REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 11 OF 2015

DAVID NJUGUNA NGOTHO .....PLAINTIFF

-VERSUS –

FAMILY BANK LIMITED.....1ST DEFENDANT

JOSEPHAT MITEI T/A TWINISTAR AUCTIONEERS .....2ND DEFENDANT

JUDGEMENT

The plaintiff, **DAVID NJUGUNA NGOTHO,** is a resident of Ongata Rongai and a business man by occupation. He undertakes trade in General Merchandise and cereals under the name and style of Kahoro Cereals with Business Premises at Roy Plaza.

The 1st Defendant, Family Bank Limited, is a limited liability Company registered as such under the Companies Act Cap 486 and the Banking Act Cap 488 Laws of Kenya.

The 2nd Defendant, **JOSEPHAT MITEI** is registered auctioneer carrying on business in the name of **TWINISTAR AUCTIONEERS,** a limited liability company.

The Plaintiff's Case.

The plaintiff averred in his plaint dated 16th December 2015, that on or about the 31st March 2015, the 2nd Defendant, under the instructions of the 1st Defendant, trespassed into his business premises Plot No.23124/46 and carelessly and negligently seized his goods and tools of trade without any known reason. In doing so, the 2nd Defendant was acting at the instance of the 1st defendant, FAMILY BANK LIMITED. He stated that the action by the 1st and 2nd Defendants was reckless and careless such that he (plaintiff) suffered loss and damage causing the plaintiff to instantly become a pauper. He further averred that he was never involved in any way in the application of a loan facility from the 1st Defendant nor did he ever authorise any one to secure any loan facility and further proceed to use my business under the name and style of Kahoro Cereals as security for a loan facility.

On the 16th of March 2015, the 2nd defendant under the instructions of the 1st defendant served the Plaintiff with a proclamation of attachment of movable property. On the 20th of the same month the plaintiff through his Advocate wrote a letter to the 1st defendant informing them of the wrongful attachment of his property. The 1st and 2nd defendants proceeded to act in bad faith by serving a notification of sale of Movable Property on 31st March 2015 and at the same time attached the property.

The plaintiff filed a Misc. Application No.246 of 2015, the Honourable Court Magistrates Court at Milimani on the 2nd April gave orders in favour of the Plaintiff to stop the Defendants and or their agents from acting in any manner involving the goods proclaimed or any other goods of the Plaintiff. In the same abovementioned matter, the honourable court gave further orders that the 2nd Defendant returns the Plaintiffs goods they had attached. On the 24th of august 2015, the honourable court issued yet other orders that the defendants and or their agents were barred from acting from any manner whatsoever with the goods proclaimed or any other goods of the plaintiff and to refrain from attaching or advertising or in any way interfering with the day to day affairs and running of the Plaintiff's premises.

The plaintiff adduced evidence to the effect that his lease with the landlord for ten years was cut short, that he had done renovations to the suit business and the expenses were to be recovered from the Landlord upon termination of the lease at the end of the agreed period amounting to 1,440,000/=, that he was evicted by the land due to failure to pay his rent hence his business came to an end due to the acts of the Defendants.

The plaintiffs further adduced evidence that on the 23rd September 2015, the plaintiff wrote to the defendants pleading with them to release his goods as per the court orders as this was his only source of livelihood but no response has been received from the Defendants. The

plaintiff wrote again on the 1st of October 2015 to the defendants with the list of all the goods and tools of trade and cash box with money Ksh.600,000/= and counter cash Ksh.58,000/=that had been illegally carried away from his shop to enable them to process his request further. On the 2nd October 2015 the 1st Defendant did write to the 2nd Defendant asking them to release the goods they had attached to the Plaintiff immediately in accordance with the court orders previously issued. The plaintiff stated that the 2nd defendant ran to court on the 25th of October 2015 to have the orders issued on the 24th August 2015 set aside on the basis that he was not aware of the application leading to the issuing of the order.

The plaintiff averred that he is hounded by his creditors starting with children school fees and the suppliers of his stock in the shop who had given him goods on credit. The plaintiff claims as against Defendants jointly and severally and severally for several damages, general Damages and Loss of Reputation & Loss of future earnings. He therefore prays for:-

a. Loss of daily income (8 months) at 900,000/= (from 31st March up to November 2015 totalling to 7,200,000/= (time before the plaintiff filed civil case 11A of 2015).

b. Also to be considered is the period from 1st December 2015 up to the conclusion of this case (to be calculated at the same rate).

c. Future earning as per the lease agreement for the remaining period (8 years 9 months)- Ksh 127, 600, 000/=

d. Special damages Ksh 6, 418, 100/=

e. General damages

f. Loss of reputation – Ksh 30,000,000/=

g. Loss of goodwill- 3,000,000/=

h. Costs and interest of the suit.

The 1st Defendant Case

In its testimony, the 1st defendant, FAMILY BANK LIMITED stated that it entered into a loan agreement with the 3rd Party for an amount of KES.1,500,000,00 through a signed and filled Micro-Credit loan application form which is usually a standard from provided by the 1st Defendant to customers seeking to apply for a loan facility. The 1st defendant further stated that the Third Party provided the name of Kahoro Cereals Store as her business which had its premises based in Rongai and the Third Party proceeded to provide the cereal stock in the said business as stock valued at KES. 2,200,000,00 as security and/or collateral for the loan amount.

The 1st defendant further stated that the Third Party provided photos showing the cereals in her shop, stored in several sacks as proof that she indeed owns the shop. To further support her application, the Third Party produced a licence issued on the 17th February, 2014, under the Food, Drugs and Chemical Substance Act and also a Business Permit Bill issued on the 29th November, 2013 in the name of the suit business, (Elizabeth Njeri Ngigi) a permit to operate a cereal store under the said name issued by the County Council of Kajiado.

It was the 1st defendant's testimony that based on the information provided by the Third Party to the 1st Defendant and relying on the same information, the 1st defendant though its own internal mechanisms approved the said loan amount in favour of the Third Party and the same was later disbursed. The third Party repaid the same up to a certain point and subsequently started to default, which led the 1st defendant to issue instructions the 2nd defendant to proceed to repossess all assets issued by the Third as security including the suit business. The 2nd Defendant proceeded to the suit business, proclaimed the same, attached the same and subsequently, the same was repossessed as it was required under the contract signed between the 1st defendant and the third party. It was after the said repossession that the plaintiff filed the present suit and sought the orders as indicated in the plaint.

The 3rd Party's Case

The third party in response to both the Plaintiff and the Defendants filed a statement of defence and a further statement of defence dated 31st October 2016 as well as submissions dated 4th June 2018. She averred that there existed a bona fide relationship between her and the 1st Defendant where the 1st Defendant had severally visited her residence at Kikuyu- Wangige and her business premises at **Ongata Rongai Kware Plot No. N/N/6082** in the previous loan appraisal. It was her testimony that the 1st Defendant approached her to take up a loan at its Rongai Branch for working capital and offsetting the existing loan. She accepted the letter of offer from the 1st Defendant and executed it. She stated that it is indicated in the loan application documents furnish before court by the 1st Defendant clearly indicated the collateral and liquidation values. The application summary indicated summary indicated further the strengths and weaknesses of the 3rd party as a loan application. The strengths included but not limited to being a repeat borrower and good turnovers, while the weakness was that of lack of proper financing records. Given the said weakness on the part of the 3rd party, the 1st Defendant asked her to supply them other documents that could improve her credit. She then furnish the 1st defendant with the food and hygiene licence showing her business showing her business to be at Ongata Rongai plot No. **N/N/6082** but she did not have a trading license. According to the 3rd Party, since she had no trading licence, the 1st defendant advised her that if she could find one even if it's not hers and that the 1st defendant was not going to use it as condition to pledge the plaintiff goods therein. The same is supported by the fact that the 1st Defendant failed to produce the Chattel mortgage during hearing according to the 3rd party. In that regard, the 3rd Party presented the 1st defendant with

DN/Ngotho/Wangotho/Baba Ngotho/Kahoro receipts and invoices as a customers who held a trading licence for the year 2014. It was alleged by the 3rd Party that upon production of the said licence that belongs to the plaintiff, the Defendant proceeded to make amendments on it and introduced her name to so that it corresponds with the food and beverage licence **No.N/N6082** she had given before and the same was done without her knowledge.

The events above according to the 3rd Party came to her attention when she visited the 1st Defendant to collect the original documents. In the 3rd Party's view the court should take judicial notice that she was made aware that the goods belonging to the plaintiff herein had been charged during the hearing of Misc Application 246 of 2015. The 3rd Party condemned the actions of the 1st Defendant in attaching and selling the Plaintiff goods and termed it as unwarranted since she (3rd Party) was not made aware of any chattel registration of the plaintiff's goods.

The 3rd party in both oral and written submissions stated that Kahoro Cereals Store did not belong to her and reiterated that the 1st Defendant knew of that fact but it was driven by greed and the quest to meet financial targets and profits shielded the 1st defendant from conducting proper scrutiny of the ownership of the suit business. Further, the 3rd party stated that the documents presented by the 3rd party were very clear on the face value that the business belonged to the Plaintiff. According to the 3rd party, she was misadvised by the 1st Defendant that she could obtain a loan by using the documents belonging to the third party (Plaintiff herein) with or without their consent. (See annexure AO-4 at page 10 to 21). She stated that she ought to have disqualified in taking the loan for the lack of consent by the rightful owner of the Business (Kahoro Cereals).

In addition the 3rd Party contested the production of a license belonging to Kahoro Cereals store that was issued in the year 2015 and having particulars of the Plaintiff and not her details. Further, she stated that the loan was issued in 2014 and clearly there lacks nexus between a loan already released and a trading license issued later. She also stated that she wrote to the 1st Defendant asking for a restructuring of the loan facility and the release of the log book for My KBA 127A which she wanted to sell for the purposes of repayment of the loan but however the same elicited no response from the 1st Defendant. The 3rd Party admitted having been in default as far as the repayment of the loan is concerned.

ISSUES FOR DETERMINATION.

a. Whether or not the Plaintiff owned the suit business.

b. Whether or not the suit business was used as security for the loan advanced to the Third Party.

c. Whether or not the repossession of the goods in the suit business was illegal.

d. Whether or not the Plaintiff is entitled to the prayers sought in the Plaint.

e. What is the estimated value of the suit business?

f. Who should pay the costs of the suit?

DETERMINATION AND ANALYSIS.

As regards the highly contested issue of the ownership of the suit business, I now endeavour to consider the evidence on record from all the three parties, which is the plaintiff, the defendant and the 3rd Party. The lease agreement that the plaintiff produced in court identifies the plaintiff as the sole tenant of Shop No.S8 and S9 on Plot No.23124/46 and the nature of business identified as Kahoro Cereals Stores. These are the premises where the goods in question were repossessed by the 2nd defendant Auctioneers under the instructions of the defendant Bank. In the same respect, the Defendant Bank did not provide any credible evidence to prove that the abovementioned premises were also leased to the Third Party nor did they adduce evidence of co-ownership of the suit business between the Third Party and the Plaintiff.

Furthermore, evidence was led by the plaintiff and the 1st Defendant in form of Business Licences of the Plaintiff and the Third Party issued by the County Government of Kajiado. The 1st Defendant produced a Business Licence No.0719566, dated 14th Feb 2014, which shows Plot No.N/N/6082 as the business location of the Third Party whereas the Plaintiff produced in before this court Business Licence No.1500661(marked as exhibit 2) issued on the 6th of February 2015 which shows Plaintiff's business location as Plot No.23124/46. The former does not contain the correct Plot number of the suit business or the premises where the said good and tools of trade where repossessed whereas the later contains the correct Plot No. (23124/46) of the suit business. Therefore, it is clear that the good and tools and trade in question were repossessed at Plot No.23124/16 which Cereal Store belonged to the Plaintiff. The plaintiff also produced a Food, Drugs and Chemical Substances (food, hygiene regulations) Licence No.3554 issued by the County Government of Kajiado on the 2nd of March 2015 which in terms of Plot No. indicated on it; corresponds with the Plaintiff's Plot No.23124/46 as provided by the Plaintiff's Lease Agreement.

As regard the 1st Defendant submission that the plaintiff ought to have led evidence to show that the suit business was either a corporate entity or it was registered business name under the laws of Kenya, it was the 1st Defendant's testimony that the suit business did not belong to the Plaintiff since it was not registered with the Registrar of Companies. In my view, the argument can't hold water. The fact that the suit business was not registered as a corporate entity or in the name of the Plaintiff does not automatically make the Third Party the true owner of the same. Further, no evidence was led by the 1st defendant to show that the suit business was registered as a corporate entity and/or in the name the Third Party hence there is ample proof provided to show that the Third Party was the true owner of the same.

Although the 1st defendant tried so hard to prove that the suit business belonged to the Third Party, the Third Party in her written submissions denied ownership of the business in question and asserted that the same were properties of the Plaintiff. The Third Party's testimony corroborates the position of the Plaintiff that he was the true owner of the suit business. In the circumstances and for the reasons set out in the above analysis, it is my considered view that the plaintiff succeeded in proving his case on a balance of probability regarding ownership of the suit business. He is the true owner of the same.

Whether or not the suit business was used as security for the loan advanced to the third party.

Having established that the true owner of the suit business and all the goods and tools of trade which were repossessed by the Defendants was the Plaintiff, I now proceed to determine the issue as to whether the suit business was used as security for the loan advanced to the Third Party and who bears the obligations/rights and liabilities emanating from the said contract.

Since it has been establish above that the Plaintiff is the true owner of the suit business, the question to ponder is whether he was privy to the contract entered into by the 1st Defendant and the 3rd Party? The doctrine of Privity of Contract is a long established party of the law of contract. It is one of the fundamental principles of the English Contract law. The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, it postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In ***DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 847***, ***Lord Haldane, LC*** rendered the principle thus:

> **"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."**

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them ***AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), KENYA NATIONAL CAPITAL CORPORATION LTD V ALBERT MARIO CORDEIRO & ANOTHER (supra)*** and ***WILLIAM MUTHEE MUTHAMI V BANK OF BARODA, (supra).***

Thus in ***AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra)***, quoting with approval from ***Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110***, ***Hancox, JA,*** as he then was, reiterated:

> **"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."**

An exception to the Privity Rule suffices where the contracting clearly intended to benefit a third party from their agreement and the third party would be able to rely on and or enforce the agreement if it is not carried out properly.

Back to the matter before this court, the 1st defendant in its submissions reiterated that the suit business was used as security for the loan advanced to the Third Party. This happened when the Third Party as a frequent customer of the Defendant bank approached them for the loan facility in which she provided the details of the suit business as security taken by the bank as collateral. That is when the 1st Defendant eventually approved the loan amount and the same was advanced to the benefit of the Third Party. On the other hand, the Plaintiff adduced that he was never a client of the 1st Defendant as he had no account with the Defendant Bank thereof, he therefore argued that putting into consideration the rules that govern how loan facilities are given out to clients, he was in no way eligible for any loan facility from the 1st Defendants as no bank-customer relationship existed between them. He further argued that the loan application form produced as evidence in court by the 1st Defendant did not contain his name nor did he sign the same as a co-borrower, spouse or guarantor. In the same respect, both the 3rd Party and the 1st Defendant in their oral and written submissions exonerated the Plaintiff from the loan facility issued to the Third Party.

In light of the above arguments, and as mentioned earlier in the 1st limp of this matter (the issue of ownership), the suit business that the 1st defendant alleged to have been purportedly used by the Third Party as security/collateral did not belong the Third Party but rather to the Plaintiff. No ample evidence was produced in court to show that the same belonged to the Third Party. In that regard, the Plaintiff was not privy to the contract entered into by the 1st Defendant and the Third Party since the doctrine of privity entails that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, this contract cannot be enforced against or in any way affect the Plaintiff.

Furthermore, the current issue does not fall under the exception to the Privity Rule as the Third Party and the Defendant Bank (contracting parties) did not intent to benefit the Plaintiff (third party) from their agreement hence he is not bound by the rights and obligations emanating from it. Therefore, the suit business being the property of the Plaintiff, there was no way it could be used as collateral by the Third Party without the knowledge of the Plaintiff.

Whether or not the repossession of the goods in the suit business was illegal

Basically, he issue that arises for determination under this limb is whether attachment and sale in so far as it related to the plaintiff was proper lawful because ideally the execution process which gave birth to this matter was targeted at **Elizabeth Njeri Ngigi**, the Third Party in this matter. There was no doubt that the 2nd Defendant acting for and on behalf of the 1st Defendant was authorised to effect the repossession and sale of the Third Party's movable property that she provided as collateral to the 1st Defendant. And it is not in dispute that 2nd Defendant

did the same pursuant to the instructions issued by the 1st Defendant. There is also no doubt that the right and authority to instruct the 2nd to repossess the stock was to be lawful only if the plaintiff was a party to the loan agreement entered into by the Third Party and the Defendant Bank or if it had effected on the Third Party's Property. The instruction letter written by the 1st Defendant to the 2nd Defendant instructing them to repossess and sell assets towards loan recovery bore the names of the Third Party. As established earlier, it must be made crystal clear that the properties attached by the 2nd Defendant did not belong to the 3rd Party as she was not the true owner of the same. In the same respect, it is the court's finding that the goods and tools of trade seized were unlawfully attached that the defendants actually trespassed into the Plaintiff's business premises after which they wrongfully deprived the Plaintiff of his property and later sold the same.

Whether there was a principal/agent relationship and is the principal liable for acts agents.

There is no doubt whatsoever that there existed a principal/agent relation between the 1st Defendant and the 2nd Defendant (Twinistar Auctioneers). This is evidenced by the notification of sale of the movable property, instruction letter instructing them to repossess and sell assets towards loan recovery and the proclamation of attachment. All these prove the fact that the 2nd Defendant was acting under the authority of the 1st defendant. ***Bowstead and Raynolds on Agency Seventeen Edition, Sweet and Maxwell, at page 1-001*** defines an agent-principal relationship as a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relationship with third parties, and the other of whom similarly consents so to act or so acts.

Whether or not the Plaintiff is entitled to the prayers sought in the Plaint

It is imperative to first establish whether the Plaintiff has discharged the burden of proof. It is trite law that he who alleges must prove. The burden of proof (latin: Onus Probandi) is to the party in a trial to produce evidence that will prove the claims they made against the other party. In civil cases, the burden of proof requires the plaintiff to convince the court of his/her/its entitlement to the relief sought. I wholly associate myself with the family case of ***(Re B (2008) UKHL 35),*** Lord Hoffman answered that question using a mathematical analogy:

> "if a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the Party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

58. In the text of J. Strong McCormick on evidence 5th Edition 1999, the author states that

> "the burden of pleading and proof with regard to most facts have been and should be assigned to the Plaintiff who generally seek to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."

Having thoroughly considered submissions from both the 1st Defendant and the plaintiff discharged the burden of proof on a balance of probability for the reasons aforementioned and/or elaborated in the issues discussed above.

As regards whether or not the Plaintiff suffered loss and damage as a result of the Defendants unlawful conduct, I have gone through the evidence produced by the Plaintiff before this court which includes fees structures and letters from school indicating arrears, demand notices and subsequent lease termination letters. He also produced documentary evidence of inventory of stock before the attachment was occasioned by the Defendants on the 31st March 2015, reports and financial statements prepared by a public accountant to show that he had income from his going concern business.

Having made the above findings, this court notes that even though the 1st Defendant's actions were the ultimate cause of the Plaintiff's misfortune, the 3rd Party's role in triggering the said misfortune cannot be overlooked. According to the evidence on record, the 3rd used the Plaintiff's property to secure a loan from the Defendant Bank. It is not in doubt that the 3rd Party is the party that benefited from the loan facility. Further, due to the failure by the Defendant Bank to practice due diligence, the 3rd Party succeeded in misrepresenting it. The question that the Bank failed to explain why the chattel mortgage was not registered. Further, the 3rd party's failure to repay the loan as per the loan agreement she entered into with the 1st Defendant triggered the Defendant Bank's decision to attach the Plaintiff's property. From these facts it is very clear that as far as the Plaintiff's misfortune is concerned, it emanated from the 3rd Party's actions.

Special Damages.

It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See ***National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR***, ***Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR*** and ***Provincial Insurance Co. EALtd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)***. In the latter case this Court was emphatic that

> **"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract …".**

How then are these special damages to be proved? In the case cited by Counsel for the Defendants of **Douglas Odhiambo Apel & Anor Vs Telkom Kenya Ltd (Supra),** the Court of Appeal held that:-

"..... a Plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court..... unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed.....

Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the Plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur."

In light of the foregoing, this court finds that for a document to be used to form part of evidence at a trial, the same must be availed at the trial, a witness must testify on it by identifying the same and thereupon produce the same as evidence. Witnesses produce documentary evidence before court stating that they wish to produce the same as exhibit or evidence or to rely on the document as their evidence. It is upon such production of the document that it is then marked as an exhibit. Thus, the document is said to have been proved at a trial. ***(See Delta Haulage Services Ltd vs Complast Industries Limited & Another (2015) eKLR).*** It can be therefore said that in evaluation and/examination of special damages, the court awards only what was proved.

In the present case, the plaintiff claims Kshs.4.400.700/= as special damages for the loss arising from the wrongful attachment and sell of the Plaintiffs goods. The 1st Defendant disputed the claim stating that the same was not specifically proved. Further, the 1st defendant faulted the financial report produced by the Plaintiff before the court by Mr. Harrison Kamau Muhia, saying that the said witness did not produce any credentials to show that he was indeed a qualified accountant and the Counsel for the 1st Defendant claimed that the said witness disowned the very report that he came to produce. It was the 1st defendant's contention that the proclamation notice at page 9 and the notification of sale at page 11 of the Plaintiff's bundle of documents reflect the value of the goods repossessed from the suit business and the same has not been challenged by neither the Plaintiff nor the 1st Defendant. In addition to the above, the 1st Defendant stated that special damages are meant to compensate a party for quantifiable monetary losses after incurring a direct loss due to another party's action and that Goods attached are not a direct loss incurred by the plaintiff.

It clear from the above testimonies that the court was furnished by two sets of evidence which seeks to prove the same fact of the actual loss arising from the wrongful attachment of the plaintiff's goods. On one hand, page 34-36 of the Plaintiff's bundle of the documents is a document prepared by the Plaintiff which outlines the goods purported to have been carried away by the 2nd Defendant from Kahoro Cereals Shop on the 31st March 2015. On the other hand, there is evidence at page 9 (exhibit PEXH 4) and page 11 (marked as PEXH 6) which is the proclamation of attachment notice dated 16th of March 2015 and the Notification of Sale dated 31st March 2015 respectively as well as the Auctioneer's advert. The said documents list the goods that were removed and sold by the 2nd Defendant from the Plaintiff's shop. A comparison of the said two sets of evidence show a very conspicuous disparity between as regards the actual goods repossessed from the Plaintiff's shop. The question that this court seeks to answer at this juncture is which of the two sets of evidence aforementioned can be relied upon by this court to ensure just determination of the case at hand.

The inventory at pages 34-36 of the plaintiff's bundle of documents provides a list of goods purported to be the ones which were illegally attached. The stock taking documents which were produced as evidence before court at pages 37-42 which runs from 1st of January to the 31st of March 2015 depicts a weekly stock taking of different varieties of cereals. One distinguishing feature the court has taken note of is that there are some cereals listed in the said inventory and the stock taking document which are not contained in the proclamation letter, notification of sale and the auctioneer's public notice. This court will not ignore the fact that the attachment was not discriminatory, it was a random attachment. The Plaintiff in his evidence did not tell the court that some goods were attached to the exception of others.

Further the court notes that the plaintiff did not furnish the court with either stock taking documents or statements of accounts for the previous business year that is 2013/2014. The evidence on record specifically the lease agreement shows that the Plaintiff entered his business premises on the 8th of November 2013 but however there is no proof of stock taking from that date to the 31st December 2014 was produced before this Court. The only evidence of stock taking the court was furnished with account for the first three month of 2015 only. That goes to show that the stock taking evidence was specifically prepared for the purposes of this case. As demonstrated above, this evidence stands at variance with other plaintiff's documentary evidence such as the letter of proclamation, notification of sale and the Auctioneers Public Notice. In premises, this court unable to believe the quantity as well as the description of the attached goods as per the inventory. The inventory does not reflect the actual goods which were taken and flies against other evidence produced to prove the same. Further, the proclamation of sale shall not be relied upon by this court because it simply notified the Plaintiff of the intended attachment of the movable property described therein but however the said good were left in custody of the Plaintiff for seven days from the date of proclamation. Thus the goods were to be removed from the Plaintiff's premises to the auction premises by the 2nd Defendant and sold by way of public auction. In my view, proclamation letter is not the best of evidence that shows the actual goods which were removed from the Plaintiff's premises because the Plaintiff by dint of the fact that he was not in agreement with the attachment, chances are very high that he would have laid hands on the said goods since they were left in his custody. The same is clearly proved by the fact that the description and quantity of the goods proclaimed differs from that of the actual goods removed from the shop as depicted by the notification of sale of movable property. In the court's view, the Notification of sale shall be considered as the prima facie evidence in that regard. The same is uncontroverted. There is no evidence in the entire proceedings to the effect that the auctioneer acted unlawfully when repossessing the suit property. In that regard, it can be said that the 2nd Defendant in discharging his duty of realizing the property in question, he was acting on behalf and in the best interest of the Defendant Bank. There is no evidence that the 2nd Defendant acted in bad faith in the execution of his duty. Therefore, in the absence of evidence that the 2nd Defendant failed to abide to the standards provided for by the Auctioneers Act hence this court takes the view that the notification of sale the most reliable piece of evidence on record as far as the question of quantity and description of the attached goods is concerned. Thus the court agrees with the description of goods listed in the said notification of sale but however the value of the property according to the same document is not tenable since it doesn't depict the actual market value of the goods but the auction values of goods. Further, as regards the value of the goods attached, the court finds that the values provided by the plaintiff in his inventory dated 1st April 2015 at pages 34-36 of his bundle of documents are quite reasonable and this court shall be calculate damages according to those values.

On the plaintiff side if indeed the claim is on wrongful attachment the exhibits on proclamation and goods carried away for sale by the

auctioneer should contain sufficient evidence on actual loss suffered. The measure of damages is primafacie either ascertained from the purchase price of the goods at the time they were delivered or on the basis of available market price at the time the goods were unlawfully attached. In the circumstances of this case given the approach taken by the plaintiff while prosecuting this claim failed to articulate clearly whether the actual loss was to be calculated on the purchase or sale price of the goods. He merely asked this court to go by the inventory of three months which I found to be at variance with the attachment inventory of the auctioneer. This special claim included laptops but to our dismay they were not part of the attached properties by the auctioneer.

The court found no evidence tendered in support of the plaintiff's claim that laptops were also in these premises. That fact was not proven.

The Plaintiff's also produced receipts in support of his claim. (See page 99 of the plaintiff's bundle of documents, marked as PEXH 41). I have gone through the said receipts and the only point they explain is that Kahoro Cereals shop had been supplied with a variety of assorted cereals on the 6th February 2015 and 25th March 2015 from his suppliers from Kawangware. The court is not denying that the said good were indeed delivered to Kahoro Cereals as depicted in the aforementioned receipts. However, there is no evidence to prove that at the time the suit property was repossessed on the 31st of March 2015 the said delivered goods were still in the same state as they were on the date they were supplied. Further, looking at the said receipts, some of the goods contained therein are not supported by what the auctioneer found in the suit premises upon attachment. It is clear from the evidence tendered by the Plaintiff that he focused more on telling the court of those that supplied goods to his shop but not those that took away goods from his shop. The court was not furnished with any proof of the daily sales but however the plaintiff produced only incoming stock which is clear that the same seeks to increase his claim on damages.

The Plaintiff also produced an expert evidence in form of reports and financial statements for the year ended 31st December 2014 dated 20th June 2015 prepared by Kigo Njenga & Company Accountants. The estimated value of the Plaintiff's business therein is Kshs. 315, 065, 020 as per the audited account. The question is what is the source of information used to prepare the said reports and financial statements? Could it be the aforementioned stock taking document? If so, the court takes the view that the evidence that appertains to the reports and financial accounts is based on a narrow framework. That is so because the stock taking document tendered by the Plaintiff as evidence before this court, only provides weekly stock taking for the first three months of 2015 only which is a very short period for that purpose and the same cannot be held to be proper sample to analyse a business as a going concern.

Furthermore, it is clear despite the large amounts of money the plaintiff did not tender any credible evidence in form of original books of accounts, proof of an active bank account, bank statements, income statement and liabilities for the business, and no evidence of stock taking was produced for November 2013 to December 2014 in support of his claim. The Plaintiff relied heavily on secondary evidence that is the inventory and the reports and financial statements. In the premises the court is not able make a comparison in terms of consistence for example in regards to the stock taking document with that of the previous business year since the same is completely absent from the evidence on record. Having said so, this court is unable to give weight to the evidence of the audited accounts in the absence of tangible evidence proving the source of information used in formulation of the same. The source of the information used was of critical importance for the court to give weight to the expert evidence in question. One of the reasons behind this case appears to be compensation payable by the defendant bank arising from the wrongful attachment of the plaintiff goods. There was a genuine dilemma on the part of the plaintiff who did not keep proper books of account the sphere of evidence he needs to persuade the court to grant the claim. Having correctly borne in mind all these issues he sought services of qualified chartered accountant to piece together something to support the case in court. This court is unable to give weight to the said expert evidence as it fell short of the evidential standards required in civil proceedings, to wit, on a balance of probability. As regards expert opinion, the Court of Appeal in the case of **Choge & Others vs. Republic [1985] eKLR**, expressed the following view regarding the role of expert witnesses:

> **"The function of the expert witness was succinctly stated by Lord President Cooper in Davis vs. Edinburgh Magistrates [1953] SC 34 at 40 when he said:**
>
> **'Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence..."**

As regards the weight to be given to expert evidence, I will at this juncture place reliance to the expressions of Mativo, J in **Stephen Kinini Wang'ondu vs. The Ark Limited [2016]** that:

> **"Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less...the weight to be given to expert evidence will derive from how that evidence is assess the context of all other evidence. 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... expert evidence does not "trump all other evidence". It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision."**

In the foregoing, it may be useful in these circumstances to refer to what appears in ***Taylor on Evidence (12th Ed.) Vol. 1., para. 58 at p.59*** as follows:-

> **"Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These witnesses are usually required to speak, not to facts, but to opinions, and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or interests of the parties who call them. They do not, indeed willfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans, their Belief becomes synonymous with Faith as defined by the Apostle, for it too often is but "the substance of things hoped for, the evidence of things not seen". To adopt the language of Lord Campbell, skilled witnesses come with such**

a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." emphasis

In the foregoing, it is clear that the cardinal characteristic of expert evidence is that it is opinion evidence and the role of it is to practically assist the court by providing as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded. **Sir George Jessell MR** in the case ***Abringer v Ashton*** where he used the phrase *"paid agents*" while describing expert witnesses. Almost 100 years later **Lord Woolf** joined the list of critics of expert witnesses. In his Access to Civil Justice Report, he said this:-

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."

In light of the above, it is important to note that experts are not being abused by those that hire them. For them to be paid or to be seen as if they have done a good job, they have to work in the best interests of their clients. That explains why the reports and financial statements herein are far from being objective and reasonable as far as the value of the suit business is concerned.

In the foregoing and for the reasons expounded above, this court is unable to place reliance in the said reports and financial statements as they are found not to reflect the true value of the business. The values depicted therein are not only exorbitant but also preposterous and outrageous putting into consideration the amount of the loan taken by the 3rd Party, which is Kshs. 1.500 000/=. That alone shows that the plaintiff's claim with regard to the wrongful attachment is up to no good.

As regards salaries, the Plaintiff stated that he incurred 89 days salary for six employees at Kshs.347, 100/=. He added that the same includes a mandatory one month notice in lieu of termination of Ksh.100, 800/=. According to According to ***Section 2*** of the ***Employment Act*** an ***"employee"*** means "***a person employed for wages or a salary and includes an apprentice and indentured learner."***

The same provision specifies that an ***"employer"*** means, **any person, public body, firm corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm corporation or company."**

Section 9 of the Act sets out the prerequisites for an employment relationship. ***Section 9 (1)*** stipulates,

A contract of service—

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

In light of the above provisions of law, I have not seen any proof in terms of a contract of employment that meet the requirements under the Employment Act as provided above. The Plaintiff brought PW6 and 7 before this court who claimed to be his employees and used to be paid for the work done but however there is no some sort of record, pay slips or payment voucher showing that payments amounting Kshs.700.00 were being done to each of the said six employees. Neither did the Plaintiff produce any evidence of termination of such employment, nor proof of redundancy since the business has gone under.

The Plaintiff claims rent paid from 1st April to 31st July 2015 amounting to Ksh.120, 000/= as part of special damages. The tenants agreement dated 8th November 2013 (page 1 of the plaintiff's bundle of documents) shows that a monthly rent of Ksh.30 000/= was payable to the landlord. The notification of sale of movable property (at page 51 of the plaintiffs bundle of documents) dated is dated 31st March 2015 which is the actual date the attached goods were removed from the Plaintiff's shop. The eviction notice (at page 26 of the plaintiff's bundle of documents) is dated 10th Judy 2015. Having said so, this court invokes section 199 of the Evidence Act, Law of Kenya by presuming a fact to the effect that the plaintiff was not able to pay rent due from 1st of April 2015 to the date he was evicted from the premises due to the direct consequence of the wrongful attachment. In that regard, the claim for rent has been proved on a balance of probability and hereby awarded as per the prayer.

On the issue regarding cost of construction and demolishing, the Plaintiff claims Ksh.1.440.00/= as part and parcel of special damages. In the court's view, there is no correlation between the wrongful attachment and the refurbishing and partition of the Plaintiff's business premises. There is no evidence that the Auctioneers destroyed any party of the business premises for them to gain entry into the plaintiff's shop for purposes of repossessing the attached goods. The Plaintiff ought to have shown the court that a tort was committed by the 2nd Defendant acting on behalf of the 1st Defendant. The claim on this limb is clearly a past event that happened way before the attachment took place and in the absence of evidence connecting the loss incurred by the Plaintiff and the construction and demolishing costs, this court is unable to agree with the plaintiff. The court finds that this limp was not proved to the required standard of evidence on a balance probability.

As regards the claim on business licenses paid for in 2015, I have seen a single business permit both original and the photocopy of the original (see page 7 of the plaintiff's bundle of documents) and the permit fee indicated on that document amounts to Kshs.5,000.00/= and on page 8 of the same bundle of documents, there is the plaintiff's Food, Drugs, and Chemical Substances License dated 12th March 2013 marked as PEXH 3 indicates the permit fee at Kshs. 4.500.00/= and both permits give us a total of Kshs.9.500.00/=. In the premises this limp can be said to have been proved by the plaintiff on a balance of probability and is hereby awarded as per the prayer.

As regards loss of goodwill, the plaintiff said that he enjoyed a good and fair relationship with his customers. The Plaintiff referred to cash

sales record, page 113-116, sales record exhibit 46 at page 117-119, the daily cash movement page 103-112, management accounts page 73-78 and audited financial statements at pages 66-72 of the plaintiff list of documents in support of his argument. He further stated that in the year 2014 he made total sales of Kshs. 61,700,000/= (as per audited accounts) and on an average it is evidenced that he would enjoy 5,000,000/= per month as his sales from his good relationship and workmanship that was prematurely cut by the acts of the 1st defendant. He relied on the case of ***Azim Sameja T/A Business 2000 v Lakhamshi Virpal Shah and 7 others Civil Case No.689 of 2001*** in support of his argument. The plaintiff therefore submitted that following the illegal attachment of his movable property and the sale thereof, he was forced to close shop. His investments and life savings were all taken away as a result. He further submitted that since the circumstances are similar from those in the case above, the plaintiff urged the court to consider an award of Kshs.3 million to that effect. The 1st defendant in opposition to the plaintiff's prayer argued that the Plaintiff relied on sales records, daily cash movement and the infamous management accounts at pages 73-78 of the plaintiff's bundle of documents. He stated that the same was disowned by the maker who was supposed to come and produce it. The 1st defendant argued that good will is a matter of fact and law and therefore it should be based on evidence in support of the claim of goodwill. The 1st Defendant placed reliance on the case of ***Kenya Tea Development Agency Ltd & 7 Others v Savings Tea Brokers Ltd (2015) eKLR. The*** 1st defendant further argued that the plaintiff business had barely existed for a year and a half and it cannot command a goodwill of 3 million shillings. It relied on the case of ***IRC v Muller & Co Margarine (1901) AC 217*** at page 223 as quoted by ***Justice Kariuki in Jedus Company Ltd T/A Mbagathi Way Petrol Station v Chevron Kenya Ltd (Formerly Caltex Oil Limited) (2016) eKLR***. The 1st defendant submitted that the same was not proved on a balance of probability.

The definition of goodwill was aptly captured by Lord Macnaghten in the case of **Commissioner of Inland Revenue v Muller & Co. Margarine Ltd,** and was adopted by this Court in **Patificio Lucio Garafolo SPA case** as follows:

> **"It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates."**

In his book ***"An introduction to the Law of Contract"*** 5th edition P.S. Atiyah who was formerly a professor of English Law in the University of Oxford opines as follows:-

> **"98 – As regards the claim for loss of goodwill, the claimant's case is that by reason of the Respondents' actions its business and goodwill was destroyed. It claims loss of goodwill on the basis of the lost net profits for five (5) years. As I understand the Respondents' they did not dispute the legitimacy of the claim for loss of goodwill. What they contested was the figure computed by the claimant**
>
> ***Having considered the evidence on record and the submissions I accept the Claimant's case that its business was destroyed by the Respondents' actions and that, accordingly, the claim for loss of goodwill is well founded, I also accept that the same should be calculated on the basis of the aggregate of the average of the last (5) trading years profits (understood to be commission income less operational costs)***

The chronological order of events in this are that the applicant has embodied his claim on 3 million goodwill. It's no secret that the plaintiff appeared to have enjoyed some measure business growth as a cereals dealer. What he didn't tell this court is the unit of measure he used to calculate quantum of three million as goodwill. This kind of business can attract good will but it ought to be nominal. In deciding on this issue a choosing the evidential points raised by the plaintiff as tabulated above I award Ksh 500,000 under the claim of goodwill.

The Plaintiff claims ksh.30.000.000.00 as special damages for loss of reputation. He stated that he enjoyed good relationship with his suppliers up to unlimited credit but upon attachment of his business, he can no longer be trusted by any suppliers. In support of his claim he called PW2 and PW3 who demonstrated how they had a good relationship with the plaintiff and could advance goods to him on credit, but upon attachment of the plaintiff's goods, the plaintiff has failed to honor the outstanding invoices. He referred to exhibit 37 at page 86 of the plaintiff's list of documents. He also resorted to the audited accounts specifically page 3 marked as exhibit 28 of the said bundle of documents, he stated the he purchased goods worth Kshs. 51,000,000/= for the year 2014 of which 80% was on credit. The plaintiff argued that he would have enjoyed a continued reputation and credit worthiness that would have supported his business and other life engagements at an annual value of Kshs.40.000.000/=. He further argued that his inability to meet family obligations like paying school fees damaged his reputation. In addition, the plaintiff contend that his life investments were attached and auctioned during broad daylight hence he was humiliated in front of his customers, employees, passersby and onlookers. He relied on the case of ***Kenya Tea Development Agency Ltd and 7 Others v Savings Tea Brokers Limited (2015) eKLR Misc. Application No.129 of 2009*** in support of his argument. The 1st Defendant in its submissions opposed the plaintiff's claim pointing out that the requires the party seeking damages for injury of reputation to specifically plead the particulars of the alleged in injury on his reputation and they must plead evidence with a former colleague that now shun him based on what befell him. In support of its argument, the 1st Defendant relied on the case of ***Kenya Fluorspar Co. Ltd v William Mutua Maseve & Another (2014) eKLR***. The Defendant humbly submitted that the Plaintiff did not meet the minimum standard required for one to be granted damages for loss of reputation.

In the foregoing, the plaintiff brought PW2 and PW3 to prove that they had good business relations and he failed to honour his obligations and not that they no longer want to deal with him due to the wrongful attachment. He ought to have demonstrated that PW2 and PW3 that indeed his reputation was lost as a result of the attachment. Am of the conceded view that the matters that should be considered on loss of reputation is whether from the date of the attachment suppliers have failed to supply goods on credit to the plaintiff. There are two points to be made on this loss. First, is whether from the day of the proclamation and attachment the plaintiff ever continued to operate the cereals business. Secondly, whether the suppliers in a selective and discriminatory manner declined any orders for supply of cereals and other related goods from the plaintiff. This kind of reputation and loss of trust needed qualification from the plaintiff which to me at the close of case was not forthcoming. In the premises the court finds that the plaintiff did not adduce enough evidence as to loss of business reputation and the same cannot be said to have been proved on a balance of probability.

On the claim of loss of daily income for 8 months at Kshs.900, 000/= from 31st March 2015 up to November 30 2015, the Plaintiff's claim is Ksh. 7, 200, 000/=. In support of this claim the Plaintiff produced audited accounts (see plaintiff document pages 66-72) and management accounts (see plaintiff document pages 73-78). The plaintiff seeks to demonstrate that he was making daily income that was totalling to an average monthly income of Ksh. 900, 000/=. He also produced the plain tiff to prove daily cash movement for the period starting from January to 31st March 2015(marked as Exhibit 44 at pages 103-112) and sampled receipts (marked as Exhibit 45 at page 113-116 of the plaintiff's bundle of documents) to prove that the Plaintiff was earning from the business.

Looking at the evidence again taking into account the facts now found it difficult to conclude that the plaintiff huge cash flow can be taken on the face value without independent documentary evidence. I have in mind banking slips comprising of daily sales and expenditures. In consequence it has not been demonstrated where opening balance in six digit figures was sourced from for this court to infer a health balance sheet of the business at the time of attachment. I would hold that with such cash flow most likely the plaintiff ought to have been a taxpayer but none of it was alluded to in this case. I agree that the burden of proof is on a balance of probabilities but in assuming responsibility it doesn't have to generate into a balance of possibilities.

In addition to the general principles applicable in assessment damages i.e. fair and reasonable compensation; not to be excessive; comparable injuries to attract comparable awards, etc., the following additional principles have been settled with regard to loss of earnings:

As far as loss of earnings is concerned, the Court of Appeal restated the principles (at page 6) in the case of Mbaka Nguru (Authority No.1 – Defendants List of Authorities) as follows:

> **"We come now to the award of Ksh. 1,943,760.00 for loss of <u>future</u> earnings. It is noted that such damages were not pleaded. The court in the case of Cecilia Mwangi & Another vs Ruth W. Mwangi, civil Appeal No. 251 of 1996 (unreported) said *<u>Loss of earnings is a special damage.</u>* <u>It must be specifically pleaded and strictly proved</u>. The damages under the head of "Loss of earning capacity" can be classified as general damages <u>but these have also to be proved on a balance</u> of probability. The Plaintiff cannot just "throw figures" at the judge and ask him to assess such damages. See the case of Kenya Bus Services Ltd. Vs Mayende (1992) 2 KAR at p. 235 where this court referred to the cases of Ali v Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Shabani vs City Council of Nairobi (1985) 1 KAR 684 and the statement by Lord Goddard C.J in the case of Bonham Carter vs Park Ltd. (1948) 647 T.L.R 177 was approved."**(underlining added for emphasis)

The Court of Appeal continued

> **"We need not set out here the statement of Lord Goddard C.J it will suffice to say that Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them."**

The court of Appeal was here restating that:

> **3. "Loss of earnings" is a special damage to be <u>specifically</u> pleaded and <u>strictly</u> proved.**
>
> **4. "Loss of earning capacity" is classified as general damages but <u>must be proved on a balance of probability</u>.**
>
> **<u>5. If loss of earnings are not properly pleaded and proved the Claimant will not get the damages no matter how much sympathy the court may have to their plight</u>**
>
> **6. The principles have held fast and been applied in a long chain of numerous decisions that they have become firmly settled as the law applicable.**

As regards the loss of future earnings based on 8 years 9 months being uncovered period as per the lease agreement which he calculated as follows: (40, 000/= x 365 x 105 months (8 x 365 = 2920 + (9 x 30 = 270 days' x 40, 000/=) which him a total of Ksh. 174, 218, 100/=. In respect of loss of future earnings, the court relies on the classic case of **<u>BUTLER VS BUTLER CIVIL APPEAL NO. 49 OF 1983 [1984] KLR 225</u>** – [Authority No. 13 – Defendants' supplementary List of Authorities]. The Court stated at page 232 concerning "loss of earning capacity';-

> **"It is a different head of damages from an actual loss of <u>future</u> earnings which can readily be proved at the time of the trial. The difference was explained in this way"** …… (and the Court proceeded with approval to quote Lord Denning MR in *<u>Fairley vs John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40, 42 (CA)</u>* as follows:-
>
> **"…….compensation for <u>loss of future earnings</u> is awarded for <u>real assessable loss proved by evidence</u>. Compensation for <u>diminution of earning capacity</u> is awarded <u>as part of the general damages</u>."**

See also statement by JUSTICE NYARANGI Pages 236-237 (as then was)

> **"There was no evidence before the trial judge that the respondent had before been in salaried employment. There could therefore be no claim for 'loss of <u>future</u> earnings'.**

In the foregoing, the plaintiff called no credible evidence whatsoever to prove what he was earning as income before the attachment was occasioned. He sought to prove earnings using reports and financial statements which this court in its earlier finding on the same was unable to rely on due to the lack of source documents which to show the basis upon which the said financial reports and statements were prepared. Such evidence cannot just materialize from the Plaintiff's submissions and be admitted. Further, on the manner in which the calculation in relation to this limp were conducted, the Plaintiff used a figure amounting Kshs.40 000/= which court was unable to comprehend whether or not it represents the Plaintiff's monthly income or monthly profits. In view of the foregoing, one cannot just throw a figure at the court and expect it to find out and decide to award damages emanating from loss of future earnings in his favour when the law requires the same to be strictly and specifically pleaded and proved. In considering this case the pointer is whether the plaintiff earned a salary or profits on investments. For reasons known to the plaintiff the statement of income or profit and loss account of Kahuro stores was not credible to be relied upon to prove this award. When I weigh on factor and another i find myself relying on words of **Sir William Duffus and P Mustafa in the case Fidahussein vs Mohamed ally 1973 E.A .**1 where faced with similar circumstances like the one before me stated as follows. *"I have considerable sympathy with the point of view that a court should form whatever evidence there may be in a case, seeking to assess the damages suffered."* In my view the plaintiffs pleaded the claim using indicators of figures with some form of multiplier and multiplicand to arrive at a loss suffered in the hands of the defendants. The risk he ran into was to explain clearly how he came up with the formulae and to prove sufficiently actual damage incurred. The court finds that this limp was not proved to the required standard of proof on a balance of probability and it therefore fails.

General damages

This limp of damages will be assessed as a quantum of both general and exemplary/aggravated damages. In is an established principle of law that the assessment of quantum of damages in a claim for general is a discretionary exercise of the court. The said discretion ought to be exercised judicially having regard to the facts of the case. ***(See Kanga v Manyoka (1961) EA 705 and Butt v Khan (1981) KLR 349)***. In respect of general damages, they are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Simon Taveta v Mercy Mutitu Njeru Civil Appeal 26 of 2013 [2014] eKLR*** thus:

> **"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".**

Further, if the circumstances or evidence on record satisfies the requirements set out by the Court of Appeal in the ***Ken Odondi Case (supra)***, exemplary damages may be awarded. In that case it was held that: -

> "Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize."

The facts brought out in the evidence on record make a clear case of exemplary damages, to record the court's concern to discourage the agregious conduct of Banks. Thus, Defendant bank in the instant case must also be checked with sanctions of an award of aggravated damages as set out in ***Obongo & another V Municipal Council of Kisumu [1971] EA 91*** where the Court of Appeal stated that…

> **"…….the power to award exemplary damages does not affect the power of the court when making an award of general damages to take into account the conduct of the defendant as an aggravating factor……**

It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and the court is making general award, it may take into account factors such as malice or arrogance on the part the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature."

In the instant case and in view of the above laid down principles, the evidence tendered by both the Plaintiff and the 1st Defendant clearly shows that the Plaintiff has been out of business for about the 3 years a situation which emanates from the direct consequences of the 1st Defendant's actions. As established above, the court found that the repossession done by the 2nd Defendant at the instructions of the 1st defendant was wrongful. Having said so the consequences of that wrongful attachment were manifestly detrimental to the Plaintiff business and he suffered due to that one act that brought his business down.

The evidence on record shows that the 1st defendant realized that it had made a terrible mistake, no apology was tendered to the plaintiff for the unfortunate action of the bank. I find the defendant bank did not act in good faith and concealed a material fact from the plaintiff since he had done the best he can to inform the bank of the wrongful attachment. Further, even after the back had realized that it had made a mistake by attaching the Plaintiff's goods, it did very little if not none to mitigate its wrongful act and that goes to show that it was not remorseful of its wrongful actions. In the same respect, Banks owe a duty of care to the public in the sense that at all times it must exercise due diligence in its ordinary course of business especially in circumstances similar to those in the instant case. The Bank in this case failed to perform this duty having regard to the fact that it entered into a supposed chattel mortgage with the 3rd Party, an instrument which was not registered. Had the chattel mortgage been registered, the 1st Defendant could have found out the true owner of the suit property. The 1st defendant undoubtedly neglected this duty. It was out of this failure to perform due diligence coupled with negligence on the party of the 1st Defendant. There is evidence on record to show that the Plaintiff suffered loss and damage as a result of the Defendants unlawful conduct, which includes fees structures and letters from school indicating arrears, demand notices and subsequent lease termination letters. Indeed the 1st Defendant's action directly caused pain, suffering and emotional distress to the Plaintiff.

This court also finds that the wrongful actions of the 1st defendant presents a case of infringement of social-economic right of social security encompassed under section 43 of the Constitution of Kenya 2010. . The same provides as follows;

> **"43. (1) Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education."**

The same is also protected under international instruments *inter alia; Article 25 of the Universal Declaration of Human Rights (UNDHR), 1948 which provides in part as follows:*

"(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

The actions of the defendant bank manifestly denied the Plaintiffs right to realize his full potential in his business venture and other rights envisaged in article 43 of the constitution of Kenya and the above mentioned international instrument.

In the above circumstances and for all the reasons stated in this judgement I come to the following conclusions; With regard to liability the plaintiff has discharged the burden of proof on a balance of probabilities that the defendant bank instructions to the second defendant to proclaim and attach the goods at David Njuguna Ngotho trading as Kahuro stores was illegal and unlawful. In the same way, am satisfied that as to the liability between the defendant bank and the third party there was privity of contract comprising of a loan agreement with unregistered inventory of goods from the plaintiff store as security for the loan. What the court is emphasizing is the special procedure to be adopted when it comes to chattels mortgage. The legal instruments ought to be strictly followed by the contracting parties to the agreement. However, having obtained the letter of offer it was dishonest on the part of the Third party to purport to show the goods of the plaintiff while she had no possessory right to them.

From the evidence there is a nexus between the loan amount advanced to the Third party and the trespass to the plaintiff store accompanied with the wrongful acts of attachment by the defendants. I can safely find that the Third party is wholly liable to the defendant bank, for evidence has shown the probable cause of wrongful attachment that connotes negligence on her part.

As regards this award I bear in mind the difficult task sometimes which confronts the court in coming up with a precise quantum of damages. The approach to me would be anchored on this statement borrowed from the decision in the case of ***Pickett v British Rail Engineering Ltd 1979 All E.R 774*** where the court held interalia that *"If a man through the negligence of another is deprived of the capacity of earning for a period he is entitled to fair compensation for the lost period occasioned by the wrongdoer."* The only reason the plaintiff sued the defendant was for a wrongful and unlawful proclamation on attachment of goods by the auctioneer acting under instructions from the defendant bank. In my view whatever damages assessed should flow from the nature of the business net worth, lack of due diligence on the part of the defendant bank and the gamble they took in listing the plaintiff goods as security in absence of privity of contract. I take the view that before this wrongful attachment the plaintiff enjoyed managing cereals business as a going concern where he continued working until this unfortunate incident. I cannot overlook the aspect that the defendant bank has not treated the plaintiff with human dignity since this whole episode started to rear its ugly head to an innocent party. Consequently, aside from what am in doubt as argued elsewhere in this judgement the award of general damages must be given a fairest estimate in relation to the facts of this claim. Given the background of this matter doing the best I can I assess and award Ksh 7,000,000 for wrongful and illegal attachment, loss of business opportunities and substantial loss occasioned as a result of the acts of negligence by the defendant bank.

Further in considering damages, the following claims should be paid by the defendant bank. Rent assessed at Ksh 120,000, business license expenditure Ksh 9,500, loss of good will Ksh 500,000. Value of the goods attached as per the auctioneer's inventory, notification of sale with the pricing adopted from the plaintiff's documentary evidence as a guide assessed at Ksh 300,000.

All other claims on loss of reputation, future earnings, loss of daily income, specials on refurbishment on the rental premises and employee dues accordingly stand dismissed for lack of merit and proof on a balance of probabilities. In the premises the plaintiff suit against the defendant partially succeeds with costs.

Dated, signed and delivered at Kajiado this 3rd day of October, 2018.

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R. NYAKUNDI

JUDGE

<u>Representation</u>

- Mr. Kazungu for the Defendant – present
- Mr. Wanyoike for the Plaintiff - present
- Third Party present in person