st Appellant under Clause 5.3 and 5.5 of the agreement to ensure the proper provision of services with adequate skill and care; as well as Clause 5.6. wherein the 1st Appellant assumed full responsibility for any loss/damage whether directly or indirectly arising in connection with the service provided, the court concurs with the finding by the trial court That there was evident breach of the duty of care owed by the 1st Appellant through its s employees, to the Respondents.
32. Regarding the 2nd Appellant however, the court is of the view That while it is not controverted That it was a party to the agreement for provision of security services, no credible evidence was tendered by the Respondents to demonstrate That the said Appellant had engaged the services of the 1st Appellant in the capacity of an agent. Rather than as an independent service provider as purported in the contract of service, so as to give rise to vicarious liability and consequently, a finding or inference of negligence. It being apparent from the record That the 2nd Appellant dutifully engaged the services of the 1st Appellant and the responsibility lay with the latter to ensure the said services were provided within the terms of the agreement. The finding to the contrary by the trial court is therefore in error. In the court's view, the Respondents did not prove the particulars of breach of duty of care against the 2nd Appellant.
33. Regarding proof of loss/damage suffered as a result of the breach of duty of care, there is no dispute That the Respondents suffered loss through the theft of the subject motor vehicle, due to the negligence of the 1st Appellant's employees.
34. In the result, the court is satisfied That the trial court arrived at a reasonable finding on the Respondents' case as against the 1st Appellant. Nevertheless, the Respondents did not prove vicarious liability of the negligence of the 1st Appellant against the 2nd Appellant. As such, the court will interfere with the trial court's finding on liability in respect of the 2nd Appellant by setting it aside.
35. The second limb of the appeal relates to the award made to the Respondents. The 1st Appellant challenged the award of damages for the loss of the subject motor vehicle in the pleaded sum of Kshs. 1,940,000/-. The Respondents' claim was one for special damages. It is trite That such damages must



be specifically pleaded and proved. This was reaffirmed by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated thus:

“It has been held time and again by this Court That special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sabbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;

“Plaintiffs must understand That if they bring actions for damages, it is for them to prove damage, it is not enough to write 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.’”

36. At the trial, the Respondents produced the motor vehicle assessment report (P. Exh 6) indicating the value of the subject motor vehicle to be the sum pleaded in the plaint. This assessment was not seriously challenged or controverted by the 1st Appellant and the court is satisfied That the Respondents’ claim having been specifically pleaded and proved, the trial court’s award was well founded.
37. Consequent to the findings above, the court makes the following orders:
- a. Civil Appeal No. 704 of 2019 is hereby dismissed with costs to the 1st and 2nd Respondents.
 - b. Civil Appeal No. 757 of 2019 succeeds and is hereby allowed.
 - c. Pursuant to b) above, the judgment of the trial court is hereby set aside as against the 2nd Appellant (the Appellant in Civil Appeal No. 757 of 2019) and the court substitutes therefor an order dismissing with costs the Respondents’ suit in the lower court against the 2nd Appellant.
 - d. The costs of the appeal in Civil Appeal No. 757 of 2019 are awarded to the 2nd Appellant and will be borne jointly by the 1st Appellant and the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of

For the 1st Appellant: Ms. Cheronno

For the 2nd Appellant: Ms. Gathara

For the Respondents: Ms. Omwenga

C/A: Carol

