



**Ariaga & another v Kenya Women Finance Trust Deposit Taking Microfinance Limited  
(Civil Appeal E041 of 2022) [2024] KEHC 2828 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E041 OF 2022  
WA OKWANY, J  
MARCH 14, 2024**

**BETWEEN**

**DOMICIANO PETER ARIAGA ..... 1<sup>ST</sup> APPELLANT**

**JOSEPHINE NYABONYI PETER ..... 2<sup>ND</sup> APPELLANT**

**AND**

**KENYA WOMEN FINANCE TRUST DEPOSIT TAKING MICROFINANCE  
LIMITED ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. M. C. Nyigei (PM) Nyamira dated and delivered  
at Nyamira on 17th August 2022 in the original Nyamira CMC Civil Suit No. 129 of 2019)*

**JUDGMENT**

**Background**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants, who are husband and wife respectively, sued the Respondent before the Lower Court seeking the following orders: -
  1. A declaration that the Defendant has breached the terms of agreement dated 9<sup>th</sup> October 2013 between the Plaintiffs and itself.
  2. An order compelling the Defendant to give back to the Plaintiffs the sum of Kenya Shillings One Million, Eight Hundred and Twenty-Seven Thousand, Give Hundred and Seventy-One Shillings and Seventy Cents (Kshs. 1,827,571.70).
  3. An order compelling the Defendant to indemnify the Plaintiffs the total amount of interest, calculated at the prevailing Central Bank of Kenya Rates, that would have accrued had the money been deposited in a TAUSI FIXED DEPOSIT ACCOUNT from the date of the agreement up until settlement of the decretal sum.



4. Damages for breach of Contract.
  5. General Damages.
  6. Costs of the suit.
  7. Interest on prayers 2, 3, 4, 5 and 6 at court rates until full payment of the decretal sum.
  8. Any other relief this honourable court may deem necessary to meet the ends of justice.
2. The Appellants case was that they were the trustees/signatories of the death benefits of the late Phanice Kemunto Peter (deceased) which benefits were held by the Respondent for the benefit of Maveline Kemunto Peter (hereinafter “the minor”) through a trust that was effected by an Agreement dated 9<sup>th</sup> October 2013 signed between the Appellants, the minor’s grandparents and the Respondent.
  3. The Appellants’ claim was that the deceased died while in the Respondent’s employment leaving behind benefits of Kshs. 2,127,571.71 to which she had nominated the Appellants as the sole beneficiaries at the ratio of 50%:50%. The Appellants mutually agreed to surrender the said benefits to the minor.
  4. The Appellants averred that through an Agreement dated 9<sup>th</sup> October 2013 between them and the Respondents, it was agreed that the total sum of Kshs. 1,827,571.70 was to be held by the Defendant in a Tausi Fixed Deposit Account (FDR) at the Respondent’s branch in Nyamira on terms and conditions set out under Clause 3 of the said Agreement.
  5. The Appellants further averred that the Respondent breached the terms of the said Agreement. They listed the particulars of breach as follows: -
    - a. The Defendant never opened the TAUSI FIXED DEPOSIT ACCOUNT (NYAMIRA BRANCH) as laid out in the Agreement.
    - b. The Defendant failed to credit the said amount in the TAUSI FIXED DEPOSIT ACCOUNT.
    - c. The Defendant has failed to disclose information relating to the account, including calculations on accrued interest, to the Plaintiffs.
    - d. The Defendant has failed to insure the minor (MAVELINE KEMUNTO PETER) with annual AAR cover as per the Agreement.
    - e. The Defendant has been utilizing the Benefits for its own selfish interests at the expense of the best interests of the minor and the Plaintiffs.
    - f. The Defendant has been withdrawing money from the benefits without the authority of the Plaintiffs.
    - g. The Defendant has been utilizing the benefits in contravention of the terms of the Agreement.
    - h. The Defendant has denied the Plaintiffs access to the benefits subject matter herein and accrued interest.
  6. The Appellants contended that the Respondent fraudulently denied them and the beneficiary of the trust the use, benefit and enjoyment of the benefits and that the Respondent’s said breach and fraud caused them loss of monetary interest on the benefits thus depriving them of the security, use and enjoyment of the said benefits.



7. The Appellants stated that they visited the Respondent's Nyamira Branch sometimes in 2017 where they discovered that there was no TAUSI FDR account in their names in trust for the minor.
8. The Appellants claim that they cannot access the said benefits contrary to the terms of their contract.
9. The Respondents filed a Defence in which they admitted having entered into the contract with the Appellants but vehemently denied the allegations of fraud and breach of contract.
10. The Respondents averred that under Clause 3 (c) and (d) of the said Agreement, the money held in the fixed deposit account was to be rolled over annually together with the accrued interest until the minor attained the age of 25 years and that payment from the account was only permitted for school fees and medical expenses.
11. It was the Respondent's case that in line with Clause 2 of the Agreement, the sum of Kshs. 300,000.00 was deposited in the 2<sup>nd</sup> Appellant's account held with the Respondent at Nyamira Branch.
12. The Respondent averred that the suit was defective, malicious, full of innuendo and an abuse of the court's process.
13. The trial court heard the case in which both sides called one witness and at the end of the trial rendered a judgment in which it dismissed the Appellants' suit for want of proof, to the required standards.
14. The decision by the trial court precipitated the instant appeal in which the Appellants listed the following grounds of appeal: -
  1. The Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's case notwithstanding the evidence on record in support of their case.
  2. The Learned Trial Magistrate erred in law and in fact in failing to consider the issues raised by the Appellant's in the Plaint, cross examination by their advocates and the submissions filed.
  3. The Learned Trial magistrate erred in both law and fact by admitting and relying on the Respondents documentary evidence that was not compliant with set down rules of evidence thereby arriving at a wrong finding.
  4. The Learned Trial Magistrate erred in law and in fact by failing to consider the admissions made by the Respondent in its pleadings and testimony in court thereby arriving at a wrong finding.
  5. The Learned Trial Magistrate erred in law and fact by finding that the suit was a case of misunderstanding/mistrust/lack of communication between parties when in fact there was proof of fraud and breach of contract.
  6. The Learned Trial Magistrate erred in law and fact by failing to find that the failure to disclose to the Appellants information, accounts and records over the fixed account was a breach of the Agreement and the Respondent's duty to the Appellants.
  7. The Learned Trial Magistrate erred in law and fact by failing to find that the Respondent's actions were detrimental and had resulted in loss of benefit, use and enjoyment of the money subject of the agreement.
  8. The Learned Trial Magistrate erred in law and in fact in failing to find fraud on the part of the Respondent despite the overwhelming evidence on record.



9. The Learned Trial Magistrate erred in law and fact by finding that the Respondent had paid premiums and thus the minor is insured and that there was a card picked yet there was no evidence to show that.
10. The Learned Trial Magistrate erred in law and fact by finding that the subject account has Kenya shillings two million six hundred and sixty-four thousand one hundred and four shillings and thirty-four cents. (Kshs. 2,664,104.34) despite there being no evidence to support that finding.
11. The Learned Trial Magistrate erred in law and fact by finding that the Respondent had performed its part yet the pleadings, evidence adduced in court and the admission of the Respondent's witness in her testimony clearly proved breach of the terms of the subject agreement.
12. The Learned Trial Magistrate erred in law and fact by giving the agreement a different interpretation from what the express terms of the agreement provided and thereby arriving at a wrong determination.
13. The Learned Trial Magistrate erred in law and fact by failing to take into account the provisions of all relevant laws of evidence and law of contract.
14. The Learned Trial Magistrate erred in law and fact by delivering a judgment that was not based on evidence.
15. The Learned Trial Magistrate erred in law and fact by failing to grant the prayers made by the Appellants despite there being adequate evidence to warrant grant of the prayers.
15. The Appeal was canvassed by way of written submissions which I have considered.

### **Appellants' Submissions**

16. The Appellants' submissions were anchored on 3 main issues, namely;
  1. Whether there was breach of contract.
  2. Whether the trial court considered evidence that was not properly on record.
  3. Whether the Record of Appeal was incomplete.
17. On breach of contract, the Appellant submitted that Clause 3 of their Agreement had explicit terms which the Respondent breached especially in respect to the opening of the Tausi FDR Account at Nyamira Branch for the benefit of the minor. They noted that the Respondent's admission that the 3 accounts were not only held in Nairobi as opposed to the agreed branch at Nyamira, but were also not Tausi FDR accounts that was agreed upon.
18. The Appellants also faulted the Respondent for failing to inform them of the account details and interest rates.
19. It was further, the Appellants' case that the Respondent did not issue the minor with a medical insurance cover by AAR as was agreed upon and that the invoices that the Respondents tendered in evidence were not sufficient proof of insurance.
20. The Appellants also faulted the trial court for admitting evidence adduced through documents that did not form part of the Respondent's list of documents despite their protests thus contravening the evidentiary threshold test expected in civil matters.



21. On the completeness of the Record of Appeal, the Appellants submitted that the claim that the Record of Appeal was incomplete as for lack of a copy of the decree as required under Section 2 of the *civil Procedure Act* (CPA) was incorrect as Order 42 Rule 3 (4) of the Civil Procedure Rules provides for the requirements on appeal.
22. It was submitted that the said requirements were a judgment, order or decree which means that once the Record of Appeal contains the judgment, it is complete.
23. The Appellants faulted the trial court for finding that their case was based on a misunderstanding when they had proved their claim on breach of contract and fraud.

### **Respondent's Submissions**

24. The Respondent submitted that the requirement that a decree forms part of the Record of Appeal is couched in mandatory terms that cannot be overlooked. For this argument, the Respondent cited the provisions of Section 65 (1) of the *Civil Procedure Act* and Order 42 Rule 3 (4) of the Civil Procedure Rules (CPR) and the decision in *Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* [2014] eKLR cited with approval in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2014] eKLR and the case of *Kenya Commercial Bank Ltd & Another v Pili Victoria* [2020] eKLR where the issue of what forms part of a Record of Appeal was discussed.
25. On breach of contract, the Respondent submitted that the same was not proved to the required standards. It was submitted that the mere fact that the account that the Appellants opened was not named Tausi FDR did not connote that the said account had a different interest rate from the other fixed deposit accounts.
26. The Respondent maintained that it remained steadfast in its fidelity to their oath by calling up the Appellants when their kin died and informing them of the existence of a will before drawing up the subject Agreement in fulfilment of the wishes of the deceased who was their employee.
27. The Respondent argued that it fulfilled the terms of their agreement by rolling over the deposit in the account annually together with interest until the minor attains 25 years a term which could not have been fulfilled if the money was deposited in Tausi FDR. It was submitted that the statement of accounts submitted as Exhibits D Exhibit 3 and 4 clearly showed that the money exists and is being strictly utilized for benefit of the minor. For this argument, the Respondent relied on the decision in *Equity Bank Ltd & Another v Nairobi Robert Chesang* [2016] eKLR where it was held: -

“...The bank is also under a contractual duty to diligently handle accounts of a customer, to ensure that funds-deposited on account are available when required by the customer. Any deviation from that understanding without justifiable reasons which should be communicated to the customer well in advance or immediately, the bank is in breach of a contract with the customer and is liable in damages.” (Emphasis supplied)
28. It was the Respondent's case that it performed its duty in utmost good faith, as required under the law and should not be faulted on account of breach of contract.

### **Analysis and Determination**

29. The duty of the first appellate court is to reconsider and reanalyze the evidence presented before the trial court with a view to arriving at its own independent findings.
30. I have already stated in this judgment that each side presented the evidence of one witness.



31. PW1, Mr. Domician Peter Ariaga, the 1<sup>st</sup> Appellant herein and the minor's grandfather, adopted his statement dated 24<sup>th</sup> October 2019 and testified that his daughter, the deceased herein was, prior to her death, employed by the Defendant at its Bungoma Branch. He stated that the deceased left a will in which she bequeathed her employment benefits amounting to a total of Kshs. 2,127,5171.71 by him and the 2<sup>nd</sup> Appellant to be shared at 50%:50% ratio but that they surrendered the said benefits to the minor for her upkeep and education.
32. According to PW1, they signed an Agreement with the Respondent wherein it was agreed that a Tausi Account was to be opened at the Respondent's Nyamira Branch for the minor's benefit in which a total sum of Kshs. 1,827,571.70 was to be deposited which sum was also to be utilized to pay for the minor's medical insurance cover with AAR. The amount was to be held by the Appellants in trust for the minor.
33. He testified that he later realized that the Respondent had breached the terms of their Agreement and had not performed any of the obligations under the contract and had further declined to supply him with the details of the account that they had opened for the minor. He added that the minor had not been issued with a medical insurance cover as had been agreed.
34. The 1<sup>st</sup> Appellant stated that sometime in 2017, he visited the Respondent's Nyamira Branch to enquire about the subject account and was surprised to learn that no account existed in their names. He was referred to the Respondent's Nairobi office where he was informed that the only account in place was in the name of the deceased and that he could not access the said account. He stated that the Respondent did not furnish him with any formal communication concerning the account and that all his attempts to get information turned futile.
35. The 1<sup>st</sup> Appellant stated that he was not sure if the account was opened by the Respondent as promised as they had not received any payments from the account for the minor's upkeep and education. He also noted that he had not been issued with the minor's medical insurance card as had been agreed. He later learnt that the deceased's account had been transferred to Nairobi West contrary to the terms of their agreement.
36. On cross examination, he testified that he was never shown the deceased's alleged will.
37. On re-examination, he confirmed that he had been shown the minor's account statement which had a deposit of Kshs. 2,265,555.05.
38. DW1, Ms. Caroline Wanjiku Mwangi, the Respondent's HR Manager, adopted her witness statement dated 16<sup>th</sup> December 2019 as her evidence in chief. She confirmed that the Respondent entered into an agreement with the Appellants on 9<sup>th</sup> October 2013 in which it was agreed that the Respondent would open a Tausi Account. She stated that the Tausi Account was opened for the minor in the Appellants' names and that money was deposited in the said account. She further stated that the minor was placed on AAR medical insurance cover and that the 1<sup>st</sup> Appellant signed for the card on 21<sup>st</sup> January 2013. She further stated that the Respondent was to provide money for school fees on presentation of invoices but that no such invoices were presented.
39. She explained that the Respondent opened a fixed deposit account and a transaction account for the fixed deposit account. She further stated that withdrawals were to be made from the transaction account for tax and medical cover but that money in the fixed deposit account could not be withdrawn until the lapse of the period fixed. She denied the claim that the Respondent had breached the terms of the contract and maintained that the fixed deposit account is in place and is accruing interest. She explained that the account was opened in Nyamira but was moved to Nairobi for security purposes.



40. On cross examination, she conceded that it was agreed that a Tausi Fixed Deposit Account was to be opened but they opened a Fixed Deposit Account that was not Tausi. She stated that she did not have statements for the fixed account but that some transactions in the transactional account show that there is money in the Fixed Deposit Account.
41. DW1 testified that the fixed account in Nairobi West had Kshs. 2,634,420.20 as at 20<sup>th</sup> May 2022 and that there are 3 accounts being Inuka Transactional Account, Deceased's Staff Account and Riziki Fixed Deposit Account. She conceded that there was no communication to show what the Respondent explained to the Plaintiff but that a status update was sent to the Appellants through the Nyamira office.
42. On re-examination, she conceded that the account statements are not certified and that she is not the one who printed them. She stated that she works in the Human Resource Department and does not deal with opening of bank accounts. She maintained that the accounts can only be accessed from Nairobi.

### **Analysis and Determination**

43. I have carefully considered the Record of Appeal and the parties' respective written submissions. I find that the main issue for determination is whether the Respondent breached the terms of its Agreement with the Appellants. The court will also consider the issues of whether the Record of Appeal is complete and whether the trial court considered evidence that was not properly on record.

### **Breach of Contract**

44. The gist of the Appellants' case was that the Respondent breached the terms of their agreement dated 9<sup>th</sup> October 2013 by not only failing to open a Tausi Fixed Deposit Account at their Nyamira Branch for the minor as agreed but also failing to provide the minor with medical insurance cover. The Appellants also faulted the Respondent for failing to inform the Appellants of the account details, statements and interest rates.
45. It was not disputed that the parties herein entered into an agreement on 9<sup>th</sup> October 2013 in which the Appellants agreed to surrender the benefits due to them being Kshs. 1,827,571.70 from the deceased to their grand-daughter (minor).
46. It was agreed that the Respondent was to open a Tausi Fixed Deposit Account for the minor at their Nyamira Branch and that the Appellants were to be the trustees and joint signatories to the account until the minor attains the age of 25 years.
47. It was further agreed that payments from the account, would be allowed for the minor's school and medical expenses. The Appellants also authorized the Respondent to insure the minor with AAR annually and to recover the premiums from the fixed deposit account.
48. I have perused clause 3 of the subject Agreement and I note that parties agreed as follows: -
  3. The total amount surrendered by the Trustees to Maveline Kemunto Peter, the minor, as per clause one (1) above is Kenya Shillings One Million Eight Hundred and Twenty-Seven Thousand Five Hundred and Seventy-One and Seventy Cents (Kshs. 1,827,571.70) shall be held in trust, on behalf of the minor, by the Trustees Domiciano Peter Ariaga and Josephine Nyabonyi Peter under the following terms and conditions: -
    - a. A Tausi Fixed Deposit account shall be opened, at KWFT's Nyamira branch with the Trustees being joint signatories until the minor reaches the age of 25 years;



- b. The amount surrendered to the minor in the sum of Kenya Shillings One Million Eight Hundred and Twenty Seven Thousand Five Hundred and Seventy One and Seventy Cents (Kshs. 1,827,571.70) shall be credited into the account set out in clause 3 (a) above;
- c. The sum mentioned in clause 3 (b) above and/or any other amount that shall remain outstanding in the account from time to time shall be held as a Fixed Deposit and shall be rolled over annually together with any accrued interest until the minor reaches the age of 25 years.
- d. Payment from the account shall only be permitted for school fees and medical expenses of the minor upon presentation by the Trustees of the school fees invoice and medical bills and payment thereof shall only be made to the ultimate beneficiary.
- e. The Trustees hereby authorize KWFT to insure the minor with AAR annually and recover the premiums paid for the aforementioned insurance cover from the Fixed Deposit account.

49. I note that clause 3 (a) was very specific on the type of account that the Appellants desired to have, the amount to be deposited in the said account and the branch in which the account was to be domiciled.

50. It however came out clearly in evidence that not only did the Respondent open a Fixed Deposit Account that was not Tausi Fixed Deposit Account, but its witness also testified that the account they opened was at their Nairobi West Branch. DW1 testified as follows on this issue: -

“We opened a fixed deposit account. It is not Tausi.....

Exhibit 5 shows that the account has Kshs. 2,634,420.20. it is in Nairobi West. It shows 3 accounts being Inuka Transactional Account, Deceased Staff Account and Riziki Fixed Deposit Account. There is no written communication to show what we explained to the Plaintiff.”

51. My finding is that the admission, by the Respondent’s witness, that the Respondent did not open a Tausi Fixed Deposit Account in their Nyamira Branch, as stated in their Agreement, was a fundamental breach of the clear terms of the Agreement.

52. This court takes judicial notice of the fact that in the banking industry, different categories of account offer different benefits in terms of the interests to be earned from the account. In this case, it is clear that the Respondent intentionally and without informing the Appellants changed the fixed deposit account from Tausi to a different account and further, changed the branch from Nyamira to Nairobi. My finding is that the Appellants’ apprehension that the Respondent was up to no good in its dealings with them is not without justification.

53. I have perused the Respondent’s list of documents presented before the trial court and I find that at no time did the Respondent inform the Appellants in the changes on the type of account or the branch and provide a plausible reason for such changes. My finding is that the Respondent did not deal with the Appellants in a transparent manner despite the fact they were the trustees to the said fixed deposit account. I also note that the Respondent did not tender a comprehensive response to the Appellants’ demand letter dated 16<sup>th</sup> July 2019 thereby resulting in filing of the suit before the trial court in October 2019.

54. The Agreement between the parties also provided that the Respondent would take out medical insurance cover for the minor. I however note that besides the invoices from the alleged insurer,



the Respondent did not tender proof of payment of premiums to the said insurer. I find that the Respondent breached the term of the Agreement in respect to the medical cover for the minor.

55. In conclusion, I find that the Appellants proved their claim under breach of contract to the required standards.

### **Reliance on Evidence not properly on Record**

56. The Appellants faulted the trial court for relying on a document that did not form part of the documents that the Respondent listed in its list of documents. It was the Appellants' case that the trial court relied on computer generated documents that were not certified despite their protests. DW1 testified as follows concerning the said documents: -

“The statements are not certified. I am not the one who printed the documents. I work in HR so I do not open bank accounts on behalf of clients.”

57. My finding is that the trial court erred in admitting documents whose authenticity was in doubt into evidence. It is noteworthy that the bank statements produced by the Respondents were not certified to confirm their authenticity. DW1 also conceded that she did not print the said documents which then puts the origin of the said documents into doubt.

### **Lack of Decree**

58. The Respondent submitted that the Record of Appeal was incomplete for lack of a decree. According to the Respondent, a decree forms an integral part of the record of appeal. They argued that the failure to include the decree appealed from rendered the entire record defective. The Appellants, on the other hand argued that the mere absence of a decree could not affect the appeal as the judgment appealed from formed part of the record.

59. The place of a decree in the context of its centrality to the Record of Appeal has been the subject of many court decisions. In Emmanuel Ngade Nyoka vs. Kitheka Mutisya Ngata [2017] eKLR, the Court of Appeal considered the issue omission of a decree from the record of appeal and stated thus:-

“Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 rule 2 of the Civil Procedure Rules which provides inter alia:-

“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed.

However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

“The word “Decree” has been defined by the *Civil Procedure Act*, Cap 21 to include judgment. In fact, the *Civil Procedure Act* has provided at section 2 that



the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.

This is the essence of the proviso to the definition of the term “decree.”

According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

60. In *Twaher Abdulkarim Mohamed vs Mwathethe Adamson Kadenge & 2 others* [2015] eKLR (Election Petition Appeal 1 of 2014) it was held that:-

“...an appeal should not be struck out simply because the certified copy of the decree has not been included in the Record of Appeal. It is always contended that an appeal emanates from the decree and not judgment. The wording of Rule 34 rule (6) (e) is to the effect that a certified copy of the judgment appealed from has to be included in the Record of Appeal. In simple terms, under Rule (34), the appeal emanates from the judgment. Without a judgment, there cannot be a decree. What is normally attacked in the appeal is the trial court’s findings including the evaluation of the evidence and legal findings. Several grounds have been raised in this appeal relating to the law on scrutiny and the general election law among other issues. These cannot be found in a decree but can only be traced from the judgment. The obsession with a decree seems to blind us from seeing the overriding objective of the dispute. Once the record is, struck out, one can still come back to file another appeal. Striking out of Records of Appeal due to lack of decrees only makes litigation expensive for Kenyans.”

61. Guided by the decisions in the above cited cases, I find that the mere fact that the decree was not attached to the Record of Appeal was not fatal to the Appeal as the Respondent did not claim that it was prejudiced in any way as a result of the absence of the decree. Furthermore, this court was able to peruse a copy of the judgment that was the subject of the appeal

### **Damages for Breach of Contract**

62. The Appellants claimed general damages for breach of contract thus raising the question whether such damages are payable to them. As a general rule general damages are not recoverable in cases of alleged breach of contract. (See Court of Appeal decision in *Kenya Tourism Development Corporation vs Sundowner Lodge Ltd* 2018 eKLR.)
63. In the case of *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* (2015) eKLR explained as follows:-
64. “The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss,



the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (See *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000* [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (See *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (See *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

65. Anson’s Law of Contract, 28<sup>th</sup> Edition at pg. 589 and 590 explains that a claimant who suffers loss as a result of breach of contract is entitled to nominal damages as follows:-

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

66. The Halsbury’s Laws of England, Third Edition Vol. II, defines nominal damages as follows:

“388. Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant’s wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus, in actions for breach of contract nominal damages are recoverable although no actual damage can be proved”.

67. Having found that the Respondent breached the terms of the Agreement it entered with the Appellants, I find that the Appellants proved their case against the Respondent on a balance of probabilities and are, in the circumstances of this case, entitled to nominal damages for such breach. I award the Appellants nominal damages of Kshs. 100,000 for breach of contract.

68. In conclusion, I allow the appeal, set aside the judgment of the trial court and in its place enter judgment for the Appellants as follows: -

1. A declaration is hereby issued that the Respondent breached the terms of agreement dated 9<sup>th</sup> October 2013 between the Appellants and itself.
2. An order is hereby issued compelling the Respondent to pay back to the Appellants the sum of Kenya Shillings One Million, Eight Hundred and Twenty-Seven Thousand, Five Hundred and Seventy-One Shillings and Seventy Cents (Kshs. 1,827,571.70).
3. An order is hereby issued compelling the Respondent to pay the Appellants the total amount of interest, calculated at the prevailing Central Bank of Kenya Rates, that would have accrued had the sum of Kshs. 1,827,571.70 been deposited in a TAUSI Fixed Deposit Account from



the date of the agreement (being 9<sup>th</sup> October 2013) , and rolled over every subsequent year thereof, until settlement of the decretal sum.

4. The Appellants shall, within 30 days from the date of this Judgment open a fixed deposit account with another banking institution of repute, for the benefit of the minor, to which the amount of money to be paid by the Defendant shall be remitted.
5. I award the Appellants nominal damages of Kshs. 100,000.
6. Mention on 18th April 2024 to confirm compliance with orders in 2, 3, and 4 hereinabove
7. I award the costs of the Appeal and the lower court suit to the Appellants.
8. Interest on orders in 2, 3, 5 and 7 hereinabove at court rates until full payment of the decretal sum.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**W. A. OKWANY**

**JUDGE**

