



**Tuwei v Eco – Bank (K) Limited & another (Civil Appeal 41 of 2022)  
[2024] KEHC 12145 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12145 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 41 OF 2022  
RN NYAKUNDI, J  
OCTOBER 11, 2024**

**BETWEEN**

**JOHN KIPKORIR TUWEI ..... APPELLANT**

**AND**

**ECO – BANK (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**PROTUS KIPKEMEI MARITIM ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Decree/Judgement of the Hon. Linus Poghon Kassan-Chief Magistrate in Eldoret CMCC NO. 261 OF 2012- John Kipkorir Tuwei Vs Eco – Bank (K) Limited & Protus Kipkemei Maritim dated the 24th February, 2022)*

**JUDGMENT**

**Representation**

Wambua Kigamwa & Co. Advocates for the Appellant

G & A Advocates LLP

1. The brief background of this case is that the Appellant instituted a suit against the Respondents following an unlawful attachment and sale of motor vehicle registration no KAD 559K and he sought for an order of declaration that the acts of the Defendants were unlawful, damages for loss of income and an order for restitution or in the alternative, payment of kshs. 420,000/= being the value of the said motor vehicle.
2. The parties herein were given the chance to tender their evidence on the issues raised. Through a Judgement delivered and dated 24<sup>th</sup> February, 2022, the trial court partially allowed the claim and ordered that the plaintiff who is the Appellant herein be reinstated to the position he was before the sale of the motor vehicle at Kshs. 420,000. The plaintiff was awarded costs and interests of the suit. However, the trial court disallowed the prayer for loss of income.



3. Being dissatisfied with the Decree/Judgement of the Hon. Linus Poghon Kassan-Chief Magistrate in Eldoret CMCC NO. 261 OF 2012- John Kipkorir Tuwei Vs Eco – Bank (K) Limited & Protus Kipkemei Maritim dated the 24<sup>th</sup> February, 2022; the Appellant filed his Memorandum of Appeal dated 23<sup>rd</sup> March 2022, where he proffered his appeal on the following grounds:
  1. That the Learned Magistrate erred in law and fact in failing to award the appellant damages for loss of income.
  2. That the Learned Magistrate erred in law and fact in failing to award general and aggravated damages.
4. The Appellant sought the following orders from his Memorandum of Appeal:
  - a. That the appeal be allowed and he be awarded damages for loss of income.
  - b. An assessment and an award of general and aggravated damages coupled with costs of the appeal and the interests. order allowing this Appeal and dismissing the Respondent’s case against the Appellant with costs to the Appellant
5. The appeal was canvassed through written submissions.

#### **Appellant’s Written Submissions**

6. The Appellant filed his submissions dated 4<sup>th</sup> January 2024 in which he couched 2 issues for determination discussed as follows;

##### **a. Damages for loss of income.**

7. Learned Counsel Mr. Kigamwa for the appellant submitted that the learned magistrate well acknowledged that the appellant had expressly pleaded for the loss of income and the appellant in his evidence at page 272 of the record of appeal clearly stated that he was using his vehicle for transport business. Further, he had kept a record of the income and produced his booklet kept in the ordinary course of the business and that the appellant in addition to his booklet had the report of his income stamped and signed by an accountant which was produced pursuant to a ruling delivered by the court on the 23<sup>rd</sup> November, 2018. Counsel noted that the accountant’s report at page 61 of the record of appeal well establishes the fact that loss of income was kshs. 1,830.50 per day and the conclusion of learned magistrate that the appellant only placed reliance on his hand written notes was not proper.
8. The learned counsel opined that the court failed to take into account the expert report on the analysis of the income of the appellant by the accountant and the said expert evidence was not challenged and thus pray that the conclusion reached denying the grant of loss of income be set aside and an award be made. He also opined that they reiterate their submissions which appear at page 187 of the record of appeal and made reference to the decision in Kenya Commercial Bank Vs Zheikh Osman Mohamed (2013) eKLR. He concluded on this issue by stating that in this matter, the appellant sought a claim for Kshs. 5,010,993.75 being a claim for 7½ years and pray that the claim be allowed accordingly.

##### **b. Aggravated and general damages**

9. The learned counsel submitted that the appellant led evidence before the trial court of the vehicle having been seized by the 1<sup>st</sup> respondent without proclamation and during the trial, the 1<sup>st</sup> respondent



did not produce any proclamation and the onus to establish the existence of one was upon it in- tandem with section 112 of the *Evidence Act*, Cap 80 which provides;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

10. Counsel stated that while the case was pending, the 1<sup>st</sup> respondent was restrained from selling the vehicle on 4<sup>th</sup> April 2012 in the first instance and that after the application for interlocutory relief was heard inter-partes, a ruling was delivered on 17<sup>th</sup> August, 2012 in the presence of the 1<sup>st</sup> respondent’s advocate which appears at page 257 of the record of appeal and noted that the court clearly ordered;

“However, this court orders that the said motor vehicle in question KAD 559K should not be interfered with in any way whatsoever until the final hearing and determination of this matter. Thus prayer 2 on the face of the application is granted and costs of this application being in cause.”

11. Further, counsel noted that the 1<sup>st</sup> respondent nonetheless proceeded to sale the vehicle in express and clear breach of an order it was aware of and the evidence of the 1<sup>st</sup> defendant’s Branch Manager at pages 287-288 of the record of appeal well confirmed the sale of the motor vehicle before the case had ended at Kshs. 100,000. He stated that the value of the vehicle was Kshs. 420,000 which was acknowledged by the 1<sup>st</sup> defendant’s witness and that the Learned Magistrate failed to consider the conduct of the 1<sup>st</sup> defendant in the matter of selling the vehicle in breach of a court order barring the same, the failure to proclaim and under selling the vehicle.

12. Moreover, the learned counsel for the appellant submitted that the test for the grant of aggravated damages was satisfied based on the 1<sup>st</sup> defendant’s conduct and the actions in issue were arbitrary. Counsel made reliance to the case of Abdulhamid Ebrahim Ahmed Vs Municipal Council of Mombasa (2004) eKLR in which it was held;

“Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.”

13. It was the counsel’s closing submissions that the appeal be allowed; damages for loss of income in the sum of kshs. 5,010,993.75 be awarded, aggravated and general damages be awarded at Kshs. 3,000,000 and the appellant be awarded costs of the appeal and interests.

#### **1<sup>st</sup> Respondent’s Written submissions**

14. The 1<sup>st</sup> Respondent filed his submissions dated 5<sup>th</sup> January 2024 where he listed 2 issues for determination which he discussed as follows:

##### **a. Whether the Learned Magistrate erred in failing to award the Appellant damages for loss of income.**

15. The 1<sup>st</sup> Respondent’s learned Counsel Mr. Mwangi submitted that the trial court held that the loss of user being special damages, had not been proved to the required standards and that the court noted that



the Plaintiff had placed reliance on hand written notes and the Appellant now faults the trial court for failing to consider the accountant's report that was produced vide a ruling dated 28<sup>th</sup> November, 2018.

16. He further submitted that the 1<sup>st</sup> Respondent agrees with the finding of the trial court and that this prayer was not specifically pleaded and proved as required because the period within which the Appellant sought damages for loss of user was not defined. He noted that a cursory look at the amended plaint, the Appellant sought for damages for loss of user from 22<sup>nd</sup> March, 2012 to the date of release of the motor vehicle whereas at the time of institution of the suit, the motor vehicle had already been sold. Counsel relied on the case of *Municipal Council of Muranga Vs Simon Macharia Kairu & Another* [2021] eKLR in which the court held;

“I have perused the trial Court record and note that the 1<sup>st</sup> Respondent testified and prayed for compensation at the rate of Kshs. 3,000/= per day based on the 180 seats in the hotel that earned him a minimum of Kshs. 50 each per day. He produced his calculation as P. Ex. 5 being a bundle of three undated and unsigned tabulations under the heading of Highway View Resort namely; - Income Projection for the period Nov. 2009 to Dec. 2010, Loss of Income calculation by one S. Kairu and an Income Projection from January 2011 to Sep. 2011.

Applying the standard for proving loss of income in the authorities above, it follows that the 1<sup>st</sup> Respondent did not prove his claim as well and to that extent the trial Court erred in allowing the claim at Kshs. 1,000/= per day for a period of time that the 1<sup>st</sup> Respondent himself had not specified. It was an open and ambiguous prayer for Kshs. 3,000/= daily for an indefinite period of time and having failed to prove his case, the claim was ripe for dismissal with costs.”

17. Counsel opined that while the Appellant produced an audited report, the period within which the prayer is sought was not specific and consequently, this prayer for loss of user was not specifically pleaded and proven hence the trial court was right in disallowing the same.

**b. Whether the Learned Magistrate erred in failing to award general & aggravated damages.**

18. The learned Counsel submitted that in as much as the trial court addressed this issue, the prayer for general and aggravated damages was never pleaded by the Appellant and ought not have been determined in the first place. He further stated that the amended plaint dated 11<sup>th</sup> August, 2015 seek three prayers where general and aggravated damages was not one of them and the Plaintiff sought:

- a. A declaration that the acts of the Defendants are unlawful a discharge of his obligations under any guarantee agreement with the Defendant, an injunction restraining the sale of his motor vehicle KAD 559K coupled with an order for the release of the vehicle;
- b. That the Plaintiff used to carry out on transport business with his motor vehicle KAD 559 D and since the 1<sup>st</sup> Defendant seized it, he has suffered loss of user and business since 22<sup>nd</sup> March, 2012 at the rate of Kshs. 1830.50 daily until the date of release of the vehicle; and
- c. Costs and interests.

19. He further submitted that parties are bound by their pleadings and the Appellant cannot be allowed to appeal against a prayer that was not sought and made reliance in the case of *Chalicha FCS Ltd Vs Odhiambo & 9 Others* [1987] KLR 182 as cited with approval in *MNM Vs DNMK & 13 Others* [2017] eKLR where the court held that; “Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the



issues raised by the Judge and the order thereon, was a nullity.” He also made reliance to the case of *Ndishu & Another Vs Muriungi (Civil Appeal 3 of 2020)* [2022] KEHC 2 (KLR) in which the court held as follows;

“Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted. From the above authorities, it is clear that a court has no power to make an order, unless by consent, which is outside the pleadings.”

20. Counsel stated that the Appellant cannot be allowed to appeal against a finding by the trial court that ought not have been made. He also stated that the Appellant did not prove the special damages to the required standards and that the 1<sup>st</sup> Respondent has also demonstrated that the prayer for aggravated and exemplary damages ought not be considered because it was not pleaded in the first place and consequently, urged this court to dismiss the appeal with costs.

### **Analysis and Determination**

21. Being a first appeal, the Court relies on a number of principles as set out in *Selle and Another Vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:
  - a. “...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 into account of particular circumstances or probabilities materially to estimate the evidence.”
22. Moreover, this being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
23. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] KLR at 403, where *Kneller JA & Hancox Ag JJA* held that

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”



24. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions, it is evident that the issues this court has to determine are:
- a. Whether the Learned Magistrate erred in failing to award the Appellant damages for loss of income.
  - b. Whether the Learned Magistrate erred in failing to award general & aggravated damages.

**Whether the Learned Magistrate erred in failing to award the Appellant damages for loss of income.**

25. The court of Appeal in Civil Appeal no. 283 of 1996, (David Bagine versus Martin Bundi) stated that damages which are claimed under the title "loss of user" are special damages which must be proved. The Court stated as follows: -

"We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

26. The Appellant pleaded Kshs. 1,830.50 daily from 22<sup>nd</sup> March, 2012 until the date of release of the vehicle. To support her claim, the Appellant produced a note book, in which he had noted down his earnings from the Vehicle per day and an accountant's report dated 28.05.2012.
27. The court of Appeal in Ryce Motors Limited & Another versus Elias Muroki (1996) eKLR stated that a claim for loss of user must be supported by acceptable evidence. The Court stated as follows: -

"The learned judge had before him by way of plaintiff's evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act. These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety."

28. Given the above cited authorities, I agree with the 1<sup>st</sup> Respondent's submissions that in as much as the Appellant produced an audited report, the period within which the prayer is sought was not specific and as such the prayer for loss of user was not specifically pleaded and proven.

**Whether the Learned Magistrate erred in failing to award general & aggravated damages.**

29. The Court of Appeal in the case of Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR stated that:

"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish



and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government
- ii. cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii. where exemplary damages are expressly authorized by statute".

30. In the circumstances of this appeal, reading through the amended Pleat dated I have not come across any aggravated damages pleaded by the Appellant and it is trite that parties are bound by their pleadings. I need not to belabor on this limb. In any event, I am not satisfied that the respondent's actions were so arbitrary and oppressive so as to justify an award of exemplary damages. This limb is dismissed in its entirety.

31. I accordingly find no merit in the appeal, which is hereby dismissed.

32. Each parties shall bear their own costs.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024**

.....  
**R. NYAKUNDI**

**JUDGE**

In the presence of

Mr. Wambua, Advocate for the Appellant

