



**Sahel Carriers Limited v A.O. Bayusuf & Sons Limited (Civil Appeal E066 of 2022) [2023] KEHC 17438 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E066 OF 2022  
DKN MAGARE, J  
MAY 15, 2023**

**BETWEEN**

**SAHEL CARRIERS LIMITED ..... APPELLANT**

**AND**

**A.O. BAYUSUF & SONS LIMITED ..... RESPONDENT**

*(Being a partial appeal of the Judgment of Hon. E. Muchoki delivered on the 4th April, 2022 in Mombasa Civil suit NO. 321 of 2018)*

**JUDGMENT**

1. This is an appeal from the Judgment of the Honourable E. Muchoki given on 4/4/2022 in Mombasa CMCC 321 of 2018. The Appeal is on loss of user of Ksh. 5,200,000 from 4/11/2015 to 23/2/18, for Assessor's report, towing fees and private investigations.

**Duty of the court**

2. The duty of the 1<sup>st</sup> Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

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

3. The Court is to bear in now that if need her seen the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The



observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

4. In *Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd* (2017)eKLR , the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

“Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

### **Pleadings**

5. The appellant pleaded that an accident did occur on 2/11/2018 involving its motor vehicle registration No. KAV 568D and the defendants motor vehicle registration No. KBD 148F/ M Benz.
6. The plaintiff pleaded various special damages and loss of user from 4/11/15 to today (which turned out to be 21/2/18). The Respondent filed its defence on 12/3/2018 denied occurrence of an accident on 2/11/2017. They however blamed the accident on the appellant.

### **Evidence**

7. On 8/10/2020 PC Julius Kiprono from Mukaaa gave evidence. Further evidence was given by Albert Ngure Mwasanu and Ann George Henry Muta. He stated that the motor vehicle was written off and salvage value was Ksh. 400,000/=. Ann Presesh Pereni testified as a tax consultant. The Defence case was closed without evidence being tendered. The court in its Judgment found the Respondent 100% liable.
8. The court relied on the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR to posit that without defence evidence, the allegations in the defence were just that, in which the court stated as doth: -

“The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant’s defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was uncontroverted and therefore unchallenged. In *Autar Singh Bahra And Another v Raju Govindji Hccc No. 548 of 1998(UR) Mbaluto J.* held:

“Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1<sup>st</sup> Plaintiff in support of the Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

I am persuaded that the cited case is a good law and I am guided by it. Following the said case, I do find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants defences were unsubstantiated and further the Plaintiff’s evidence against them unchallenged.”



9. The court awarded a sum of Ksh. 1,085,064 and dismissed the other claims as they were not pleaded with particularity. The appeal is in respect of 4 of the dismissal special damages, that is: -
- a. Loss of user 5,200,000/=
  - b. Cost of assessors Report 12,000/=
  - c. Towing fees 78,000/=
  - d. Private investigations fees 20,000/=
- Total 5,310,000/=

10. The case of *David Bagine v Martin Bundi* [1997] eKLR settles what is required of special damages. The law Lords posited as follows: -

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

Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it”

11. Therefore, the duty to plead specifically lies with the Appellant. Then and only then will they proceed to proof. In this case there are two sets of damages I will address
- a. Loss of user
  - b. Others

#### **Loss of user**

12. Loss of user is given as the loss which a party suffers as they await repairs. In the case the motor vehicle was written off, with a salvage of Ksh. 450,000. Effectively the vehicle was not to be repaired.
13. The assessor indicated that it could take less than a month to procure another vehicle. This period could be considered. However, there was no proof of the type of loss. I therefore do not find merit in this limb of the Appeal.

#### **Appellant’s submissions**

14. The Appellant rightly quotes the decision of *Ndugu Transport Company Limited & Another v Daniel Mwangi Waitbaka Leteipa* [2018] eKLR wherein the Courts stated as follows in respect to loss of user: -

“What emerges from these decisions is that the correct position in law in this jurisdiction is that a claim for loss of user is a special damages claim. Not only must it be specifically proved, it must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only pleaded but also was not specifically proved cannot stand.”



15. The also quote the decision in *Nkuene dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiya* [2010] eKLR associated itself with the sentiments of Bowen L.J. in *Ratcliffe v Evans* [1892] 2 QB 524 wherein the learned Judge sated as follows: -

“The character of the acts themselves which produce the damages, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As such certain and particularity must be insisted on, in pleading and proof of damages, as reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damages is done. To insist upon less would be to relax old and intelligible principles. To sit upon more would be the vainest pedantry.”

### Respondent’s submissions

16. I have not had sight of these. If they were filed, they are not in the file. I shall therefore mirror their submissions in the court below.

### Analysis

17. Without repair of the motor vehicle, the loss of user was unnecessary. Further, there needed to be particulars of what loss of user consisted. As held in David Bagime case(supra), they should not just be thrown to the court. I therefore reject the appeal on loss of user. I uphold the finding of the trial court that it was not pleaded and proved.
18. In *South Nyanza Sugar Company Ltd v Donald Ochieng Mideny* [2018] eKLR, the court, D.S. Majanja stated as doth: -

“I reiterate what I stated in *Consolata Anyango Auma v South Nyanza Sugar Company Limited* MGR HCCA 53 of 2015 [2015]eKLR that:

- (15) 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 is 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)).



19. This was also reiterated in the decision of *South Nyanza Sugar Company Limited v Joseph O. Onyango* MGR HCCA No. 10 of 2016 [2017] eKLR, where the same court stated as doth: -

“(21) I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words if the main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement”.

20. The other reason is that once a vehicle is a write off, loss of user is not payable. Further the appellant has a duty to mitigate losses. In the case of *Peter Njuguna Joseph & Another v Ann Moraa* Civil Appeal No. 23 of 1991 (UR) where it had held that;

“We are here concerned that with the actual loss of user of the vehicle which has been immobilized by the accident. The owner must take all reasonable steps to ensure that the vehicle is back on the road within a reasonable period. The owner must mitigate his damages by having the vehicle repaired if it is not a write off. If the vehicle is to be a write-off, then the owner is entitled to pre-accident value of the damaged vehicle. He would then be paid a reasonable figure for loss of user until such time he received the pre-accident value of the write-off vehicle.

21. In the cases of *Sabuni v Kenya Commercial* [2002] KLR 1 and *Ryce Motors Limited & Another v Elias Muroki* MSA CA Civil Appeal No. 119 of 1995[1996] eKLR. The Court, Justice Ringera J equally stated as follows: -

“However, I do agree with the submission that once the plaintiff has been compensated for the value of the vehicle he cannot then claim for damages for loss of user thereof subsequently. That would clearly be double compensation. That, however is not, in my understanding, the same thing as to say that a claim for value of the article destroyed and for loss of user thereof cannot be entertained in the same accident.”

22. In this case there was no basis for the dates chosen for loss of user. The Appellant did not mitigate losses. Losses should thus fall where they are due.

23. In *D K Njagi Marete v Teachers Service Commission* [2020] eKLR, the court stated as follows: -

“In considering this question, we remind ourselves of the purpose of awarding any form of compensation in a dispute on unfair termination. In *Hema Hospital v Wilson Makongo Marwa* (supra) this Court adopted with approval the holding of the Labour Court of South Africa in *Le Monde Luggage cc t/a Pakwells Petze v. Commissioner G. Dun and others*, Appeal Case No. JA 65/205 which when applying provisions of the *Labour Relations Act* of South Africa held that:

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary



enquiry for a court is to determine the extent of that loss, taking into account, the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.”

24. Without mitigation, the appellant cannot be heard that the other side should be loaded with the loss.

#### **Other losses**

25. The same were pleaded and receipts produced were as follows: -

- a. Assessment report exhibit 5
- b. Court attendance receipt 6.

26. The Appellant had already pleaded cost of the motor vehicle. He did not prove, how much was spent in procuring a new one.

27. The tax consultant produced reports and expenses for some financial years. The same were totally irrelevant to the questions at hand. There is no other exhibit showing that the expenses were proved. I am of the considered view that the court below was correct in all respects. I dismiss these prayers also.

#### **Determination**

28. I therefore make the following orders: -

- a. The entire appeal lacks merit and is hereby dismissed *in limine* with cost of Ksh. 225,000 to the Respondent.
- b. The file is closed.
- c. The judgment be sent upon the trial court.
- d. The original file be released forthwith to the lower court.
- e. This file is closed save for execution.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15<sup>TH</sup> DAY OF MAY 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:**

Mr Kithome for Appellant

No appearance for the Respondent.

Court Assistant - Firdaus

