Mada Holdings Limited v Silvestri (Civil Suit 137 of 2006)
[2023] KEHC 24123 (KLR) (23 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 137 OF 2006

OA SEWE, J

OCTOBER 23, 2023

BETWEEN

MADA HOLDINGS LIMITED ..... PLAINTIFF

AND

CLAUDIO SILVESTRI ..... DEFENDANT

JUDGMENT

1. The plaintiff, a limited liability company incorporated in Kenya, is and was at all material times, the owner and occupier of Kilifi Bay Beach Resort, situated on Land Reference Number 8006/2, Kilifi. It was averred, at paragraph 3 of the Plaint dated 13th June 2006 that the said resort included 6 blocks of bedroom units, main reception area, central and service areas as well as other buildings and pool area. It was further averred that the property was adjoining the property, known as Land Reference No. 8006/13, Kilifi which was then owned and occupied by the defendant, Claudio Silvestri.

2. The plaintiff's cause of action was that, on or about the 27th July 2003 at about 1.05 p.m., fire started on the *makuti* roof of the defendant's said house adjoining the plaintiff's resort; and that the said fire escaped to the plaintiff's resort and destroyed the plaintiff's buildings and structures at the resort as well as the contents thereof. In particular, the plaintiff complained of having suffered the following losses which it claimed by way of special damages:

    (a) Buildings and structures.....Kshs. 45,181,712.00

    (b) The value of the contents damaged.....Kshs. 26,671,846.00

    (c) Loss of profit for 18 months.....Kshs. 20,259,936.00

    Total Kshs. 92,113,494.00

3. It was further the contention of the plaintiff that the escape of the fire from the defendant's house to its resort was attributable the negligence of the servants or agents of the defendant; particulars whereof were supplied at paragraph 9 of the Plaint. The plaintiff averred in the alternative that the fire that destroyed its resort was occasioned by a non-natural user of the defendant's house which the defendant negligently allowed to escape to the plaintiff's land. Accordingly, the plaintiff prayed for judgment against the defendant for:

    (a) Special damages in the sum of Kshs. 92,113,494.00;

    (b) General damages;

    (c) Interest thereon at court rates;

    (d) Costs of and incidental to this suit.

4. The claim was resisted by the defendant vide a Defence dated 8th January 2008. The defendant denied the allegations set out in the Plaint and, in particular, that the alleged fire escaped from his premises and/or destroyed the plaintiff's property and the contents thereof. The defendant also denied that the plaintiff suffered loss in terms of the special damages set out in Paragraph 8 of the Plaint. On a without prejudice basis, the defendant stated that he is only a joint owner of Plot No. 8006/13, Kilifi, and that even if the alleged fire indeed broke out from the premises and escaped to the plaintiff's premises, the same was caused by circumstances beyond his control and therefore he cannot be held liable as alleged or at all. The defendant blamed a third party, namely, Kenya Power & Lighting Company Limited for the incident and proposed to join it to the suit at the appropriate time.

5. Further and without prejudice to the foregoing, the defendant averred that if indeed the alleged fire broke out and escaped to the plaintiff's premises, the alleged damage and loss of the plaintiff's premises was wholly or substantially caused by the plaintiff's own negligence for which he was not liable at all. To this end, the defendant supplied Particulars of Negligence at paragraph 11 of the Plaint.

6. When the matter came up for hearing on 18th January 2023, the defendant failed to attend court and consequently, the matter proceeded *ex parte* in accordance with Order 12 Rule 2 of the *Civil Procedure Rules*. Thus, the plaintiff presented its three witnesses, namely, Paramjeet Mhajan *alias* Tinu Mhajan PW1), Luigi Vincentini (PW2) and Maria Teresa Credazo Salvi Varano (PW3). As the Managing Director of the plaintiff, PW1 testified that the plaintiff is a limited liability company that carries on the business of hotelkeepers in, *inter alia*, Kilifi. He adopted his witness statement dated 18th October 2022.

7. It was therefore the evidence of PW1 that, on the 27th July 2003, he was in the plaintiff's offices in Nairobi when, at about 1.15 p.m. the plaintiff's Manager at Kilifi Bay Beach Resort, Mr. Peter Njoroge, rang him and informed him that the resort got burnt by the fire which originated from the residential house on the adjacent plot, being Land Reference No. 8006/13, Kilifi. He further testified that he instructed Mr. Njoroge to report the incident to the Police; and that the loss was thereafter quantified to be in the total sum of Kshs. 92,113,494.00 by Adam Consultants, a firm of registered Quantity Surveyors and Project Managers.

8. PW1 further testified that the structural damage to the buildings and the structures comprising the subject property were inspected by Parikh Sondhi & Associates, Consulting Civil and Structural Engineers, appointed by the Loss Adjusters of the plaintiff's insurers, Cunningham Lindsay; and that the loss of the contents of the buildings and loss of profits was particularized by the plaintiff. He stated that when the plaintiff was unable to obtain payment of the loss suffered, it instructed Gichuki Kingara

& Company Advocates to pursue its claim from the defendant for Kshs. 92,113,494.00 together with interest and costs.

9. PW2 and PW3 who are husband and wife, adopted their joint witness statement dated 15th August 2003 and filed on 1st December 2014. They stated that they know the defendant; and that they were close neighbours of the defendant's when the fire incident took place and were eye witnesses of the occurrence. They confirmed that the fire started from the defendant's house before spreading to the adjacent property belonging to Kilifi Bay Beach Resort; and that in spite of their attempts to put off the fire using a water pipe, it was not possible to do anything to stop it as there was a strong wind from south to north that fanned and caused it to spread quickly to the adjacent property. They attached a drawing to their joint statement showing the direction of the wind and how the fire spread. They also made reference to the photographs exhibited at pages 98 to 101 of the Plaintiff's Bundle of Documents marked Exhibit 1, which PW1 took at the time of the incident.

10. In his written submissions filed on 1st March 2023, Mr. Nanji reiterated the factual background of this matter and pointed out that the defendant neither cross-examined the plaintiff's witnesses nor called any witness on his behalf; and therefore that the plaintiff's case remains uncontroverted. He relied on *Imperial Health Sciences Kenya Limited v Wiseway Freighters Limited* 2018. eKLR, *Acceler Global Logistics v Gladys Nasambu Waswa & Another* 2020. eKLR and *Kenya Power and Lighting Company Limited v Mohamed Dahir Molole* 2022. eKLR in urging the Court to find that the plaintiff had proved its case against the defendant on a balance of probabilities in terms of liability as well as quantum.

11. It was further the submission of Mr. Nanji that, on principle, the defendant was bound to take reasonable care and stop the fire from spreading from his property. Counsel placed reliance on *Rylands v Fletcher* 1861-73. All E R 1, *Goldman v Hargrave* 1966. 2 All E R 989 and the dissenting decision of Scrutton, LJ, in *Job Edwards Limited v Birmingham Navigations* 1924. 93 LJ KB 261, which was approved by the House of Lords in *Sedleigh-Denfield v O'Callaghan* 1940. 3 All E R 349. Counsel likewise made submissions on quantum and relied on several authorities, including *Nkuene Dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiya* 2010. eKLR, *Khanna v Samuel* 1973. EA 225, *Peter Jurgen Herkenrath & Ursula Krezential Monika Herkenrath v African Safari Club Limited* and *McGregor on Damages, 17th Edition at page 1239*, to justify the plaintiff's claim for an award of Kshs. 92,113,494.00 together with interest thereon at court rates from the date of filing this suit till payment in full.

12. From a careful consideration of the pleadings filed herein, the evidence adduced by the plaintiff's three witnesses and the written submissions filed herein by counsel for the plaintiff there is no contention that the plaintiff was, at all material times to this suit, the registered owner and occupier of the property known as Land Reference No. 8007/2, Kilifi, on which it was running a resort known as Kilifi Bay Beach Resort. In the Bundle of Documents produced by the plaintiff as Exhibit 1 there is a Certificate of Postal Search at page 22 thereof as well as a Certificate of Title in confirmation of the plaintiff's ownership of the property.

13. There is also no dispute that Kilifi Bay Beach Resort comprised of 6 blocks of bedroom units, main reception area, central and service areas, pool area as well as other buildings. The layout can be seen at page 21 of the Plaintiff's Exhibit 1; and therefore it is not in dispute that the property was adjacent to the property known as and Reference No. 8006/13, Kilifi. It is also common ground that, at all times material to this suit, the defendant was the owner of Land Reference No. 8006/13, Kilifi. In addition to the defendant's own admission in this regard at paragraph 8 of the Defence, the plaintiff annexed a Certificate of Title at pages 4 and 5 of the plaintiff's Bundle of Documents marked Exhibit 1 as well as

a Certificate of Postal Search at page 3 thereof which confirm not only the defendant's ownership of the property, but also that he was the sole owner thereof at the material time.

14. That a fire incident occurred on the 27th July 2003 at about 1.05 pm that gutted the plaintiff's Kilifi Bay Beach Resort is also not in dispute. And, although the defendant vehemently denied liability in his Defence dated 8th January 2008, it neither filed witness statements nor attended court at the hearing of this suit to present his case. In urging the Court to find the plaintiff's case proven to the requisite standard in terms of both liability and quantum, counsel placed reliance on *Imperial Health Sciences Kenya Limited v Wiseway Freighters Limited* (*supra*) in which it was held:

> "...other than the defendant having filed a statement of defence, it did not appear to give evidence in opposition to the plaintiff's claim which proceeded *ex parte*. A filed defence cannot be taken as controverting the evidence given by the other side, if no oral evidence is adduced to the contrary. The defence therefore remains as a document that has no probative value and cannot be relied upon to challenge oral evidence given by a party in a suit. Without oral evidence, the defence cannot be tested through cross examination and it cannot be said to be worth considering."

15. A similar position was taken in *Acceler Global Logistics v Gladys Nasambu Waswa* (*supra*) thus:

> "...where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against the defence is uncontroverted and therefore unchallenged."

16. Needless to state that the general position, from the standpoint of Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is that the burden of proof is on he who alleges. The provision states:

> (1) 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

17. Likewise, Section 108 of the *Evidence Act* provides that:

> The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

18. Accordingly, in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* 2004. eKLR the Court of Appeal held: -

> "...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 the 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..."

19. It is therefore now settled that mere failure by the defence to adduce evidence does not, of itself, relieve a plaintiff of the legal burden of proof. In *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* 2016. eKLR, for instance, the Court of Appeal held:

> "The appellant relies on a number of decisions to press the view that in the absence of rebuttal evidence by the respondent, its case must automatically be taken as proved. We have already alluded to some of those cases in this judgment... First and foremost, there can be no quarrel with the statements in the above judgments that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in *CMC Aviation Ltd v. Crusair Ltd* (No1) 1987. KLR 103 when he stated:
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> > "The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."
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> The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities."

20. In the light of the foregoing, and in view of the averments set out in the Defence, it is imperative for the Court to satisfy itself that the plaintiff has discharged its burden of proof herein, notwithstanding that no evidence was adduced by the defendant. Accordingly, the issues for consideration are:

    (a) Whether the plaintiff has established liability against the defendant to the requisite standard;

    (b) Whether the plaintiff is entitled to damages as sought in the Plaint.

A. On liability:

21. In terms of liability, the plaintiff set out the Particulars of Negligence alleged by it at paragraph 9 of the Plaint, namely, that fire escaped from the defendant's house and spread to its resort; and that the defendant, by his servants, negligently failed to control the said fire in its initial stages, thereby allowing it to spread at a time when the defendant's servants were aware or should have been aware of the dry windy and hot weather conditions then existing. The plaintiff further alleged that the defendant was negligent in failing to take any or any adequate precautions to ensure that the fire would not escape from his house to the plaintiff's property.

22. From the evidence of the two eye witnesses, PW2 and PW3, there is direct evidence in proof of the fact that the fire started from the south side of the defendant's *makuti* roof; from where it spread to the roof of defendant's garage before spreading to the roof of the guest room of plaintiff's resort next to the stone fence. The two witnesses testified as to their attempts to put off the fire using a hosepipe as they shouted "Fire! Fire!" to draw attention to the hazard. In addition, they alerted the security guards via alarm.

23. In addition to the evidence of PW2 and PW3, the plaintiff produced a Fire Report dated 27th July 2003. The report was prepared by the Municipal Council of Mombasa. It confirms that, at the instance of the plaintiff, firefighters were called to the scene in an attempt to contain the situation. The report also confirms that, by the time the fire was extinguished, it had damaged the entire *makuti* roofed cottages at the resort including furniture, beer and beer crates, clothing, electronic machines, fridges, and other items at the resort. In the report, the Fire Brigade of the Municipal Council of Mombasa attributed the cause of the fire to:

> "Actual Burning Substances From A Neighbouring House (i.e.) Pieces Of Makuti Roof Carried Away By Convection Air Currents Which Ignited Makuti Roof Cottages Of The Hotel."

24. It is manifest therefore that the plaintiff adduced credible and uncontroverted evidence in support of its case. That evidence proves, on a balance of probabilities, that the fire started from the *makuti* roof of the defendant's house before spreading to the plaintiff's resort. The general principle, in such circumstances, is that the defendant was under obligation to take reasonable steps to prevent the fire from spreading. Hence, in *Job Edwards Limited v Birmingham Navigations* (*supra*) Scrutton LJ held:

> "...it was safer to say that the fire was continued by negligence, and that the cause of action was not for a fire accidentally begun, but for negligence in increasing such a fire...There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has 'permitted it to continue', and becomes responsible for it. This would base the liability on negligence, and not on the duty of ensuring damage from a dangerous thing under *Rylands v Fletcher* (14)...I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours."

25. The above decision gained the approval of the House of Lords in *Sedleigh-Denfield v O'Callaghan* (*supra*). It is therefore immaterial that the escape was aided by strong winds over which the defendant

had no control because there is absolutely no evidence as to any attempts on the part of the defendant or his employees to contain the fire. I am persuaded by the decision in *Goldman v Hargrave* (*supra*) that:

> "As regards many hazardous conditions arising on land, it is impossible to determine how they arose – particularly is this the case as regards fires. If they are caused by human agency, the agent, unless detected in flagrante delicto, is hardly likely to confess his fault. And is the occupier, when faced with the initial stages of a fire, to ask himself whether the fire is accidental or man-made before he can decide on his duty? Is the neighbor, whose property is damaged, bound to prove the origin of the fire? The proposition involves that if he cannot do so, however irresponsibly the occupier acted, he must fail. The distinction is not only inconvenient, but also it lacks, in their lordships' view, any logical foundation."

26. In any event, for the hazard to be classified as an act of God, it had to be shown that the wind was exceptionally strong; as pointed out by Hon. Sergon, J. in *Peter Jurgen Herkenrath & Another v African Safari Club Limited* (*supra*), in which he held:

> "I also find that though the wind was strong, it was not exceptionally strong to be classified as an act of God..."

27. It is therefore my finding that the plaintiff has proved, on a balance of probabilities, that the defendant is wholly liable for its loss and I so find.

B. On Quantum:

28. For its loss and damage, the plaintiff prayed for special damages in the sum of Kshs. 92,113,494.00 in addition to general damages and interest thereon. Needless to say that special damages must not only be specifically pleaded but also proved. The Court of Appeal made this point thus in *Herbert Hahn v Amrik Singh* 1985. eKLR:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

29. At paragraph 8 of the Plaint, the plaintiff set out the particulars of Special Damage in terms of the buildings or structures damaged, the value of the contents thereof as well as loss of profit for 18 months during which the resort was not operational. Accordingly, the Kshs. 92,113,494.00 claimed by way of special damages was computed as hereunder:

    (a) Buildings and structures.....Kshs. 45,181,712.00

    (b) The value of the contents damaged.....Kshs. 26,671,846.00

    (c) Loss of profit for 18 months.....Kshs. 20,259,936.00

30. In terms of material damage to the buildings and structures on the resort, the plaintiff relied on the Reinstatement Schedule of Costs exhibited at page 6 its Exhibit 1. The document is dated 8th August 2003 and was prepared by Adams Consultants. The structural aspects of the damage were inspected by Parikh Sodhi & Associates, who were appointed for that purpose by the plaintiff's insurers' loss adjusters, Cunningham Linday. The report on the structural damage caused by the fire was exhibited at pages 44 to 49 of the plaintiff's Exhibit 1. As for damage to plant, equipment and other contents of

the buildings, the plaintiff relied on the list marked 'A' exhibited at pages 8 to 11 as well as the Detailed Assessment Report exhibited at pages 50 to 73 the of the plaintiff's Exhibit 1.

31. It is noteworthy however that the loss adjusters, Cunningham & Lindsey, having carried out full investigations into the incident, was of the view that Kshs. 30,594,900.00 was a fair value for the damaged buildings; and that Kshs. 52,536,197.00 for burnt furniture, plant and machinery as well as other damaged items, was a fair estimate. The loss adjuster's communication in this regard to the plaintiff's insurers is to be found at pages 102 to 104 of the plaintiff's Exhibit 1. It is dated 1st July 2013.

32. In the premises, I would be guided by the expert assessment by Cunningham & Lindsey Kenya Limited and find that the sums due to the plaintiff under the two heads is only Kshs. 30,594,900.00 for the damaged buildings; and Kshs. 52,536,197.00 for furniture, plant and machinery as well as other damaged items. In arriving at this conclusion I have taken into account the probative value of expert evidence. For instance, in *Stephen Kinini Wang'ondu v The Ark Limited* 2016. eKLR, it was pointed out that:

> "...Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
>
> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account."

33. More importantly, I have in mind the position taken by the Court of Appeal in *Kenya Power and Lighting Company Limited v Mohamed Dahir Molole* 2022. eKLR, that:

> 21. Contrary to appellant's tacit contention that special damages must be strictly proved and strict proof mean proof by documents, I do find that in the absence of receipts or such other documents, for any valid reason, any other cogent evidence suffices in proof of special damages. Special damages may be proved by means other than the production of receipts and documents in that the court can still consider and rely on any other cogent evidence adduced whether oral or documentary to decide whether special damages though pleaded were proved. In *Garissa Maize Millers Ltd v Attorney General & 3 Others*, 2016. eKLR, the court stated that; -
>
> > "Proof of special damages does not necessarily need to be on documents, but there has to be cogent evidence to establish that the loss quantified in terms of money has been established, and that the loss was visited upon the plaintiff by the defendant."
>
> 22. Similarly in *Mitchell Cotts (K) Ltd v Musa Freighters* (2011) eKLR, the court expressed itself thus:
>
> > ".... In the light of the above and in the circumstances we cannot fault the superior court which accepted the only evidence which was tendered to the court on the issue, the appellant having failed

> to give any evidence on the value of the tyres it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance tilting in favour of the respondent on the critical issue of the value of the uncollected tyres. The court did its best and cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court."

34. The third component of the plaintiff's claim under special damages is the claim for loss of profits. In this respect, the plaintiff claimed loss of profit in the sum of Kshs. 20,259,936.00 for 18 months when the resort was not operational following to the fire incident. Reliance was placed on the evidence of PW1 as well as the financial statements exhibited at pages 80 to 97 of the Plaintiff's Exhibit 1. It is noteworthy, however, that at no time did PW1 mention the exact period it took to have the resort restored to full functionality and why. This is pertinent because, there is the obligation on the part of every plaintiff to mitigate his loss.

35. The principle was aptly discussed by the Court of Appeal in *African Highland Produce Limited v John Kisorio* 2001. eKLR, thus:

> "The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages or embark on dubious litigation. The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant."

36. Likewise, in the case of *David Bagine v Martin Bundi* (*supra*), the Court of Appeal held:

> "... the learned judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent's lorry could have been repaired plus some period that may have been required to assess the repair costs. There was no evidence before the learned judge of what period the vehicle would have needed for repairs or for assessment of repair costs. The learned judge quite erroneously proceeded to award general damages at the rate of Kshs.500/= per day from the date of accident until date of judgment.

> The award of Kshs. 540,000/= was made in total disregard of the principles for assessing special damages and we have no alternative but to set it aside in toto."

37. Moreover, there is absolutely no proof that the plaintiff paid salaries for 18 months when the hotel was not operational. In the circumstances hereof would consider 12 months to be reasonable in the circumstances. I am guided to this conclusion by the decision of the Court of Appeal in *Uchumi Supermarket Ltd v Toigoi Investment Limited* 2016. eKLR wherein 10 months was considered a reasonable period for repairs to a supermarket building that was destroyed by fire. In this instance the plaintiff had several buildings and structures on site and therefore 12 months would not be unreasonable for purposes of their repair back to usability. Thus, the loss of profits is hereby worked out as follows:

> Sales Turnover:
>
> (98 pax x 30 US$ x 30 x 12 months
>
> X 60% occupancy at Kshs. 78.00 per
>
> 1 US$ Kshs. 49,533,120.00
>
> Profit @ 20% of sales Kshs. 9,906,624.00

38. Hence, the total amount of special damages due to the plaintiff is as follows:

> (a) Buildings and structures Kshs. 30,594,900.00
>
> (b) damage to contents of buildings Kshs. 21,941,297.00
>
> (c) Loss of Profit for 12 months Kshs. 9,906,624.00
>
> Total Kshs. 62,442,821.00

39. The claim for general damages was not expounded on by the plaintiff and is therefore treated as unmerited. In the same vein, the plaintiff did not make any attempt to demonstrate that it is entitled to VAT at this stage. There was no proof of such payment and therefore I am persuaded by the position taken by Hon. Onguto, J. in *Pyramid Motors Limited v Langata Gardens Limited* 2015. eKLR in which VAT in a party and party bill of costs was disallowed. The Judge took the view that:

> "...Value Added Tax (VAT) is chargeable in taxable supply made by any registered person. There was no taxable supply of either goods or services made to the Applicant herein by the Respondent herein."

40. I also find instructive the following passage from *D.B. Casson and I.H. Dennis, Odgers: Principals of Pleading and Practice in Civil Actions in the High Court of Justice at pp. 170 to 171*, which was quoted with approval by the Court of Appeal in *Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017)* 2021. KECA 328 (KLR) (17 December 2021) (Judgment):

> "Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is

either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote."

41. It is plain then that VAT is not recoverable in the circumstances. The plaintiff also prayed for interest on the sums found due to it. Thus, in his written submissions, counsel urged that interest be awarded from the date of filing this suit to the date of full payment. The rationale for an award of interest on the principal sum is essentially to compensate a plaintiff for the deprivation of any money that is rightfully due to it through the wrong act of a defendant. Hence, Section 26 of the *Civil Procedure Act* is explicit that:

> (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

43. No doubt, the Court has the discretion to award interest from such period as appropriate. In *Mugenyi v Ssekubwa* 2008. 2 EA 249, the Court expressed itself as follows:

> Section 26(1) of the *Civil Procedure Act* gives the court power to award interest on the decretal amount and a proper construction of the would show that it empowers court to award three types of interests at the rate it deems reasonable:
>
> (1). Interest adjudged on the principle sum from any period prior to the institution of the suit. Here the court must first decide on the evidence, the question of awardability of this interest and then on the rate at which it is to be awarded if any.
>
> (2). In addition to that, interest on the principal sum adjudged from the date of filing the suit to the date of the decree. Here, the court decides at its discretion, which must be made judicially, the rate of interest to be awarded.
>
> (3). Further to the above, interest on the aggregate sum so adjudged, from the date of decree to date of payment in full. Whether or not interest is payable for the period prior to the date of the suit depends on the evidence available and that is why section 26(2) referred to that type of interest as 'interest adjudged'."

44. Accordingly, in *Sempra Metals Ltd v Inland Revenue Commissioners and Another* 2007. 3 WLR 354 the point was made that:

> "In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from

> the late payment may take some other form. Whatever form the loss takes the court will here, as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge." (see *Lata v Mbiyu* 1965. EA 392)

45. As pointed out hereinabove, whereas counsel for the plaintiff urged that interested be awarded from date of filing suit, this prayer this was only asked for in the plaintiff's written submissions and was not pleaded in the Plaint. In *Nairobi City Council Case* (*supra*), it was held that:

> "It is now settled law that the only way to raise issues for determination by the Court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them."

46. Accordingly, in *Dipak Emporium v Bond's Clothing* 1973. EA 553, it was held that:

> "The court's right to award interest is based on Section 26(1) of the *Civil Procedure Act* which states that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment."

47. In the premises, it is my finding that the interest payable herein is at court rate and is only payable from the date hereof.

C. On costs of the suit:

48. The proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya is explicit that costs follow the event; the event herein being that the plaintiff is the successful litigant herein. Hence, the plaintiff is entitled to costs of the suit, and I so find.

49. In the result, judgment is hereby entered for the plaintiff against the defendant as follows:

    (a) Special damages in the sum of Kshs. 62,442,821.00;

    (b) Interest on a. above at court rate from the date hereof till payment in full;

    (c) The costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF OCTOBER, 2023

OLGA SEWE

JUDGE