



**Co-operative Bank of Kenya Limited v Amasi (Suing as the  
Administratrix of the Estate of Dorcas Amasi Mwima) (Civil Appeal  
E205 of 2023) [2024] KEHC 12691 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E205 OF 2023  
RE ABURILI, J  
OCTOBER 17, 2024**

**BETWEEN**

**THE CO-OPERATIVE BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**SUSAN RIZIKI AMASI ..... RESPONDENT**

**SUING AS THE ADMINISTRATRIX OF THE ESTATE OF DORCAS AMASI  
MWIMA**

*(An appeal arising out of the Judgment of the Honourable E.A. Obina in the Chief Magistrate's  
Court at Kisumu delivered on the 7th November 2023 in Kisumu CMCC No. E081 of 2023)*

**JUDGMENT**

1. The respondent sued the appellant vide a plaint dated 10<sup>th</sup> March 2023 seeking the following orders against the appellant:
  - a. A declaration that the defendant's actions were illegal null and void.
  - b. A permanent injunction restraining the defendant from taking away motor vehicle registration number KCX 228Z
  - c. An order of release of the motor vehicle to the plaintiff
  - d. General damages for the illegal attachment and loss of user from the date of attachment.
  - e. An order for the value of the motor vehicle.
  - f. Costs of the suit and interest.



2. It was the respondent's case that her deceased mother had a banking facility arrangement with the appellant which was run and managed well until her mother died which information was communicated to the appellant and that subsequently without any notice or justifiable cause, the appellant illegally impounded and repossessed motor vehicle registration number KCX 228X.
3. In response to the claim by the respondent, the appellant filed a statement of defence dated 27<sup>th</sup> March 2023 denying each and every allegation of the plaint. The appellant admitted that the respondent's mother had a facility with the bank in form of a security agreement in respect of the suit motor vehicle to secure the hire purchase facility of Kshs. 4,734,000.
4. The appellant contended that the security agreement was binding to the deceased's personal representatives and assigns as well as the deceased's successors and assigns and that by virtue of Clause 6 (i) of the asset finance hire purchase agreement, the appellant was entitled to repossess the suit motor vehicle without notice upon the deceased's death.
5. In his judgement, the trial magistrate held that the appellant's action of impounding and repossessing the suit motor vehicle without following due process was illegal, null and void; that compliance with the prerequisites with regard to service of notice was mandatory and that non-compliance with the prerequisites rendered the entire process undertaken to realize the security invalid. The trial court further held that the deceased's right to property did not evaporate or become extinct upon her death, as it devolved to her personal representatives.
6. The trial magistrate thus found in favour of the respondent declaring that the appellant's act of repossessing and attaching the deceased's motor vehicle was illegal and unjustified and that no interest and penalties could accrue from said repossession; that the suit vehicle be released to the respondent unconditionally; that the respondent was entitled to Kshs. 545,062.25 being the payment for the 5 months after the suit vehicle was seized and equal to the monthly payment to the deceased prior to her death. The respondent was also precluded from paying installments that fell due after her mother's demise and the period when the suit vehicle was impounded and released back to the respondent. The trial magistrate further awarded the plaintiff Kshs. 300,000 general damages for the wrongful and illegal attachment and loss of user of the suit motor vehicle.
7. Aggrieved by the said decision, the appellant filed this appeal vide memorandum of appeal dated 4<sup>th</sup> December 2023 raising the following grounds of appeal:
  1. That the learned trial magistrate erred in law and fact in awarding Kshs. 545,062.45 being general damages for wrongful and illegal attachment. There was no basis or evidence to justify the award of the said amount to the Respondent. It was not pleaded as one of the reliefs in the Plaint as required by law. The court decision has thus occasioned great miscarriage of justice.
  2. That the learned trial magistrate gravely erred in law and fact in awarding general damages in a breach of contract case.
  3. That the learned trial magistrate erred in law and in fact in failing to observe that the Respondent did not prove the special damages and had not particularized the same to the required legal threshold as strictly required by the law. Particularly, the court failed to observe that the Respondent neither provided evidence nor particularly pleaded and proved the loss of user to the tune of Kshs. 300,000 as required by the law being a special damage claim. This



led to the court arriving at an erroneous decision which has occasioned great miscarriage of justice.

4. That the learned trial magistrate erred in law and in fact in awarding the Plaintiff prayers that had not been sought in the pleadings.
5. That the learned trial magistrate erred in law and fact in finding that the Appellant was liable to pay the Respondent Kshs. 545,062.45 being a refund yet the Plaintiff did not pray for the refund in her pleadings. There was no basis for the order to refund the sum of Kshs. 545,062.45 to the Plaintiff.
6. That the learned trial magistrate erred in law and fact in delivering a judgment that was internally contradictory since on one hand, the court enters judgment in favour of the Respondent as against the Appellant and awards the Respondent damages whereas on the other hand, the court orders the Respondent to continue making the instalment payments to the Appellant for the motor vehicle.
7. That the learned trial magistrate erred in law and fact in failing to apply the legal principles as relates to special damages.
8. That the learned trial magistrate erred in law and in fact in failing to appreciate and consider the pleadings and the evidence adduced in support thereof.
9. That the learned trial magistrate erred in law and fact in failing to attach due weight to appellant's evidence and submissions and authorities attached thereto.
10. That the learned trial magistrate's award lacked legal and factual basis and also amounted to an erroneous award of damages due in the particular case.
11. That the learned trial magistrate misdirected himself and based his findings on wrong considerations.

8. The parties agreed to file submissions to canvass the appeal but only the appellant filed its submissions.

### **The Appellant's Submissions**

9. The appellant submitted that general damages are not awardable for breach of contract or breach of contractual obligations and that a contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, not general damages as was held in the case of *Dharamshi V Karsan* [1974] EA 41, where it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication; and in *Securicor Courier (K) Ltd V Benson David Onyango & Another* [2008] eKLR, where the Court of Appeal reiterated that general damages are not awardable for breach of contract.
10. The appellant's counsel submitted that the Appellant neither owed the respondent a duty of care nor was such duty, if any, breached to warrant the award of general damages. Reliance was placed on the case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR where the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract and that damages for breach of contract are compensation to the aggrieved party and



a restitution of what he has lost by the breach. The appellant also relied on the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR.

11. The appellant further submitted that the award on loss of user was not justified. It was submitted that loss of user is a special damage that must be specifically pleaded and proved and that the plaintiff did not adduce any evidence in support of the claim of loss of user and therefore the court cannot pluck a figure from the air as was observed in Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa [2018] eKLR where the court quoted with approval the Court of Appeal decision in Richard Okuku Oloo v South Nyanza Sugar Co. Ltd. The appellant further relied on the case of Kenya Women Microfinance Ltd v Martha Wangari Kamau [2021] eKLR.
12. It was submitted that the trial court's judgement was internally contradictory as the court awarded the Plaintiff prayers that had not been sought in the pleadings, specifically that the trial court awarded general damages which were neither pleaded as one of the reliefs in the Plaint nor proved by the Plaintiff. Reliance was placed on the case of Karin Anne Challis Vs The Hon. Attorney-General And 6 Others [2002] eKLR where it was held inter alia that:

“Indeed where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs.”
13. The appellant further submitted that the judgment is internally contradictory since on the one hand, the court entered judgment in favour of the Plaintiff as against the Defendant and orders the Defendant to refund the Plaintiff Kshs. 545,062.45 whereas on the other hand, the court directed the Plaintiff to continue making payments for the suit motor vehicle. Further it was submitted that there was no basis for the order against the appellant to refund the sum of Kshs. 545,062.45 to the Plaintiff/respondent herein.
14. The appellant urged this Court to allow this appeal, set aside the judgment of the lower court with costs of the subordinate court and of this Appeal.

### **Analysis and Determination**

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. Thus, the duty of this Court is to determine whether the respondent proved her case on a balance of probabilities as against the appellant to warrant grant of the orders sought. A brief history of the dispute between the parties suffices.
17. The evidence on record is clear that on the 4<sup>th</sup> December 2019, the deceased applied for a hire purchase finance facility of Kshs. 4,734,000 from the appellant which application was approved on the 13.01.2020 and one of the terms of the Agreement was that the finance facility would be paid in 59 equal monthly installments.



18. The record further reveals that the hire purchase facility was utilized to purchase a motor vehicle registration number KCX 228Z Isuzu FRR33 that was jointly registered in the names of the deceased and the appellant.
19. Additionally, it is evident that on the 28<sup>th</sup> January 2020, the deceased and the appellant executed a security agreement in respect of the said motor vehicle to secure the hire purchase finance facility of Kshs. 4,734,000 and under clause 3 (xii) of the said agreement, the appellant was at liberty to take possession and sell or dispose of the suit motor vehicle without notice upon default in the payment of the outstanding hire purchase facility.
20. The record further reveals that on the 10<sup>th</sup> February 2020, the deceased and the appellant executed an asset finance hire purchase agreement in the sum of Kshs. 4,734,000 and the agreement was subsequently registered. At clause 6(i) of the hire purchase agreement, the appellant was entitled to repossess the suit motor vehicle without notice upon the deceased's death.
21. It was also undeniable that on or about the 8<sup>th</sup> December 2022, the deceased's spouse, one Samson Atingo informed the appellant of the deceased's demise and also of the fact that the deceased's brother intermeddled with the deceased's estate by taking away the suit vehicle and that subsequently, the deceased's estate fell into arrears of servicing the hire purchase facility.
22. During the hearing, the respondent testified by adopting her witness statement that was annexed to the plaint dated 10<sup>th</sup> March 2023. She admitted that the deceased had a facility with the appellant who impounded the suit vehicle after her mother's demise, sometime in late February early March 2023.
23. In cross-examination, the respondent reiterated that she was aware of the agreements that the deceased had with the appellant; that she informed the appellant of the deceased's demise and that the deceased was in arrears. In re-examination, the respondent testified that she had a copy of the log book of the suit vehicle that was registered in the name of the appellant.
24. The appellant on its part called one witness Atieno Joseph Johnstone who adopted his witness statement dated 27.7.2023. He further produced the list and bundle of documents dated 27.3.2023 as DEx 1 – 8. Mr. Johnstone testified that the appellant repossessed the suit vehicle since the deceased's estate had fallen into arrears and that as at 14<sup>th</sup> March 2023, the estate had fallen into arrears of Kshs. 2,480,278.22. He further testified that the respondent had no intention of making payments as they had come to the bank, lined up to make some payment but did not pay.
25. In cross-examination, Mr. Johnstone admitted that the appellant was notified of the deceased's demise on the same date she died and that prior to her death, she had been making payments. It was his testimony that the appellant issued the repossession order on the 3.1.2023 and that the amount due was Kshs. 105,614.98 which was lower than the monthly instalment of Kshs. 112,000. He testified that there was no notice issued to the respondent as there was no need for a notice.
26. In re-examination, Mr. Johnstone testified that as per Clause 6 (i) of the Agreement, upon death, there was no need for a notice. He further testified that Samson, the deceased's spouse stated that the vehicle in question had been taken over by strangers.
27. Taking all the above into consideration, the question that this court must answer is whether the respondent warranted the orders sought in the plaint dated 10<sup>th</sup> March 2023.
28. The suit before the trial court was civil in nature. Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya placed the incidence of burden of proof on the party which desired the court



to find in its favour. In the instant case, that burden was on the Respondent and in the discharge of that burden, the Respondent was called upon to prove her case on a balance of probability.

29. Firstly, it is trite that the courts ought not to interfere in contractual disputes as was held by the Court of Appeal in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR that:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

30. However, the same Court of Appeal appreciated in the case of *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft ('Deg') & others* [2011] eKLR that there are certain situations where the Court may interfere with a bargain between parties. The majority Judges, through the judgement of Tunoi, JA (as he then was), clearly expressed the current legal position by stating that:

“The equitable rule is that if the borrower is in a situation in which he is not a free agent and is not capable of protecting himself, a Court of Equity will protect him, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so. In *Vanzant V Coates*. [1969] 14 D.L.O.R. 256 it was held that the transaction would, in the foregoing circumstances be rescinded.

The traditional view that “if people with their eyes open willfully and knowingly enter into unconscionable bargains, the law has not right to protect them”- as held in *Fry V Lane* 1888 40 Ch. D 312 – has long been altered. Also, I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of “overriding objective” which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it.

The position in England in cases involving inequality of bargaining power was succinctly stated by Lord Denning M.R. in *LLoyds Bank Ltd Vs Bundy* [1975] Q.b. 326 And *Schroeder Music Publishing Co Vs Macanlay* [1974] 1 W.L.R. 1308, when he said that by virtue of it, the English law gives relief to one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”

31. The Court of Appeal in the earlier case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, must therefore be tempered with by the current thinking that a sense of fairness should be infused into transactions between private persons, such that the strong party in a contractual relationship should not be allowed to steamroll over the weaker party. Is this the case herein? Was the deceased steamrolled into entering into the hire purchase finance facility on the 4<sup>th</sup> December 2019 and the subsequent security agreement dated 28<sup>th</sup> January 2020 as well as the Asset Financing Agreement? I do not think so. No evidence was presented before the trial court to prove that the deceased was steamrolled, noting that she faithfully paid up the monthly instalments until her demise. In the circumstances, I am persuaded that the Agreements aforementioned were valid as between the appellant and the deceased and that both parties to those agreements were bound by the terms therein.



32. Having determined as such, it is also evident that by virtue of Clause 3 (xii) of the said agreement, the appellant was at liberty to take possession and sell or dispose of the suit motor vehicle without notice upon default in payment of the outstanding hire purchase facility and similarly, under clause 6 (i) of the hire purchase agreement, the appellant was entitled to repossess the suit motor vehicle without notice upon the deceased's death.
33. This type of litigation is not new in the commonwealth and in Kenya. In the Supreme Court of India case of *M/S Magma Fincorp Ltd. (Formerly Magma vs Rajesh Kumar Tiwari* on 1 October, 2020 Equivalent citations: Air 2020 Supreme Court 4978, Aironline 2020 SC 770 where a similar situation arose, the Court held as follows:

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“87. The question raised by the Financier in this appeal, that is, whether the Financier is the real owner of the vehicle, which is the subject of a Hire Purchase Agreement, has to be answered in the affirmative in view of the law enunciated by this Court in *Haranjit Singh Chadha (supra)*, *K.L. Johar & Co. (supra)* and *Anup Sarmah (supra)*. The Financier being the owner of the vehicle which is the subject of a Hire Purchase Agreement, there can be no impediment to the Financier taking possession of the vehicle when the hirer does not make payment of instalments/hire charges in terms of the Hire Purchase Agreement. However, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation. Nor can such possession be taken by engaging gangsters, goons and musclemen as so-called Recovery Agents.

88. Whether the service of proper notice on the hirer would be necessary for repossession of a vehicle, which is the subject matter of a Hire Purchase Agreement, would depend on the terms and conditions of the Hire Purchase Agreement, some of which may stand modified by the course of conduct of the parties. If the hire purchase agreement provides for notice on the hirer before repossession, such notice would be mandatory. Notice may also be necessary, if a requirement to give notice is implicit in the agreement from the course of conduct of the parties.

89. If the hirer commits breaches of the conditions of a hire purchase agreement which expressly provides for immediate repossession of a vehicle without further notice to the hirer, in case of default in payment of hire charges and/or hire instalments repossession would not be vitiated for want of notice. In this case, however a duty to give notice to the Complainant before repossession, was implicit in the Hire Purchase Agreement. The Hire Purchase Agreement was a stereotype agreement in a standard form, prepared by the Financier. The same kind of agreements, containing, identical terms, except for minor modifications are executed by all hirers of vehicles, equipment, machinery and other goods, who enter into hire purchase agreements with the Financier. The Financier who set down the terms and conditions of the hire purchase, construed the hire purchase agreement to contain an implied term for service of notice and accordingly dispatched a notice, but did not address it to the correct address of the Complainant as given in the hire purchase agreement.



90. In a case where the requirement to serve notice before repossession is implicit in the hire purchase agreement, non-service of proper notice would tantamount to deficiency of service for breach of the hire purchase agreement giving rise to a claim in damages.

The Complainant consumer would be entitled to compensatory damages, based on an assessment of the loss caused to the complainant by reason of the omission to give notice. Where there is no evidence of any loss to the hirer by reason of omission to give notice, nominal damages may be awarded.” [emphasis added]

34. In *Athman Mustafa Mohammed v Ecobank Kenya Limited & 2 others* [2015] eKLR, the court held that repossession of a motor vehicle without notice was legal as the only interest which the defendant had in the vehicle was that it was the security for the financial facility which the bank gave to plaintiff. Provided the plaintiff was paying the monthly instalments, and doing so within time, the defendant would have had no reason to take possession of the vehicle unless the plaintiff violated any other term of the agreement between them. It is the defendant who had taken steps to dispose of the vehicle. They had done so, according to the plaintiff, without first giving him Notice or any Demand Letter.
35. The court further stated that even assuming that Notice was not issued by the defendant to the plaintiff, that would not, on a prima facie basis, have rendered unlawful or irregular the proposed sale. Since the Chattels Mortgage expressly stipulated that the power to take possession of the vehicle and to dispose of it accrued immediately to the defendant, when there was a default; and that it accrued without any previous or further notice or concurrence on the part of the grantor.
36. In *Joseph Chege Gitau v CFC Bank Limited* [2008] eKLR it was held that from the pleadings and the evidence adduced before the trial court, it was not disputed that the appellant defaulted in the repayment of the hire instalments for the motor vehicle. The appellant blamed the respondent for repossessing the motor vehicle without taking into account that the appellant was unable to pay the rental instalments because the motor vehicle had mechanical problems and the appellant could not therefore generate any income. The court noted that the fact that the motor vehicle had mechanical problems did not absolve the appellant from his obligation to make the monthly payments, nor did it deny the respondent its right to repossess the motor vehicle. Further, that it was evident that the agreement provided the respondent the right to repossess the motor vehicle as long as there was default in payment of the monthly instalments.
37. from the above judgments, it is evident that the court is willing to enforce consumer rights in hire purchase agreements and protect consumers from unfair trade practices as long as there is proof of violation when consumers have fulfilled their obligations to the agreements.
38. As stated above, it is undeniable that following the deceased’s demise, the repayment went into arrears and that the respondent even testified that the deceased’s brother had taken possession of the suit vehicle.
39. In the cited Indian Supreme Court decision above, the Court further observed that:

“ 92. In the instant case, there is no evidence of any loss suffered by the complainant by reason of non-receipt of notice. Admittedly, several instalments, remained unpaid. After repossession the complainant contacted the Financier and was informed of the reasons for the repossession. He only made an offer to pay outstanding instalments and gave an assurance to pay future instalments in time. If the Financier was not agreeable to accept the offer, the Financier was within its rights under the hire purchase agreement. This is not a case where



payment had been tendered by the hirer but not accepted by the Financier/ lender. The Complainant had not tendered payment.

40. In this case, there is no evidence of loss and or that the respondent offered to settle the outstanding arrears but the appellant rejected. Consequently, I find that the respondent failed to prove that the appellant's actions in repossessing the suit vehicle were illegal, null and void and therefore it is my finding that the respondent was thus not entitled to an order for release of the suit vehicle or an award for loss of user.
41. This leads this Court to the question as to whether the respondent was entitled to the order for an award of general damages for alleged illegal attachment. This court having found that the repossession of the suit vehicle was in accordance with the contract entered into between the deceased and the appellant. On the issue of remedies for breach of contract, in the case of *James Maranya v South Nyanza Sugar Co. Ltd* [2017] eKLR, the High Court at Migori stated as follows and I agree that:

16. .... It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of *Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR)* emphatically expressed itself thus:  
.....As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....

17. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* (2015) eKLR as follows:

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).”

42. The remedy arising from breach of contract is therefore in the nature of special damages. It is settled that a claim for special damages must be specifically pleaded and strictly proved. (See the Court of Appeal in *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).

43. The Court in John Richard Okuku v South Nyanza Sugar Co. Ltd (2013) eKLR had the following to say on pleadings in sugar disputes:

“In the case before the trial magistrate the appellant, as plaintiff, pleaded in the plaint acreage of the parcel of; and which was 0.2 hectare (paragraph 3 of plaint), average cane proceeds per acre was given as 135 tonnes and the price per ton was pleaded as Kshs. 1553/=. The trial magistrate was not persuaded by this pleading but dismissed the suit after holding that there was no breach of contract.

The learned judge in first appeal found that there was a valid contract between the appellant and the respondent and that the respondent had breached the same. The learned judge faulted the trial magistrate holding that the appellant had not specifically pleaded the claim nor proved it.

We have shown that the pleading on special damages suffered by the appellant was clear and sufficient enough and the learned judge was clearly in error to dismiss the appeal on the ground that the appellant had not specifically pleaded for the same to the required standard nor offered sufficient proof.

Having found that the learned judge erred in his findings this appeal has merit and is accordingly allowed. The orders of the High Court and those of the subordinate court are hereby set aside and we substitute thereof an order entering judgment for the appellant/ plaintiff as prayed at prayer (a) in the plaint. We also award interest from the date of filing suit.

44. In this case, the Respondent prayed for damages for illegal attachment and loss of user from the date of attachment as well as an order for the value of the motor vehicle. In my view, these damages were not specifically proven by the respondent and could not be granted.
45. The upshot of the above is that I find that the trial court erred entirely in its judgement dated 7<sup>th</sup> November 2023. I find this appeal merited. It is hereby allowed on all fours. I set aside the judgment of the lower court and substitute it with an order dismissing the respondent’s case before the trial court against the appellant, with costs to be assessed in the lower court. Costs of this appeal assessed at Kshs 50,000 shall be paid by respondent to the appellant within 60 days of this date and in default, the appellant shall be at liberty to execute for recovery.
46. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024**

**R.E. ABURILI**

**JUDGE**

