REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 615 OF 2018

SIGINON FREIGHT LIMITED.....APPELLANT

VERSUS

AIR CHARTER BROKERS LIMITED.....RESPONDENT

(Being an appeal from the judgment of Gesora P.N (CM) delivered

on 10th December 2018 in Nairobi CMCC NO. 2865 of 2014.)

JUDGMENT

1. This appeal emanates from the judgment of **Gesora P.N**, CM delivered on 10th December 2018 in **Nairobi CMCC No. 2865 of 2014.** By the plaint dated 19th March 2014, the Plaintiff in the lower court now, the Respondent, had sued the Defendant, now the Appellant, for breach of contract. The Respondent sought payment of USD 37,058.82 averred to be the market value of a consignment of goods lost in transit, namely, 7,000 sachets of a veterinary drug known as Samorin; and payment of USD 34,843.96 on account of an invoice allegedly rejected by the Respondent's client on account of the lost goods.

2. The Respondent averred that it is engaged in the business of provision of air charter services in East Africa and environs ; that on 4th February,2013 it entered into contract – **CT/13/003/T-13/36** - with **FAO** (Food and Agriculture Organization of the United Nations)Somalia Country Office in Nairobi for air transportation of veterinary drugs and equipment (hereafter the consignment) from the FAO offices in Nairobi to the FAO Field Office in Hargeisa , Somaliland and assumed full responsibility and liability for the cargo pursuant to the contract; that in execution thereof the Respondent on 5th February 2013 engaged the services of the Appellant , a company specialized in aviation transport logistics and allied services, to transport the consignment, consisting of 290 boxes from the offices of FAO Somalia in Nairobi to the Jomo Kenyatta International Airport (JKIA), where it was to be airlifted to Hargeisa, Somaliland by the Respondent's appointed carrier.

3. It was further averred that it was an express and/or implied term of contract between the Appellant and Respondent that the consignment would be transported and delivered to the agreed destination in the same quality and quantity it was received. The Respondent averred the Appellant duly received the consignment from the FAO Offices on 20th February 2013 but in breach of the agreement, the Appellant lost seven (7) boxes of the consignment containing 7,000 sachets of the drug Samorin as result of which only 283 boxes arrived in Hargeisa, Somaliland. It was averred that the Appellant was wholly to blame for the loss because of which FAO declined to settle the Respondent's invoice , occasioning loss and damage to the Respondent.

4. The Appellant filed its statement of defence dated 26th June, 2014 admitting the engagement to provide logistical support services to the Respondent and averred that it duly delivered the full consignment and had it loaded onto the aircraft and receipt thereof acknowledged by the Respondent's pilots, servants/agents and employees. The Appellant disputed that it breached the agreement with the Respondent and denied liability for the loss of part of the consignment, the value thereof and the Respondent's alleged unpaid invoice, calling for strict proof.

5. The matter proceeded to full hearing. Each party called one witness. For the Respondent **Samira Low (PW1)** the Managing Director, gave evidence while the Appellants called **Jared Oswago, (DW1)** the Operations Manager. In his judgment the trial magistrate found the Appellant liable for breach of contract for failing to fulfill its primary obligation as a bailee to ensure that the consignment was delivered intact and loaded onto the aircraft as received. The trial court therefore allowed the Respondent's entire claim totaling USD71,902.78.

6. The Appellant, aggrieved with the outcome preferred this appeal citing twelve grounds as summarized below, in its Memorandum of Appeal: -

a) That the learned Magistrate considered extraneous matters in arriving at the decision to allow the entire claim made by the Respondent, Air Charter Brokers Limited against the Appellant.

b) That the learned Magistrate erred in failing: - to appreciate and record the significance of the various factors that emerged in the evidence of the Appellant's witness at the trial including that of the Respondent's witness too, to consider or properly consider all the evidence before him; and to make any or any proper findings on the evidence placed before him.

c) That the learned Magistrate erred in law and in fact in failing to appreciate that the Appellant only provided the ground handling services and transportation for the cargo to its unit at the airport whereafter it was handed over to Tradewinds Ltd, the airport ground handling company of the carrier of the cargo, namely, **Skyward International Cargo Aviation Limited.**

d) That the learned Magistrate failed to appreciate that the owner of the goods, the Food and Agriculture Organization (FAO) had contracted the Respondent for the carriage of its cargo from Jomo Kenyatta International Airport to Hargeisa in Somaliland and if indeed any loss occurred, only the FAO had *locus* to sue for the loss it sustained.

e) That the learned Magistrate failed to appreciate and recognize that the Respondent was not the legal/or beneficial owner of the goods and had not sustained any loss as a result of their alleged loss and therefore had no *locus standi* to sue or claim for the value of the goods allegedly lost.

f) That the learned Magistrates erred in law and fact in failing to appreciate that the Appellant was never contracted to carry the goods to Hargeisa as was purported by the Respondent, to the contrary, all the documentary evidence showed that it was the Respondent who was contracted for carriage of the subject goods to Hargeisa in Somaliland.

g) That the learned Magistrate erred in law and fact in ignoring the documentary evidence by the customs department of the Kenya Revenue Authority certifying that all the cargo was loaded onto the aircraft chartered by the Respondent, and nothing was left behind.

h) That the learned Magistrate erred in law in failing to hold that the Respondent was bound by its pleadings in the subordinate court and could not seek to pursue a cause of action not previously pleaded.

i) That the learned Magistrate erred in law and in fact in failing to recognize and hold that the authority and case law relied upon by the Respondent involved significantly different facts and was distinguishable.

j) That the learned Magistrate erred in law and fact in holding the Appellant fully liable for the Respondent's claim without assigning or giving any or any proper reasons therefore and without properly considering the submissions filed by the Appellant as required under the principles of 'substantive justice'.

k) That the learned Magistrate erred in law in holding that the Respondent had discharged its burden of proof and was entitled to the claim for USD 71,902.78 plus costs.

l) That the learned Magistrate erred in law in failing to appreciate that the Respondent had failed to prove its claim or indeed the value of the goods allegedly lost or indeed that it had a cause of action in the first place given that the Respondent had suffered no loss nor had FAO's claim been subrogated or assigned.

7. On 5th February 2021 the court directed that the appeal be canvassed by way of written submissions and after compliance, the same were highlighted on 12th April, 2021.

8. In its opening submissions, the Appellant restated the duty of the first appellate court as espoused in several authorities including **Peters v Sunday Post Ltd [1958] EA 424** and **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123**. Counsel reiterating the Appellant's pleadings, evidence and submissions in the lower court asserted that the Appellant had discharged its obligations as agreed, by transporting the cargo from FAO offices to the aircraft aboard which all 290 cartons of cargo were loaded. Thus, it was contended that the trial court erred in rendering a judgment against the Appellant which amounted to vitiating, varying and/or rewriting the contract between the parties, contrary to the cardinal rule that a court of law cannot rewrite a contract between parties as pronounced in **John Njuguna Mugo v Kenya Commercial Bank Limited [2018] eKLR**.

9. Moreover, it was also submitted, the Respondent lacked the necessary legal standing to sue for the lost consignment, which was admittedly the property of FAO, and as such, the Respondent had failed to specifically plead and prove what loss it had suffered. Further emphasizing that the Respondent did not adduce any evidence of the invoice allegedly unpaid by FAO, the Appellants viewed the judgment as manifesting unjust enrichment on the part of the Respondent and cited the decision in **Equity Bank Limited v Gerald Wang'ombe Thuni [2015] eKLR.** Finally, it was submitted the Respondent was bound by its pleadings and the learned magistrate failed to appreciate the inconsistencies in its pleadings and evidence before the court as to the nature of the cause of action. The Court was urged to allow the appeal.

10. The Respondent defended the findings of the trial court and urged this court not to disturb the judgment of the lower court. The Respondent restated the duty of the first appellate court as enunciated in **Kariuki v Attorney General [2014] eKLR 424**. Calling to their aid the decisions in **Surgipharm Limited v Express Kenya Limited & Another [2015] eKLR**; **Savings & Loan (K) Limited v Kanyenje Karangatia Gakombo & Another [2015] eKLR** ; and **Raoul Coulinvanx's** treatise **"Carrier's Carriage by Sea" Vol.2 (London Stephens 1971),** the Respondent submitted that by dint of the contract and relationship between the parties herein, and the consent letter from FAO, the Respondent had the necessary locus to institute the claim against the Appellant.

11. Secondly, it was submitted that the Appellant was in breach of its contractual obligation by failing to ensure all the cargo was loaded onto the aircraft and that it had opportunity to enjoin all other parties, who in its opinion were to blame, but failed to do so. It was posited that in the absence of a plausible explanation for the loss of part of the consignment by the Appellant, the doctrine of *Res Ipsa Loquitor* applies. On this score, the Respondent relied on the pronouncement of the court in **Kenya Airfreight Handling Ltd v Kenital Solar Energy Ltd &**

Another [2011] eKLR. Finally, counsel submitted that the Respondent had proved the loss incurred on account of the Appellant's breach of contract as required by law and relied on the case of **Chrispine Otieno Caleb v Attorney General [2014] eKLR.**

12. This being a first appeal, the duty of the court as rightly submitted by the parties is to re-evaluate the evidence adduced at the trial and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see and hear the witnesses testify. See **Peters v Sunday Post Ltd [1958] EA 424**, **Selle –Vs- Associated Motor Boat Co. [1968] EA 123, Williams Diamonds Limited v Brown (1970) EA 11.**

13. The Court of Appeal stated **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 287** that: -

> **"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown to have demonstrably acted on wrong principle in reaching the finding he did."**

14. The court has considered the evidence adduced in the lower court and the submissions therein and on this appeal. It is not in dispute the Respondent was engaged by FAO Somalia Office in Nairobi to transport veterinary drugs and equipment from FAO's Somali office in Nairobi to the FAO Field Office in Hargeisa ,Somaliland; and in execution of the contract the Respondent procured the services of the Appellant to handle all the logistics related to the transport of the said cargo from FAO Nairobi Offices to the airport (JKIA), customs processing and eventual loading onto the aircraft in readiness for airlifting to Hargeisa Somaliland. Although it had been pleaded in the plaint that the responsibility of the Appellant was to transport the cargo to Hargeisa, it became evident in the trial that the as far as the Appellant's contract was concerned, the ultimate destination of the cargo received from FAO Office by the Appellant was intended to be onboard the carrier at JKIA appointed by the Respondent. There is no dispute that the Appellant did collect the cargo from FAO Somali Office in Nairobi and did load some of it on board the carrier, late in the night of 25th February 2013.

15. Thus, having considered the grounds of appeal, the submissions made on this appeal and the entire record of the proceedings of the trial Court, three main issues fall for determination, namely, whether or not the Appellant duly discharged its express and/or implied obligation to the Respondent by delivering, processing and loading onto the aircraft the same quantity of cargo received; whether the Respondent was entitled to claim for the loss of cargo; and finally whether the Respondent has proved the loss it allegedly incurred as a consequence of the Appellant's alleged breach of contract.

16. The Respondent's witness **PW1**, adopting her witness statement testified that FAO had contracted the Respondent to airlift the consignment to Hargeisa-Somaliland. She asserted that the Appellant's duty under the parties' mutual agreement in furtherance of the objects the said agreement was to provide logistical support for the pickup, delivery and customs processing and eventual loading of the consignment onto the aircraft at the airport. That as result of the Appellant's breach of contract, a portion of the consignment (7 out of 290 cartons) containing veterinary drugs worth the claimed amount of USD 37,058.82 leading to the losses claimed. On his part **DW1** similarly adopted his witness statement. The gist of his testimony was that all cargo received was delivered and loaded onto the aircraft and pointed out that no short -landed report/certificate customarily issued in the event of cargo loss was tendered and that the aircraft manifest reflected all the 290 cartons loaded onto the aircraft. Hence, the Appellant had discharged its obligations under the agreement with the Respondent.

17. The applicable law as to the burden of proof lay with the Respondent, as stated in Section 107 (1) of the Evidence Act:

> **"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."**

18. Section 108 further provides that:

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

19. In the case of **Wareham t/a A.F. Wareham & 2 Others 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."**

20. The key objects and terms of the agreement between the Appellant and the Respondent are pleaded at paragraphs 5, 6 and 8 of the plaint as follows:

> **"5. On 5th February, 2013 or thereabout, the plaintiff entered into contractual agreement with the defendant, a specialized company in logistics, to ship various veterinary drugs and equipment (hereafter referred to as "cargo") to Hargeisa in Somaliland comprising 290 cartons/boxes; among them being 8 cartons/boxes of drug known as Samorin.**

6.It was an express and/or implied term of the contract that he cargo would be transported and delivered to the agreed destination in the same quality and quantity as had been delivered to the defendant…

8. It was the responsibility of the defendant to fetch cargo from FAO offices in Nairobi, transport it to the airport, process all the customs paperwork and safely load them to the aircraft in readiness for airlifting to Hargeisa Somaliland." (sic)

21. Save for the fact that so far as the Appellant's role was concerned, the destination of the goods was the JKIA and not Hargeisa as claimed in paragraph 5, the averments at paragraphs 6 and 8 were not disputed by the Appellant in its statement of defense. On the facts of the case, and based on the emails exchanged by the parties between the 5th February, 2013 and 20th February, 2013 the Appellant's role was principally that of a picking/ carrying/storing /processing and loading the cargo on the aircraft and stood in the capacity of a bailee. Its role commenced with pickup and ended with the onboarding of the subject cargo onto the aircraft. **Black's Law Dictionary Tenth Edn.** defines a bailee as

"1. Someone who receives personal property from another and has possession of but not title to the property. A bailee is responsible for keeping the property safe until it is returned to the owner. 2. Someone who by warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them".

See also the definition adopted by **Gikonyo J.** from **Chitty on Contracts** in **Surgipharm Limited v Express Kenya Limited & Another (2015) eKLR.**

22. As for the term bailment, the same Dictionary defines it as:

1. A delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, usu.under an express or implied-in-fact contract . Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title."

23. Similarly, **Halsbury's Laws of England**, **Fourth Edition 3(1) (2005)** states that:

"1. Under modern law a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The legal relationship of bailor and bailee can exist independently of any contract and is created by voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding.

2. The element common to all types of bailments is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods. A claim against a bailee can be regarded as a claim on its own *sui generis*, arising out of the possession had by the bailee of the goods.

Note: By design bailment is distinguishable from a sale, a relationship of *mutuum,* a relationship of licensor and licensee.

3.To constitute a bailment (which derives its name from the old French word bailer, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be vacated by its owner or possessor (the bailor), or his agent duly authorized for that purpose, in favor of another person (the bailee) in order that the latter may keep the same or perform some act in connection with it, for which such actual or constructive possession of the chattel is necessary, thereafter returning the identical subject matter in its original or an altered form.

4. Thus, a bailment may arise by attornment involving a constructive delivery of possession, as where, for example, a warehouseman holding goods as agent for an owner agreed to hold them for another person pursuant to the owner's instructions. There can be bailment by an owner without ever having taken possession of the chattel concerned, so long as the title to it or the right to possess it has passed to him".

24. The Court of Appeal in **Equator Distributors v Joel Muriu & 3 Others [2018] eKLR** observed as follows on the relationship between a bailor and bailee:

"The basic rule is that the bailee is expected to return to its owner the bailed goods when the bailee's time for possession of them is over, and he is presumed liable if the goods are not returned".

25. The trial court in its judgment correctly found that the Appellant was a bailee (more precisely, a sub-bailee as will become evident in the course of this judgment) who had the duty/obligation to ensure that the consignment entrusted to it by the Respondent reached its destination intact. The Appellant was obligated under the agreement of the parties to ensure the cargo was duly delivered to the airport and loaded upon the aircraft. Despite pleading that the Respondent's pilots, servants/agents ,employees had acknowledged receipt of the cargo , the Appellant at the trial conceded through **DW1** that no such acknowledgement was obtained from the Respondent's agents or aircraft personnel and sought to rely on documents such as the Airway Bill, Check Weighing Docket, Air cargo manifest, and KRA custom's entry, most of which were generated by the Appellant but above all none bearing the acknowledgment of receipt by the Respondent's employees or servants as pleaded in the defence. Similarly, considering their admitted failure to obtain acknowledgement of receipt of the cargo from the Respondent's agents or employees, it was idle for the Appellants to demand a short- landed certificate or report from the Respondents when emails from the FAO office Somalia confirmed the non-receipt of the 7 cartons of cargo, which loss the Appellant barely disputed in subsequent correspondence with the Respondent.

26. The Appellant's obligation as bailee was to ensure that the same quality/quantity of cargo collected from FAO Nairobi office was loaded on the aircraft notwithstanding their admitted engagement of **Tradewinds Ltd** to handle the actual loading of the cargo upon the aircraft. Having admitted receipt of the entire subject cargo from FAO, the onus lay with the Appellants to demonstrate that contrary to the Respondent's assertions of loss, they discharged their obligation by delivering the cargo as agreed and as received or to explain what became of the undelivered portion. See section 112 of the Evidence Act. It was not merely enough to repeatedly claim that they discharged their obligation. The trial court sated in its judgment that:

> **"It is not in disputed that the Defendant did receive and collect 290 boxes of the cargo from FAO on onward transportation to the airport for loading and air lifting to Hargeisa Somaliland. The Defendant was obligated to ensure that the received goods were loaded in the aircraft that the plaintiff was to provide. The Defendant is a specialized entity in the provision of logistical support to its clients for transportation of cargo and ensuring that the same are properly loaded to the aircraft for transportation/airlifting…**
>
> **The Defendant herein was a bailee who had a duty/obligation to ensure that the consignment reached its destination intact…** (sic).

27. This finding was properly arrived at, based on the pleadings and evidence adduced by the parties. The trial court cannot therefore be faulted on that score.

28. Moving now onto the second issue for determination, the Respondent had sought judgment against the Appellant for *inter alia*:

> **"i) Payment of the market value of the missing 7,000 sachets of Samorin in the sum of USD 37,058.82.**
>
> **ii) Payment of USD 34,843.96 on of account unpaid FAO invoice… "**

29. The question to be determined is whether the Respondent had the locus *standi* entitling it to claim compensation for the loss of the cargo totaling USD 37,058.82. The Respondent relied on the letter by FAO dated 6th November 2013 addressed to it, by which FAO allegedly consented to the institution of legal proceedings by the Respondent as against the Appellant for loss of seven (7) cartons of veterinary drugs which were part of the cargo destined for Hargeisa. The Appellant took the position that the Respondent lacked locus standi to sue for the lost cartons as it was the property of FAO. It seems that there were two levels of bailment in this case, the primary one being between FAO and the Respondent governed by a written contract referenced as **CT/13/003/T-13/36;** and the subsidiary bailment between the parties herein in respect of which was no specific contract was executed**.** The subject matter however remained the property of FAO.

30. Under clause 2.1 of its contract with FAO, the Respondent agreed ***"to perform the following services for (FAO) …in accordance with the following terms and requirements***:

> **"Air transportation of Veterinary drugs and Veterinary Equipment from FAO Somalia Country Office, Nairobi Kenya to FAO Somalia Field Office, Somaliland (and) should include pickup from FAO Somalia Country Office ,Nairobi, loading charges at FAO Somalia…Kenya, customs clearance and airfreight costs to be specified at final destination , off-loading charges at destination and any other security and delivery related costs so that the goods arrive safely at the FAO Somalia Field Office , Hargeisa…**

31. Pursuant to clauses 4.1,4.2 and 5.4 of the contract with FAO, **the** Respondent had the status of an independent contractor and could not, without FAO's written authorization enter into sub-contracts; charge or assign any of its rights or obligations under the contract to a third party; and was liable to FAO for any losses incurred under the contract. There was no evidence that the Respondent had been authorized by FAO to subcontract any portion of their obligation to the Appellant. Admitting the prohibition against subcontracting, **PW1** stated during cross-examination that FAO *"was aware"* that the Respondent had contracted the Appellant to ferry the consignment to the airport. The foregoing notwithstanding, FAO as the owner of the goods rather than the Respondent was entitled to sue for the lost goods as stated by the Appellant. This court's full appreciation of the passage in **Raoul Colinvaux's Carrier's Carriage by Sea** quoted by the Court in the **Big Road Enterprises** case and cited herein by the Respondent, is limited by the brevity of the passage. Besides, it appears that the facts in **Big Road Enterprises** may be distinguishable from the pertinent facts of the instant matter where the original bailee (Respondent) had executed a contract with FAO and subsequently engaged a sub-bailee without a specific contract.

32. In **Halsbury's Laws of England** (above) sub-bailment is explained as follows:

> **"A sub-bailee is a person to whom the actual possession of goods is transferred by someone who is not himself the owner of the goods but who has a present right to possession of them as bailee of the owner. <u>When a sub-bailee accepts possession of the goods he thereby assumes the obligations of a bailee towards the original bailor. Thus, if the sub-bailment is for reward, the sub-bailee will owe to the bailor all the duties of a bailee for reward. The bailor has a right to make a claim against the sub-bailee for breach of any of his duties either if the bailor has the right to immediate possession of the goods or if they are permanently injured or lost. The sub-bailee also owes, concurrently, the same duties to the original bailee whose obligations to the bailor are not extinguished by the sub-bailment".</u>**

33. The above appears to be the case here. **FAO** remained the owner of the cargo in question and there is no evidence that it assigned its rights to enforce its tittle in respect of the consigned goods to the Respondent under the contract, or at all. Nothing in the letter dated 6th November 2013 relied on by the Respondent can be construed as authorization by FAO to the Respondent to institute legal proceedings on its behalf as against Appellant. It is merely a letter of *no objection* and acknowledgment of the Respondent's intention to recover the loss suffered by FAO. It contains a caveat that any assistance offered by FAO would be without prejudice to FAO's claim against the Respondent

for the lost goods. Consequently, as correctly submitted by the Appellants the *locus standi* to claim payment in respect of the market value of the missing 7,000 sachets of the Samorin drug in the sum of USD 37,058.82 entirely lies with FAO. Had the trial magistrate addressed his mind to this matter, he would have arrived at a different conclusion regarding the claim for compensation in respect of the value of the lost goods.

34. Besides, the pleaded value of the lost consignment appeared to have been obtained from the unsupported values in the email correspondence by one **Khalid Saeed** of FAO Somalia (of 18.4.2013) with **PW1**. It will be noted from the Commercial Invoice issued by the Office of the FAO Officer in-charge Somalia, dated 5.2.2013 (at page 21 of the Respondent's documents), that the total value of the 8 cartons of samorin was USD33600.00 Thus, the Court also agrees with the Appellant that based on that invoice, the value of the 7 lost cartons of Samorin would be USD29,400.00 and hence the asserted value of USD 37,058.82 appears to have no evidential basis.

35. Concerning the final issue, the question is whether the Respondent proved the loss pleaded in the plaint as arising from the Appellant's breach of contract. The Court of Appeal in the case of **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR** observed that:

> **"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity, but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of".**

See also the judgment of **Chesoni J**. (as he then was) in **Ouma v Nairobi City Council [1976] KR 304.**

36. The Court has already found that the Respondent was not entitled to sue the Appellant, a sub-bailee for the lost goods and cannot assert to have suffered loss thereby in the circumstances of this case. By virtue of sections 107 and 108 of the Evidence Act a party who alleges the existence of a fact is obligated to prove it on a balance of probability. The Respondent claimed payment of USD 34,843.96 on account of an unpaid FAO invoice and has submitted it had proved the loss to have been occasioned by the Appellant's breach of contract. On its part, the Appellant submitted the Respondent failed to specifically plead and prove what loss it had suffered asserting that no evidence of the unpaid invoice by FAO was tendered. The court having perused the record of appeal notes in this regard that on 26th April 2013 FAO sent an email to the Respondent indicating they would settle the Respondent's invoice *less the value of the lost cargo*. The email states in part:

> **"Dear Samira,**
>
> **A decision has been reached to pay your invoice minus the balance of the value of lost cargo as investigation continues, unfortunately your invoice has inadvertently misplaced, kindly send us a copy of the invoice and to process your payment."**

37. Nothing could have been easier than for the Respondent to furnish correspondence after the above email indicating that FAO never settled the invoice as stated, allegedly because of the loss of the 7 cartons of samorin. In fact, the so-called authorization letter of 6.11.2013 by FAO to the Respondent (page 60 of the Plaintiff's documents) strongly suggests that FAO may have settled the full Respondent's invoice but without deducting the sums in respect of the lost consignment. Else, there would have been no need for the letter in the first place, or reference therein to FAO's outstanding claim against the Respondent. The wording and tone of this letter suggests that FAO may have been persuaded, in lieu of direct compensation by the Respondent through deduction, to give opportunity to the Respondent to bring this claim to recover the loss from the Appellants.

38. This conclusion is also bolstered by the fact that the Respondent's demand letter to the Appellant dated 15.05.2013 (page 56 of Plaintiff's documents), also significantly copied to one **Stoyan Nedyalkov** of FAO does not include a claim in respect of the alleged unpaid invoice but only the claim in respect of the lost goods. More significantly, in her written witness statement and evidence-in -chief, **PW1** was decidedly reticent about this matter and made no express statement to the effect that FAO had declined to settle the Respondent's invoice. When cross-examined on the issue, the curt reply elicited was, *"**They (FAO) have refused to pay".*** There was therefore no evidence that FAO failed to settle the Respondent's transport invoice and that they were therefore entitled to pursue the Appellant in that regard.

39. In summary, although breach of contract was established against the Appellant, there was no proof that, a)the Respondent had suffered any loss either directly, for which they were entitled to sue the Appellant, or in having made good FAO's claim for the lost goods, in which event they would have been entitled to directly sue the Appellants for compensation, and b) in FAO declining to settle their invoice dated 1.03.2013 .It is doubtful in any event whether, based on its pleadings and evidence, the Respondent could simultaneously sustain both claims, as potentially, FAO would have been obligated to settle the Respondent's invoice once compensated for the lost goods; the claims appear compounded and amount to duplication of payments as awarded in the lower court.

40. In the result, this court finds that the trial court's finding that the Respondent had proven that it suffered the losses alleged was erroneous and against the weight of evidence. The findings cannot stand. In the circumstances, this court allows the appeal on quantum and sets aside the award of damages in the judgment of the lower court and substitutes therefor a finding that the damages pleaded in the plaint were not proved and the claims must fail. As the appeal has partially succeeded the parties will bear their own costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 1ST DAY OF JULY 2021.

C.MEOLI

JUDGE

In the presence of:

Mr.Khagram for the Appellant

Ms Katile h/b for Mr.Juma for the Respondent

C/A: Carol