



**Wambua v Family Bank Limited (Civil Appeal 179 of 2021)  
[2024] KEHC 16906 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 16906 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 179 OF 2021  
F WANGARI, J  
JANUARY 19, 2024**

**BETWEEN**

**PHILIP WAMBUA ..... APPELLANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

*(Being an Appeal against the Judgment of the Senior Resident Magistrate Hon. G. Kiage delivered on the 12th day of March, 2021 at Mombasa in Civil Case No. 791 of 2018)*

**JUDGMENT**

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 12/3/2021 by Hon. G. Kiage, Senior Resident Magistrate in Mombasa CMCC No. 791 of 2018.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
  - a. The Trial Court erred in disregarding the evidence tendered by the Appellant
  - b. The Trial Court erred in law and fact in failing to find that the Appellant proved his case on a balance of probabilities
  - c. The Trial Court erred in law and fact in failing to consider the Appellant's submissions.

**Pleadings**

3. The Appellant claimed against the Respondent the sum of Kshs. 340,000, being losses incurred as a consequence of the purchase of a container from the Respondent via auction, where the said sale was subsequently voided by a Judgement of Court.



4. It was further averred after the sale was voided, the Appellant had incurred Kshs. 85,000 in purchasing the container from the Respondent through a public auction. He had further incurred Kshs. 15,000 in renovations and Kshs. 240,000 as lost rent, since he had rented the container to his customers.
5. The Plaintiff therefore sought recovery of Kshs. 340,000 in special damages.

### **Defendants case**

6. The Defendant filed its Defense dated 11<sup>th</sup> June 2018 denying the assertions in the Plaint in toto.

### **Evidence**

7. The Plaintiff adopted his witness statement and produced the documents filed in court. It was his case that he did not attend the auction personally but sent one Florence Wairimu who attended and deposited the amount of Kshs. 85,000 towards the purchase of the subject container.
8. On the part of the Defendant, one witness, Victor Maganga testified. He relied on his witness statement and produced the documents filed in court.
9. It was his case that he did not know the Plaintiff and the Plaintiff did not participate in the auction sale. In cross examination, he stated that it was not the fault of the Plaintiff that the sale was voided by the Judgement of Court.

### **Submissions**

10. In his submissions, the Appellant posed that the Trial Court disregarded the evidence produced by the Appellant and failed to find in his favour on a balance of probabilities. It was submitted that the Appellant was an innocent purchaser for value and reliance was placed on section 14 of the [Sale of Goods Act](#).
11. Counsel also faulted the Trial Court for failing to award special damages which according to him the Appellant had pleaded and proved. Reliance was placed on the case of [David Bagine v Martin Bundi](#) (1997) eKLR to canvass the argument that the Appellant had pleaded and proved the credentials for special damages amounting to Kshs 340,000.
12. On its part, the Respondent submitted that Appellant did not prove the special damages pleaded in the Plaintiff. Reliance was placed on a number of authorities. On the basis of [Hahn v Singh](#), Civil Appeal No 42 of 1985, it was submitted that a party should produce receipts in support of special damages and the Appellant did not do so.
13. Further, it relied inter alia on [Kenya Women Finance Trust v Martha Wangari Kamua](#) (2021) eKLR to submit that the Appellant had not proved the special damages pleaded and the Trial Court was correct in declining the award. It urged this court to dismiss the Appeal.

### **Analysis**

14. This court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issue for this Court's determination is whether the Trial Court erred in its finding that the Appellant had not proved the special damages pleaded.
15. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.



16. In the case of *Selle & another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

17. On my perusal of the Judgement, I find no basis for the appeal on the ground that the Trial Court failed to find that the Appellant had proved his case on a balance of probabilities. The Trial Court relied on Section 14 of the *Sale of Goods Act* to find that the Respondent had the duty to ensure validity of the title of the goods that it sold to the Appellant, and as such was liable for losses that the Appellant would incur.

18. The only divergence between the Appeal and the Judgement of the lower court is based on the fact that despite finding the Respondent liable, the court did not find the Appellant to have proved the particulars of loss pleaded. That is the only issue before the court in this appeal.

19. With special damages, 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.”

20. 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.

21. 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. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages... General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.”

22. 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 Iivanji 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.
23. In this case, the Appellant pleaded that he paid Kshs. 85,000 towards the purchase of the container, Kshs. 15,000 towards renovation of the same and Kshs. 240,000 in rental loss.
24. On my re-evaluation of the pleadings and evidence, I note that the only available evidence to prove the asserted amount of Kshs. 85,000 was the letter dated February 25, 2015 issued by Autoland Auctioneers, and forwarding the Customer Receipt of the same date confirming and stating that one Florence Wairimu Mburu was the highest bidder in the auction and had won the bid by paying Kshs. 85,000 towards the purchase of the subject Container.
25. During the testimony, the appellant’s case was that Florence Wairimu was paying on the behalf of the Appellant. The Respondent’s witness stated that the Respondent only recognized Florence Wairimu as the bidder and not the Appellant.
26. The Appellant did not produce any evidence that Florence Wairimu paid for the bid on his behalf and even if she did, he did not bother to call the said Florence Wairimu as his witness in the case. It could



as well be presumed that if he had called Florence Wairimu, her testimony would have been adverse to his case.

27. I say so because it is a well-known rule of evidence founded on section 119 of the Evidence Act that the failure by a party to call as a witness any person whom he might reasonably be expected to give evidence favorable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination. See Green Palms Investment Ltd vs. Kenya Pipeline Co. Ltd Mombasa HCCC No. 90 of 2003; Bukenya & Others vs. Uganda [1972] EA 549; R. vs. Uberle [1938] 5 EACA 58.
28. In Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR it was stated as follows:
53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.
29. On the above basis, I am unable to agree with the Appellant that he proved the pleaded amount of Kshs. 85,000. I proceed to equally observe that since the Appellant failed to prove that he paid Kshs. 85,000 to acquire the container, it follows that the consequential amount of renovation claimed at Kshs. 15,000 is untenable. The amounts claimed for lost rent of Kshs. 240,000 is also untenable and in any event, the lease agreements produced in court cannot be prove that rent was received.

### **Determination**

30. In the upshot, I make the following Orders;
- a. The Appeal is devoid of merit and is hereby dismissed.
  - b. In the circumstances, each party shall bear their own costs of the Appeal.

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 19<sup>TH</sup> DAY OF JANUARY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Appellant

Randiek Advocate for the Respondent

Barile, Court Assistant

