A Jiwa Shamji Limited v Elite Earhtmovers Limited (Civil Appeal E018 of 2023) [2024] KEHC 1093 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1093 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E018 OF 2023

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

A JIWA SHAMJI LIMITED .... APPELLANT

AND

ELITE EARHTMOVERS LIMITED .... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 20th September 2021 by Hon. P.K. Mutai, SRM in Kisii CMCC No. 412 of 2019.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
    a. The Trial Court erred in law and fact in failing to appreciate the provisions of Order 21 Rule 5 of the Civil Procedure Rules.
    b. The Trial Court erred in law and fact in failing to make a conclusive decision in the matter despite the overwhelming evidence.
    c. The Trial Court erred in law and fact in failing to find the admission by the Defendant that it received the merchandise supplied by the Appellant.
    d. The Trial Court erred in ordering for reconciliation of Accounts.

Pleadings.

3. The Appellant was the Plaintiff in the trial court. His case was that he supplied the Respondent with assorted building materials. The Respondent made part payments leaving a balance of Kshs. 695,600/- as at 2nd November 2018.
4. It was further averred that Respondent had declined to pay the said balance

5. The Respondent as Defendant filed Defence dated 10th July 2019. It substantially denied all the averments in the Plaint.

Evidence

6. At trial, PW1, the Appellant's witness testified and produced evidence in Court. He relied on his witness statement and Bundle of documents produced in evidence.

7. It was its case that the balance of Kshs. 695,600/- had not been settled. And was outstanding since 2nd November 2018.

8. It was his further case that the Respondent paid Kshs. 100,000/= on 3rd July 2019 and nothing more.

9. On cross examination, it was his case that he signed the witness statement.

10. Further, he admitted that he did not have a contractual agreement between the parties; that the contract was oral.

11. The Respondent also called a witness, Lawrence Wambua Ndolo.

12. It was his case that he relied on his witness statement and documents filed in Court.

13. On cross examination, it was his case that the Respondent had settled all the outstanding dues with the Appellant.

14. Further he testified that the Respondent paid Kshs. 100,000/- before reconciliation of the accounts.

15. It was his further case that the Respondent had not raised issues on the invoices and deliveries produced by the Plaintiff.

16. He prayed that the Appeal against the Respondent be dismissed

17. The Trial Court rendered its Judgement on 20th September 2021. In the Judgment, the Court found that it was in the interest of justice to reconcile the parties' statements of accounts. Consequently, the court directed parties to jointly appoint an independent accountant to reconcile their accounts and file a report in Court within 60 days.

18. Aggrieved, the Appellant, who was the Plaintiff lodged this Appeal.

19. Parties did not file submissions.

Analysis

20. The issue that falls for this Court's determination is whether the Trial Court erred in failing to make a final determination on the matter.

21. 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.

22. 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 form 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."

23. I note from the record filed in Court that the Appellant's only concern is that the Court ought to have made a final determination in favour of the Appellant. The Memorandum of Appeal is however, verbose and unnecessarily repetitive of only a singular issue of finality of the Judgement.

24. The rest of the grounds are argumentative, unseemly and do not please the eye to read. Order 42 Rule 1 that requires that the memorandum of Appeal be concise. The same provides as doth: -

> " 1. Form of appeal –
>
> > 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

25. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

26. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of appeal observed that: -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports*

Authority Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

27. However, as stated above, I understand the Appellant to have premised the Appeal on the contention that the Trial Court failed to determine the matter in finality. In my reevaluation of evidence, I note that the Appellant's suit was based on a claim for special damages.

28. The rule for a claim for special damages is now settled. 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 where it was 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."
>
> 29. 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.

30. 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."

31. Regarding proof of loss, while 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.

32. To my mind, the Trial Court established that the materials filed in Court were inadequate to constitute a final finding on the issues presented by the parties. That is why the court ordered for a joint reconciliation statement of account to determine the matters on finality.

33. I have to establish whether the Court did not make a determination. The Plaintiff's suit sought special damages. As detailed in the authorities above, it was the Plaintiff to specifically plead and strictly prove the claim for Kshs. 695,600/=. The Trial Court would then decide whether or not the Plaintiff had proved his case on a balance of probabilities. It was not upon the court to call for further evidence by way of the Judgment. Calling for a joint Reconciliation Account Statement amounted to calling for further particulars. It was too late. That, ipso facto, in my view led to the miscarriage of justice since the court did not determine the rights of the parties in the Judgment.

34. The Court of Appeal in Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment) stated as follows in relation to determinations:

> … Decree as defined in section 2 of the *Civil Procedure Act* meant the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit and could be either preliminary or final…

35. I have perused the law and note that Decree is defined in Section 2 of the *Civil Procedure Act* as follows:

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; It includes the

striking out of a plaint and the determination of any question within section 34 or section 91, but shall not include—(a)any adjudication from which an appeal lies as an appeal from an order, or(b)any order of dismissal for default.

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation: --A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

36. The Trial Court clearly did not indicate whether the determination made was preliminary or final. The court ordered for reconciliation. Reconciliation meant an informal process which would involve a joint accountant mutually agreed upon by the parties. There was no anticipation of the position if the joint reconciliation would fail. I agree with the Appellant that the court had practically ordered for the status quo ante; before the suit was filed. The calamity in such decision would be that the rights of the parties would hang in a balance.

37. Whereas the Trial Court found that the Plaintiff had not clearly pleaded the exact outstanding balance, it was in error to order for reconciliation. It would be prejudicial particularly to the Plaintiff because the fate of the suit had not been determined one way or another.

38. Consequently, I have to reevaluate the pleadings and evidence produced in Court. The burden of prove remained on the Appellant. On the prove of the allegations of breach of contract in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

> " When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...
>
> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

39. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " 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 case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

1. Therefore, it follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case.

41. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

42. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

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

43. Furthermore, in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

44. I note from the testimonies in Court that whereas the Appellant's case was that the Respondent settled Kshs. 100,000/- leaving out a balance of Kshs. 695,600; the Respondent on the other hand acknowledged having paid Kshs. 100,000/= and averred that if there was any claim, the same would be subject to the accounts reconciliation process. I understand it is based on the call for reconciliation that the Learned Magistrate found the way he did.

45. However, in my view, the issue was clear: whether the Appellant had proved his case on a balance of probabilities. The case would fail or succeed. It was not desirable to direct parties to avail further evidence while at the same time rendering a judgement. It was a reversible inconsistency and to that extend I interfere with the Judgement of the trial court. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

46. Further, in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden… is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

47. In this case, the existence of a contract was not denied. It was an oral contract between the parties. The dispute was on the amounts paid and the amounts not paid. Clearly, the invoices produced in court were for amounts more than Kshs. 100,000/-. The Respondent acknowledged to have paid to the Appellant Kshs. 100,000/- and was of the view that any further payments, if any, should be subject to prior reconciliation of accounts. This clearly meant that the Respondent acknowledged a possibility of the existence of other repayments to be done after reconciliation.

48. It was not apparent whether the oral contract provided for reconciliation before payment. However, by accepting to pay Kshs. 100,000/-, the Respondent as well acknowledged that it was indebted to the Appellant. I have perused the invoices and Statement of Account filed by the Appellant and I am satisfied that on a balance of probabilities, the Appellant proved that the outstanding amount was Ksh. 695,600/=.

49. Talking about the legal burden and evidential burden of prove placed upon the Plaintiff by the law, I find it useful to recall Mbuthia Macharia v Annah Mutua Ndwiga & another (2017) eKLR in which the Court of Appeal when dealing with the issue of burden of proof observed:

    'The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift" to the patty who would fail without further evidence?

50. In the case of Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment) the Court of Appeal stated as follows:

> " A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

51. I have already observed that the oral contract was not denied and add that the Respondent too did not adduce any evidence in Court to counter the claim by the Appellant. I note from the Statement of Defence dated 10th July 2019 that the Defendant admitted paragraph 3 of the Plaintiff. Paragraph 3 of the Plaintiff averred that the Plaintiff at the request of the Defendant did supply assorted building materials to the Defendant. The invoices proceeded in Curt related to the supply building materials to the Defendant. Therefore, it was not in dispute that that building materials were supplied. What is in

dispute is whether all the supplies were paid for. This is a matter of evidence and the evidence produced by the Appellant sufficiently proved this fact.

52. From the statement of account dated 31st December 2018, the amount due was projected at Kshs. 695,600/=. All the invoices produced in Court were drawn against the Respondent's order. I have juxtaposed this with the testimony of the Respondent's witness. It was his case that part payment was done in favor of the Plaintiff. However, he acknowledged that Kshs. 100,000/- was paid before the reconciliation. One wonders why Kshs. 100,000/- was paid before reconciliation and there should be reconciliation before the outstanding Kshs, 695,600/- is paid. This is particularly because the supplies are not denied. The Respondent's witness too appear to have changed the tune during re-examination. He testified that the Respondent called for reconciliation after the payment of Kshs. 100,000/- to ascertain the Kshs. 100,000/-. Consequently, I am inclined to believe the Appellant more than the Respondent.

53. In David Bagine Vs Martin Bundi [1997] eKLR

> " 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 Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in additon to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus: "Plaintiffs must understand that if they bring actions for damages it is for thm 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" We also refer to the cases of Ouma vs. Nairobi City Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235. The evidence before the learned judge on the question of loss of user was just "thrown at him". The Respondenthad stated that his profit margin was Kshs. 5,000/= to Kshs. 9,000/= per day from the sale of potatoes. Although the learned judge said that there was not a single receipt to show or prove those figures, the learned judge nevertheless proceeded to the damages under the heading of "loss of user" as general damages and said:

54. Therefore, I agree with the Appellant's submission that the Respondent admitted having received the supplies in its Defence. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

55. Pleadings bind parties and the Respondent was bound by the Defence it filed just as the Appellant was bound by the Plaint. In Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013 (2014) eKLR, G. B. M. Kariuki J, P. O Kiage J and K. M'inoti J while quoting with approval an excerpt from an article by Sir Jack Jacob entitled. "The present Importance of pleadings" restated that:-

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the

parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.... In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

56. Therefore, I am inclined that on a balance of probabilities, to find in favour of the Appellant.

Determination

57. In the upshot, the I allow the Appeal and make the following Orders:

    a. The Judgment of the Trial Court is set aside.

    b. Judgement is entered for the Plaintiff against the Defendant in the Lower Court in the sum of Kshs. 695,000/=.

    c. The Appellant shall have the costs of the Lower Court suit and interest thereon at court rates from the date of filing the suit.

    d. The Appellant shall also have the costs of this Appeal at Kshs. 75,000/.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 7TH DAY OF FEBRUARY, 2024. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant - Brian