



**Ng'ang'a v Forward Travellers Sacco Society Ltd (Civil Appeal
E785 of 2021) [2023] KEHC 20533 (KLR) (Civ) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E785 OF 2021

CW MEOLI, J

JULY 14, 2023

BETWEEN

BENSON MWENDA NG'ANG'A APPELLANT

AND

FORWARD TRAVELLERS SACCO SOCIETY LTD RESPONDENT

*(Being an appeal from the judgment of the Co-operative Tribunal at
Nairobi delivered on 11th November 2021 in CTC No. 559 of 2017)*

JUDGMENT

1. This appeal emanates from the judgment delivered by the Co-operative Tribunal (hereafter the tribunal) on 11.11.2021 in CTC No. 559 of 2017. The proceedings before the tribunal were commenced by way of a claim filed on 15.09.2017 by the Benson Mwenda Ng'ang'a the claimant before the tribunal (hereafter the Appellant) against Forward Travelers Sacco Society Ltd, the respondent before the tribunal (hereafter the Respondent).
2. The Appellant sought an urgent order directing the Respondent to return the Transport Licensing Board (TLB) licenses in respect of motor vehicles registration no. KCL 088A and KAT 946E (hereafter the subject vehicles) to the Appellant; that the Respondent be ordered to pay the Appellant the daily losses at a rate of Kshs. 17,000/- daily as a result of the grounding of the Appellant's vehicles due to the Respondent's removal of the TLB licenses from the windscreens of the subject motor vehicles until the TLB licenses were restored; and an order restraining the Respondent from interfering in any manner with the Appellant's subject motor vehicles or by preventing him in any manner whatsoever from picking or dropping passengers at the designated points or imposing illegal charges.
3. It was averred that at all material times to the claim, the Appellant was a member of the Respondent society and paying his dues regularly as the owner of the two subject vehicles that were operated as



public service ‘matatus’ and that a dispute ensued between the parties herein over unspecified dues alleged to be owed to the Respondent by the Appellant pursuant to which, on 12.09.2017 while the Appellant’s vehicles were being driving between Nairobi and Kayole, the Respondent’s officials unlawfully and without any colour of right plucked out the TLB licences from the windscreens of the two vehicles.

4. Thus, grounding them and occasioning the Appellant extensive financial loss, to wit, Kshs. 10,000/- and Kshs. 7,000/- per day in respect of the vehicles reg. no. KCL 088A and KAT 946E, respectively. It was further averred that the Respondent’s agents’ actions constituted trespass for which the Appellant was entitled to damages, in addition to the immediate return of the TLB licenses and payment of losses in the sum of Kshs. 17,000/- per day.
5. The Respondent filed a defence to the claim on 12.10.2017 denying the key averments in the claim and averred that the Appellant was a suspended member of the Respondent hence not entitled to the society’s services. That the TLB licenses were issued in the name of the Respondent, and they were within their rights in withdrawing the same if a member failed to comply with the with the law or the society’s constitution and rules.
6. The matter proceeded to trial during which the parties adduced evidence in support of their respective cases. In its judgment, the tribunal found that the Appellant had not proved his case on balance of probabilities and thus proceeded to dismiss his claim with costs. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds: -
 1. The Co-operative Tribunal erred grossly in law in failing to apply the law as stated in the [Sacco Society Act](#) No. 14 of 2008 as to the conduct of financial business of the Respondent instead of the [Co-operative Society Act](#) Cap 490 of the Laws of Kenya as the Respondent is a Saving and Credit Deposit Taking Sacco in terms of Section 23 of the [Sacco Societies Act](#).
 2. The Co-operative Tribunal erred grossly in making a finding that the Respondent had provided sufficient evidence to show that the Appellant owed Kshs. 17,000/- in respect of entrance fees to the Respondent when in fact the bylaws required a member to pay Kshs. 10,000/- only as entrance fees and to pay at least 40 share equivalent to Kshs. 100/- each making a total Kshs. 14,000/- which the Appellant paid prior to being issued with a membership certificate.
 3. The Co-operative Tribunal failed to apply the bylaws of the Respondent Sacco particularly paragraph 9 thereof and paragraph 29-30.
 4. The Co-operative Tribunal erred grossly in accepting the handwritten minutes alleged to be of the Respondent Sacco dated 21.12.2020 which was prior to the registration of the Sacco and which were thereof invalid and which were unsigned by Attendants thereof where a proposed a membership fee of Kshs. 120,000/- was provided
 5. The Co-operative Tribunal erred in law in stating that “The Respondent has provided adequate explanation regarding the removal of the Claimants two vehicles TLB License which were returned to the authority, the NTSA The Respondent acted rightfully as the agent of NTSA in the issue” when in fact in a previous ruling of the tribunal given on 06.07.2018 it said “ This notwithstanding we note that as a member the claimant is entitled to certain rights as agents the Respondent in accordance with the purpose and objectives of the Respondent. Among these is a right to facilitate to acquire TLB License and operate his vehicles. Withdrawal of these rights other than by way of surprise or expulsion from membership is governed by the [Co-operative Societies Act](#) and by the bylaws and Constitution rules of natural justice do apply.”



6. The Tribunal erred in fact in stating that the Respondent had provided the Appellant adequate hearing meetings to resolve the matter but to no avail. In fact, the Respondent has never provided the Appellant with any opportunity to be heard except only to demand from the Appellant illegal payments of Kshs. 120,000/- not provided for in the bylaws of the Sacco. The finding of the Tribunal is an encouragement of the offices to oppress the Appellant by illegal penalties.
 7. The ruling and finding of the Co-operative Tribunal was totally against the weight of the evidence as the Tribunal completely failed to set out the witness evidence both oral and written that was given in court, the Exhibits and Documents produced. The Tribunal very flimsily handled the evidence.
 8. Co-operative Tribunal erred in law in failing to make a finding that complains involving removal of Transport Licensing Board (TLB) are handled by the NTSA TLB tribunal.” (sic)
7. The appeal was canvassed by way of written submissions. Counsel for the Appellant arguing that the Appellant was not indebted to the Respondent asserted that the Respondent’s levy christened as branding fees was not sanctioned by the society bylaws or the Respondent’s code of conduct, and that no formal resolution was passed by the society to increase membership entrance fees from Kshs. 14,000/- to Kshs. 120,000/-, as contemplated by Clause 9 of the bylaws. Moreover, that it was not clear whether the sum of Kshs. 120,000/- demanded by the society comprised entry fees, branding fees and or outstanding fees.
 8. Counsel faulted the Respondent’s minutes dated 21.12.2010 for want of execution saying that these could not oust subsequent registered bylaws. Hence the tribunal erred in relying on the same in finding that the Appellant was indebted to the Respondent to the tune of Kshs. 17,000/-, which claim was unsupported by evidence. That the Appellant having paid Kshs. 14,000/- in keeping with the Respondent’s bylaws was not indebted and the Respondent’s demand for branding fees was illegal.
 9. Concerning the Respondent’s withdrawal of the Appellant’s TLB license, it was submitted that the tribunal’s finding that there was justification was tantamount to sitting on appeal on its earlier decision delivered on 06.07.2018. Counsel contending that from the evidence before the tribunal the Respondent was not shown to have acted as an agent of National Transport and Safety Authority (NTSA) and no board resolution to that effect as contemplated under Section 13 of the NTSA Act was tendered. That the Appellant was fully compliant upon paying Kshs. 14,000/-.
 10. Further that if the Appellant was indebted to the Respondent in the sum of Kshs. 120,000/- as purported, the demand and subsequent actions of withdrawal of the TLB licences was time barred as the Appellant had operated under the said licences for over 5 years. Counsel thus asserted that the Respondent’s actions were illegal and without authority.
 11. It was submitted, concerning reliefs sought in the tribunal that by the date of the hearing before the Tribunal the Respondent had returned the Appellant’s TLB licenses, albeit late and after their expiry. Therefore, the only issue outstanding was the Appellant’s claim for loss of earnings. Citing decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, counsel contended that Respondent’s agents removed the Appellant’s TLB licenses on 12.09.2017 and returned them on 03.08.2018 pursuant to the tribunal order that found the Respondent in contempt for failing to return the TLB licenses despite its earlier order. Hence the tribunal ought to have found the Respondent liable for the Appellant’s loss, at least for the period of their non-compliance with the tribunal’s orders.
 12. Regarding proof of loss of income, counsel cited the decision in *Dick Omondi Ndiweo t/a Ditech Engineering Service v Cell Care Electronics* [2015] eKLR to submit that the Appellant tendered expert



evidence by way of certified accounts which was not controverted. In conclusion the court was urged to set aside the tribunal's decision and allow the Appellant's claim as lodged.

13. The Respondent naturally defended the tribunal's findings. On his part counsel opted to address each of the Appellant's grounds of appeal. Concerning ground 1, it was contended that the issue did not arise for consideration by the tribunal and nowhere in its decision did it pronounce itself on the applicable law on the case. And that in any event, the Respondent was registered under *Co-operative Societies Act*.
14. Regarding ground 2, it was submitted that the Appellant admitted in his evidence that he had not paid the relevant fees, a fact that was corroborated by the Respondent's evidence, and the tribunal could not be faulted for finding the Appellant indebted to the Respondent in the sum of Kshs. 17,000/-. Hence his suspension from membership in the society was proper. It was summarily argued concerning ground 3 that the Appellant having failed to address it, had seemingly abandoned that ground.
15. In respect of ground 4, it was contended that the minutes dated 21.12.2010 were not in issue during the trial. That these were the foundational minutes in respect of the formation of the Respondent and were lodged with the registration documents. It was further contended that a member expelled from a Sacco could not continue to enjoy benefits in the form of a TLB license which is generally issued by NTSA to Sacco or Company and not to individual operators. On grounds 6 it was asserted that evidence tendered showed that the Appellant was invited to a disciplinary meeting.
16. In addressing grounds 8 and 9, counsel submitted that on the evidence before the tribunal, the Respondent had acted in order to preserve itself and the investments of its membership. In conclusion, counsel asserted that the Appellant had not impeached the judgment of the tribunal and the appeal ought to be dismissed.
17. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle -Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

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

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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 this 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.”

18. It is settled that an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. The Court upon reviewing the memorandum of appeal and



submissions by the respective parties is of the view that the appeal turns on the key issue whether the tribunal's finding was well founded and justified.

19. Pertinent to the determination of issues before this court are the pleadings, earlier summarized, that form the basis of the parties' respective cases before the tribunal. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.” (Emphasis added).

20. The gravamen of the Appellant's complaint before this court is that the tribunal's finding went against the weight of evidence, particularly regarding the question whether he was indebted to the Respondent and the tribunal's dismissal his claim for loss of income between 12.09.2017 and 03.08.2018. In its judgment, the tribunal having restated and analyzed the evidence before it held as follows in its judgment; -

“Vide these submissions we find that the Respondent has provided sufficient evidence to prove that the claimant is indebted to the Respondent to the tune of Kshs. 17,000/- being claimant balance for entrance fee.

The respondent has provided the claimant adequate hearing meeting to resolve the matter but no avail.

The respondent has provided adequate explanation regarding the removal of the claimants two vehicles TLB license which were returned to the issuing authority, the NTSA. The respondent acted rightfully as the agent of NTSA in the issue.

The claimant's submission was not sufficient to warrant an order to the respondent to:-

- i. Return the two vehicles TLB license
- ii. Pay Claimant losses occasioned by the removal of the TLB licenses
- iii. Not to interfere with claimants two vehicles

Conclusion

The claimants claim for losses of Kshs. 17,000/- daily for his vehicles KCL 088A and KAT 946E has not been proved satisfactorily. The prayer to have the Respondent return TLB license for claimant's vehicle is not tenable.

The upshot of the foregoing is that the claimant has not proved his case on a balance of probability and hereby dismiss it with costs.” (sic)



21. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say;

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“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.”

The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

22. Further, the Court of Appeal 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 lose because the requisite standard will not have been attained.”

23. The duty of proving the averments contained in the claim lay squarely on the Appellant. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that;-

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal



proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

24. The Appellant testified as CW1 and having adopted his witness statement proceeded to produce his list of documents filed on 11.01.2021 as CExh.1 to CExh.12. The gist of his evidence was that the TLB licenses were removed from his vehicles on 12.09.2017 and returned on 03.08.2018 occasioning him loss in the sum of Kshs. 17,000/- daily. That the Respondent demanded Kshs. 120,000/-, an unlawfully charge levied as entrance fees whereas under the bylaws, the entrance fee was Kshs. 10,000/- and Kshs. 4,000/- as share capital all of which he had paid in full in 2011 upon joining the society. That the TLB license for motor vehicle reg. no. KCL 088A issued on 13.04.2017 expired on 13.04.2018, and that in respect of motor vehicle reg. no. KAT 946E issued on 13.06.2017 expired on 13.06.2018.
25. It was his evidence that the Respondent's action of depriving him of the TLB licenses grounded his vehicles and caused him serious financial loss as he was servicing a bank loan on motor vehicle reg. no. KCL 088A and a second loan from the Respondent. That despite the order issued at inception by the Tribunal for the return of the TLB licenses, the Respondent returned the TLB licenses on 03.08.2018 after being found in contempt of the order. Under cross examination he reiterated having paid entrance fees of Kshs. 14,000/- and that the bylaws did not provide for branding fees.
26. Peter Kuge Njai testifying as CW2 equally adopted his witness statement. He introduced himself as the chairperson of the Respondent between 13.07.2011 and April of 2015. He asserted that the removal of TLB licences from members' vehicles without the order of a court was illegal and that any dispute in that regard ought to be to be presented to a tribunal at NTSA charged with resolving disputes relating to TLB licenses. It was his evidence further that the Respondent's demand of Kshs. 120,000/- from the Appellant was illegal because under article 9 of the Respondent's bylaws, a member was only required to pay the entrance fee of Kshs. 10,000/- and 4,000/- as shares hence there was no justification for the Respondent's demand. He confirmed during cross-examination that he was no longer a member of the Respondent stating regarding the minutes of the meeting of 28.04.2016 which he attended, that he abstained from voting on the resolution to suspend the Appellant.
27. Paul Mbaruk testified as CW3. He identified himself as an accountant. Referring to the report produced as CExh.12 he testified that the loss incurred by Appellant amounted to Kshs. 9,232,874/-. Under cross-examination, he affirmed his qualification as a certified public accountant although did not tender any certificate in proof, explaining that it was not a requirement to attach such documents to the account reports. And that his deductions at page 10 of his report were based on his professional view relating to the material loan period.
28. On the part of the Respondent, John Bosco Ndungu testified as RW1. He identified himself as the treasurer of the Respondent. Adopting his witness statement, he produced the documents in Respondent's list of documents filed on 12.01.2021 as RExh.1 to RExh.21. The gist of his evidence was that on 21.12.2010 during formation of the Respondent, operators had met and crafted rules and guidelines for operation of the Sacco, as captured in minute 11 and 12 of RExh.1.
29. That whereas Appellant applied for membership in the society, he failed to pay the entrance fees of Kshs. 120,000/- indicated in RExh.1. He however confirmed that the Appellant managed to pay Kshs. 14,000/- being the share capital but was later suspended from the Sacco on account of his failure



- to settle entrance fees. It was his evidence further that the Respondent was authorized By NTSA to remove TLB licences from offending members' vehicles. He challenged the Appellant's earnings as evinced by CW3 and reiterated that Appellant was expelled from the Sacco for failing to follow its bylaws.
30. Upon being cross-examined, he confirmed the conviction for contempt. He stated that the Appellant's TLB's were removed due to his failure to pay branding fees although the bylaws did not provide for payment of branding fees. Explaining however that upon the formation of the Sacco, the members agreed on branding fees and entrance fees as per the 2010 resolution and that all members, save the Appellant paid the fees. On re-examination he reiterated that RExh.1 wherein it was agreed that new members pay Kshs 120,000/- , formed part of the registration documents of the Respondent.
 31. George Njoroge Mugo testified as RW2 and identified himself as the current chairman of the Respondent. Having adopted his witness statement as his evidence in chief, the gist of his evidence was that expulsion of the Appellant and removal of the TLB licenses from his vehicles was procedural and resulted from the Appellant's non-compliance with the Respondent's bylaws. In cross-examination he reiterated that the Respondent could remove TLB licenses from members' vehicles because NTSA issued these to Saccos who in turn issued them to the respective members of the Sacco. He equally confirmed conviction for contempt and subsequent return of the TLB licenses to the Appellant. It was his evidence further that the Appellant was in arrears of entrance fees in the sum of Kshs. 120,000/- which debt ultimately led to his suspension from Sacco.
 32. Charles Mureithi testified as RW3. He identified himself as a retired District Co-operative officer. He too adopted his witness statement as his evidence in chief. The thrust of his evidence was that the Respondent's management committee acted within their powers as enshrined in the bylaw by removing the TLB licenses from the Appellant's vehicles, in denying him society services. Further that the resolutions of the Respondent were binding on the Appellant and other members. In cross examination, he stated that the Respondent was not registered under Sacco Societies Regulatory Authority (SASRA). He equally reiterated that not every requisite society fee was included in the bylaws.
 33. John Macharia Gichigi testified as RW4 and identified himself as the Chief Operations Officer of the Respondent. He adopted his witness statement as his evidence in chief. The gist of his evidence, like RW2 was to the effect that due to the Appellant's failure to pay entrance fee, the Respondent had no option but to have the TLB licenses removed from the Appellant's vehicles. Under cross-examination he stated that the Appellant failed to pay branding fees and that his contribution of Kshs. 14,000/- was applied to membership fees.
 34. It is settled law that issues for determination before a court generally flow from the pleadings and a presiding court can only pronounce judgment on the issues arising from the said pleadings. See the Court of Appeal decision in *North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR. Reviewing the pleadings and evidence before the tribunal, the core issues in dispute related the question whether the Respondent was justified in withdrawing the Appellant's TLB licenses from his vehicles and whether the Appellant was entitled to payment in respect of alleged loss of earnings on account of the Respondent's actions. The issues being intertwined, the court proposes to deal with them contemporaneously.
 35. Two of the reliefs sought before the tribunal were for "an urgent order directing the Respondent to return the TLB licenses for motor vehicles no. KCL 088A and KAT 946E to the Appellant" and "an order restraining the Respondent from interfering in any manner with the Appellant's motor vehicles no. KCL 088A and KAT 946E or by preventing him in any manner whatsoever from picking or



- dropping passengers at the designated points or imposing illegal charges” . Both have evidently been overtaken by events.
36. From the proceedings and the Appellant’s evidence before the tribunal, the TLB licenses were returned by the Respondent albeit late, and by the time of the trial, the Appellant had left the Respondent Sacco and was operating under the aegis of Pinpoint Sacco. Thus, the outstanding issue for determination was whether the Appellant was entitled to the loss of earnings on account of the Respondent’s action.
37. The Respondent’s case appears to be that it lawfully withdrew the Appellant’s TLB licenses from the respective motor vehicles on account of his failure to comply with the Respondent’s resolution made in 2010 - Rexh.1 thereby failing to abide by the Respondent’s bylaws. The Appellant on his part vehemently disputed this assertion by arguing that the Respondent’s actions were illegal as the payment demanded of him by the Respondent amounting to Kshs. 120,000/- being branding fees was not provided for under the Respondent’s bylaws – CExh.1. And that he was fully compliant having paid the Kshs, 14,000/- and been issued with his membership certificate CExh.2.
38. The Transport Licensing Act was repealed by the National Transport and Safety Authority Act the latter which essentially transitioned TLB licenses to RSL licenses. It is a notorious fact implicit in the parties’ evidence, and about which the court takes judicial notice that, between 2010 to 2011 in an attempt to organize the transport industry and instill order in the industry, the government directed that ‘matatus’ operate under Sacco societies. Hence the registration of the Respondent. Neither of the parties herein tendered the Respondent’s registration certificate to establish whether it was registered under the Sacco Societies Act or the Co-operatives Societies Act. It would seem from the evidence on record that the former is more likely the case here.
39. Section 24 (1) & (2) of the Sacco Societies Act provides that; -
- (1) A Sacco society intending to transact the deposit-taking business in Kenya shall, before commencing such business, apply in writing, to the Authority for a licence, in the prescribed form.
 - (2) An application under sub-section (1) shall be accompanied by -(a) a copy of the certificate of registration and the by-laws of the Sacco society;
 - (b) evidence that the Sacco society meets the minimum capital requirements prescribed in the regulations;
 - (c) information relating to the place of business, indicating that of the head office, and branches, if any;
 - (d) the prescribed fees;
 - (e) a report by the Sacco society, covering the following-
 - (i) objectives of the deposit-taking Sacco society business;
 - (ii) membership and share capital;
 - (iii) economic and financial environment;
 - (iv) organisational structure and management; and
 - (v) financial and risk analysis.
 - (f) such other requirements as the Authority may prescribe.”



40. Among the requirements for registration of a Sacco Society are the bylaws of the proposed society. The bylaws ideally guide operations of a sacco such as the Respondent, including admission of new members. Pertinent to the Appellant's complaint was Clause 7, 8 & 9 of CExh.1 which provided that; -

7. Membership Composition.

- a) The membership of the Society shall consist of;
 - i. Original members who signed the application for registration.
 - ii. New members subsequently admitted in accordance with these by-laws
- b) The rights of members of the Society shall be determined and exercised in accordance with the applicable law of the Society and the valid resolutions of the management committee.

8. Membership Application Forms Every applicant for membership shall complete an application for membership -form as prescribed in these by-laws

9. Admission into Membership.

An applicant shall be admitted to membership on being accepted by a simple majority vote of the Management Committee members, but shall not qualify to the rights and privileges of membership until; an entrance fee of Ksh.10,000 is paid, and She/he has paid for at least 40 shares of Ksh. 100 each or as the members may decide upon such other minimum during a General Meeting.”

41. The Respondent has not disputed that the Appellant complied with the provisions of paragraph 9 of the Respondent's bylaws. Nonetheless, the Respondent's justification for claiming Kshs. 120,000/- as branding fees was the unexecuted and purported 'foundation' minutes of the meeting held on 21.12.2010 – Rexh.1, specifically minute 11. Minute 11 related to branding fees but was not incorporated into the Respondent's bylaws. And a perfunctory reading of the entirety of the said bylaws reveals that the payment of purported branding fees was not a requirement for admission of members. The resolution alleged by the Respondent in formalizing the requirement for payment of branding fees by a member of Sacco was not produced at the trial.

42. Therefore, there was no proper or lawful justification for the Respondent's demand for branding fees from the Appellant. Under Section 13 and 27 of the [NTSA Act](#) as read with regulation 5 of the *NTSA (Operation of Public Service Vehicles) Regulation, 2014*, issuance and revocation of RSL (TLB) and enforcement thereof is a prerogative of NTSA. Neither the Respondent's bylaws nor the foregoing statute contemplates the Respondent acting as an agent of the NTSA in respect of withdrawal of RSL (TLB) licenses, for whatever default or in enforcement of a member's compliance with the Sacco bylaws. The Court therefore agrees with the Appellant's position that Respondent had no mandate under its bylaw or authority to remove the respective RSL (TLB) from the Appellant's motor vehicles.

43. Now turning to the question whether the Appellant was entitled to loss of earnings at the rate of Kshs. 17,000/- until the date of return of his RSL (TLB) Licenses in respect of motor vehicle reg. no. KCL 088A and KAT 946E, this was a special damage claim to be specifically pleaded and proved. In [David Bageine vs. Martin Bundi](#) [1997] eKLR the Court of Appeal stated: -

“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 Sabbani 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 vs. Hyde Part 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.’”

44. Further in *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] eKLR stated that:

“In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of... . In *Ratcliffe v. Evans* [1892]2QB 524 Bowen L.J. said:

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

See also *Ouma v Nairobi City Council* (1976) KLR 304 and *Hahn -v- Singh* [1985] KLR 716.

45. It was not disputed that the Appellant’s TLB licenses were removed from his vehicle’s on 12.09.2017 and returned on or about the 03.08.2018 after they had expired on 13.04.2018 and 13.06.2018, respectively. The Appellant relied on the evidence of CW3 and CExh.12 to contend that in the material period he suffered financial loss in the sum of Kshs. 9,232,874/-. A claim challenged by the Respondent by contending that the sums were not substantiated and or sufficiently supported by material evidence. The Respondent not having called any evidence on that score, appeared content to generally dismiss the Appellant’s financial report marked CExh.12.
46. The court has taken the liberty of perusing the said report in its entirety. Beyond stating the brief background, scope, and objective of the financial statement and /or audit report, the document was comprised for the most part of secondary evidence. Neither the source of the data therein nor primary business records such as past receipts, bank statements, audited accounts, or tax returns in respect of the Appellant’s business were tendered to corroborate the projected profits, and losses, the latter which was estimated at Kshs. 9,232,874/-.
47. The evidential burden was on the Appellant to prove and justify the projected estimates of profits and loss as captured in CExh.12. Mere compliance with International Financial Reporting Standards (IFRS) or International Financial Reporting Standards for Small and Medium Enterprises (IFRS for SMEs) as rightly documented in CExh.12, cannot be a substitute for primary material evidence. Moreover, the projected losses were of no mean sum and were alleged to relate to a business enterprise.



48. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR in distinguishing between legal and evidential burden held inter alia that;

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

49. Thus, although the Respondent’s unauthorized and illegal actions may have affected the operations of the Appellant’s business through the grounding of the affected motor vehicles, the tribunal cannot be faulted for rejecting the Appellant’s claim for lost earnings as stated in CExh.12. In the court’s opinion, the Appellant failed to specifically prove the said claim on a balance of probabilities. Consequently, the appeal is without merit and is dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Kisotu h/b for Mr. Makumi

For the Respondent: Mr.Ntarangwi

C/A: Carol

