



REPUBLIC OF KENYA



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Commissioner of Police & another v Intraspeed Logistics Ltd & 15 others (Civil Appeal 271 of 2019) [2025] KECA 1732 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1732 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 271 OF 2019
W KARANJA, K M'INOTI & LA ACHODE, JJA
OCTOBER 24, 2025**

BETWEEN

COMMISSIONER OF POLICE 1ST APPELLANT

HON. ATTORNEY GENERAL 2ND APPELLANT

AND

INTRASPEED LOGISTICS LTD 1ST RESPONDENT

DOOBA ENTERPRISES LTD 2ND RESPONDENT

WILEX UGANDA LTD 3RD RESPONDENT

SEBCO UGANDA LTD 4TH RESPONDENT

KPI LTD 5TH RESPONDENT

SULEIMAN BATEGANYA 6TH RESPONDENT

DAVID MUSANA 7TH RESPONDENT

BUNYONYI SAFARIS LTD 8TH RESPONDENT

SEVEN HILLS IMPEX LTD 9TH RESPONDENT

BOARD CITY LTD 10TH RESPONDENT

UGANDA AGRICULTURAL TOOLS LTD 11TH RESPONDENT

ARTHUR TURY AHIKAYO 12TH RESPONDENT

BIDCO (U) LTD 13TH RESPONDENT

KAMPALA CITY TRADERS ASSOCIATION 14TH RESPONDENT

KATRACO (U) LTD 15TH RESPONDENT

MUGENGA HOLDINGD LTD 16TH RESPONDENT



(Being an appeal from the judgment of the High Court Civil Division at Nairobi (Mbogholi J) dated the 28th day June 2018 in HCCC No. 398 of 2009)

JUDGMENT

1. The aftermath of the 2007-2008 post-election violence still lingers on, manifesting itself in different forms. This appeal is one of those manifestations. In this appeal the Commissioner of Police, the 1st appellant and the Hon. Attorney General, the 2nd appellant, are challenging the judgment of Mbogholi J. (as he then was), dated 28th June 2018 in Nairobi HCCC No. 398 of 2009, rendered in favour of Intraspeed Logistic Ltd and 15 others (the 1st to 16th respondents).
2. The respondents who were all involved in transnational transport businesses using tracks to transport goods to and from Mombasa traversing into DRC Congo, Rwanda and Uganda, were caught up in the post-election violence that followed the general elections in Kenya in 2007, extending into 2008. As a result of the violence, they lost trucks and goods due to arson and theft and blamed the appellants for not providing security for their trucks and goods. Thus they claimed damages as appeared in their amended plaint dated 12th March 2010.
3. The appellants filed their statement of defence dated 29th September 2009, opposing the original plaint. They denied liability and averred that they reasonably discharged their statutory duty of care in providing security. They also denied the particulars of special damages in the plaint. However, they did not file any other documents in support of their case.
4. As a result, the 16th respondent filed an application requesting for judgment on liability to be entered against the appellants. The application was served on all parties in the suit but when it came up for hearing, counsel for the appellants were not present. The respondents were allowed to prosecute the application, the appellant's absence notwithstanding. The learned Judge was persuaded that the orders sought by the 16th respondent should apply to all the respondents since the claim arose from the same circumstances.
5. The court was further persuaded that liability could not be avoided in view of the concession of liability by the appellants to the 16th respondent and extended the concession to the rest of the respondents. Judgment was entered in favour of all the respondents against the appellants jointly and severally on liability and the matter proceeded for hearing on the issue of quantum. The respondents presented four witnesses to prove their case while the appellants presented none.
6. John Bosco Rusagara (PW1), the Chief Executive Officer of the 1st respondent gave evidence on behalf of his company and the 2nd and 15th respondents. He set out their claim by referring to the police abstract, logbooks, valuation report and financial statements. Their claim totaled USD 47,577,081 on the goods and vehicles damaged. It was his evidence that before the incident, he had obtained loans and when their tracks were destroyed, they could not continue with their financial obligations. Their company was put under receivership. In addition, he suffered loss of 6 trucks loaded with fuel and tyres, 2 trucks loaded with tyres only, and 4 trucks loaded with tyres and fuel type PM5. It was his evidence that the moment they lost the cargo they had to pay as the cargo was not insured. He had valued his six lorries on 1st August 2011.
7. Faustin Mbundu (PW2), the Managing Director of the 15th respondent adopted PW1's evidence and added that their loss included three trucks and their trailers, assets, and all the businesses they had. He



prayed for compensation for those losses. In cross-examination, he stated that the tracks were loaded with “FMS” from Nakuru belonging to Petro Uganda.

8. Tom Mugenga (PW3), the Managing Director of the 16th respondent also gave evidence relating to the loss suffered by the 16th respondent, stating that his loss amounted to 8 trucks. He had valued the trucks before the incident for purposes of borrowing money, and he did borrow money from NIC, DTB and Bank of Africa, all banks located in Kenya. He testified that he was ferrying goods for different people, and he has been paying for them since the incident complained of. He produced a document to prove as much. Further, that he defaulted in the repayment of the money borrowed and the Bank of Africa had already sold his lorries and were seeking to sell his matrimonial home in Kampala.
9. Mr. Abubakar Katende (PW4), a Valuer practicing in Kampala under the name Zolm International Limited, testified that he did the valuation for property belonging to the 1st, 15th and 16th respondents. He based the valuation on the type, model, year of manufacture, relevant tax payable, maintenance record, and where available, the physical condition of the truck and lorries. He admitted that he did not sign the report and that his instructions were limited to valuation of the trucks which he did. His company was not part of the computation of the losses.
10. Upon considering the evidence on quantum, the learned Judge assigned 15% loss of business per truck per annum for a period of 6 years based on the value of each truck, to cater for loss of business. He awarded them the demurrage charges because of the destruction of the trucks, and the value of goods destroyed, as particularized in their plaint. He also awarded the 16th respondent Kshs. 20,000,000 for his house on subdivision No. 3918, section 1 North Mombasa, sold by Bank of Africa Limited and compensation as claimed to the tune of USD 16,813, 959.25, being special damages. Thereafter, the learned Judge directed the parties to calculate the loss of business on the basis of 15% per truck per annum, for a period of 6 years based on the value of each truck.
11. This judgment grieved the appellants enough for them to prefer this appeal. In the grounds raised in the memorandum of appeal dated 19th June 2019, they assailed the court:
 - i. For finding that the government of Kenya failed in its obligation to provide security to the respondents, while the state duty is owed to the public generally and not specific individuals.
 - ii. For failing to appreciate that the post-election violence was spontaneous and took everyone by surprise, thus the police could not be blamed.
 - iii. For failing to appreciate that even though judgment had been entered on liability against the appellants, the respondents were still obligated to prove their case on a balance of probabilities which they failed to do.
 - iv. For relying on expert evidence of a valuer who did not prepare or sign the valuation reports.
 - v. For awarding the respondents special damages in the nature of destroyed or damaged trucks, loss of business, loss of revenue, loss of goods in the trucks, loss of profit cost of hiring workshop equipment, storage charges, demurrage costs, repair costs, value of fuel lost, bank interest, loan repayment, contingencies and other consequential loss like the loss of charged property belonging to the 16th respondent which had not been specifically pleaded or proved.
 - vi. For applying a wrong principle in calculating damages for loss of business and hence arriving at a figure which was inordinately high.
 - vii. For ordering the parties to calculate damages for loss of business, hence irregularly delegating his function to the parties who are not vested with the authority.



- viii. For entertaining the respondents' claim for negligence and breach of statutory duty, when it was statutorily time-barred by virtue of section 3(1) of the *Public Authorities Limitation Act*.
12. This appeal was argued by way of written submission and brief oral highlights. Joseph Ngumbi, learned Principal State Counsel, filed written submissions dated 4th October 2024, on behalf of the 1st and 2nd appellants. The 1st to 15th respondents filed submissions dated 21st February 2025, through the firm of M/S J. A. Guserwa & Company Advocates. The 16th respondent filed submissions dated 19th February 2025, through the firm of M/S Walker Kontos Advocates.
13. The appellants urged that the learned Judge erred in holding that the government of Kenya failed in its obligation to provide security to the respondents, and failed to appreciate that the duty of the State to maintain law and order is owed to the public generally and not to specific individuals. That the respondents did not show that there was a special duty owed to them. Further, that the violence that occurred during the post-election period was spontaneous and the police should not be blamed for the outcome.
14. The appellants contended that the respondents reported the burning of the trucks to the police after the fact and the police did not have prior knowledge of the location of the trucks, or that they were at the risk of being burnt. Also that they were not served with notice of the judgment to give them an opportunity to appeal against it. The appellants urged further that the 1st, 15th and 16th respondents exaggerated the values of their motor vehicles in the plaint vis-à-vis the values in the valuation reports. That all the vehicles belonging to Intra- speed Logistics Ltd were pleaded at higher values than the values assigned in the valuation report by Zolm International Limited.
15. It was contended that the 1st to 15th respondents did not produce documents such as bills of lading, to prove the value of the lost goods in the trucks, neither did they produce books of accounts to prove loss of business, loss of revenue and loss of profit. They also did not produce receipts to prove the cost of hiring workshop equipment, storage charges, demurrage charges, repair costs or the value of fuel that was lost. Further, that they did not produce loan agreements, or loan account statements to prove the bank interest and loan repayment.
16. In rebuttal, it was urged on behalf of the 1st to 15th respondents that judgment was entered in their favour on liability against the appellants jointly and severally, after the appellants failed to defend the 16th respondent's application dated 31st May 2017, despite having been duly served. That the appellants were aware of the judgment on liability entered on 23rd November 2017, against them but they did not appeal it. They accepted the outcome as indicated by their advocate in court on 20th February 2018.
17. It was also urged that according to Article 89 (f) of the Treaty for the Establishment of the East African Community, the Government of Kenya has a mandatory duty to provide security and protection to transport systems, to ensure smooth movement of goods and persons. The appellants failed to do so which is indicative of the breach of this specific duty of care. They urged that the appellants did not adduce any evidence to demonstrate that the State employed all its resources and efforts to ensure that it performed its duties. This left the respondent's evidence uncontroverted.
18. The respondents contended that they produced several documents including police abstracts, statements of accounts and valuation reports to demonstrate the loss they suffered, which evidence remains unchallenged. Therefore, the balance of convenience tilted in their favour. They pointed out that the Valuer testified that he did the valuation and the allegation that he did not conduct the valuation is false.



19. The 1st to 15th respondents urged that on 21st February 2019, the court adopted the schedule of special damages as set out or tabulated by the respondents. They submitted that the respondents made their respective claims, particularized in the schedule attached to the amended plaint dated 14th December 2009 and the learned Judge awarded damages based on the evidence. They contended that the judgment that awarded 15% for loss of business per truck per annum for 6 years and directed parties to calculate the loss in that regard was not partial and the award on loss was within the meaning of Order 21 Rule 5 of the Civil Procedure Rules.
20. The respondents submitted that under paragraph 4 of the Amended Plaint, they disclosed that they obtained leave of the Court to file the suit out of time vide the proceedings in HCCC No. 355 of 2008 (OS) before they filed it. Therefore, the issue of being time barred does not arise. They asserted that the suit was not raised under the Public Authorities Act, but specifically under the *Government Proceedings Act*. That under paragraph 12 of the Amended Plaint, the respondents itemized particulars of special loss and special damages and set them out in the schedule attached to the plaint, in accordance with the provision of Order 2 Rule 1.
21. The 16th respondent asserted in opposition to the appeal, that the record of appeal was filed out of time. That the appellants lodged the notice of appeal on 9th June 2018, and filed their Record of Appeal on 21st June 2019, almost ten months out of time, therefore, the Record of Appeal and the Supplementary Record of Appeal are incompetent and irredeemable and are for striking out with costs.
22. The 16th respondent urged that the appellants' failure to file a certificate of delay, the parties' written submissions and authorities before the High Court, and evidentiary bundles of the respondents from page 76 to 209 in the record of appeal and supplementary record of appeal is contrary to Rule 89 (1) (K) of this Court's Rules. It is their submission that this fatal omission renders the record of appeal and the supplementary record of appeal incompetent and they are for striking out.
23. The 16th respondent urged that the judgment on liability was not challenged by way of appeal. Therefore, the appellants cannot at this stage, attempt to challenge it by alleging that the notice of entry of judgment was not served, or that the judgment on liability relied on privileged documents.
24. It was the 16th respondent's submission that on 8th November 2018 the parties to this suit entered a consent where they confirmed in the form of a schedule, the amounts that were to be paid to the respondents by the appellants and all the parties' counsel appeared physically in open court to record the consent. This led to the Amended Decree dated 8th November 2018 which confirmed the settlement of the matter in accordance with the terms of the consent. The consent can, therefore, only be set aside in a clear case of fraud, misrepresentation, coercion and related vitiating factors of contracts. To bolster this argument, they relied on the case of *James Muchori Maina v Kenya Power & Lighting Company Ltd (2005) eKLR*.
25. They maintain that the consent recorded by the parties and adopted by the court as seen at pages 1 to 3 of the 16th respondent's Supplementary Record of Appeal, evinces that there is no live controversy affecting the rights of parties herein. Further, that the expert evidence by PW4 can only be challenged by expert evidence as was held by this Court in *INN v MSC (2018) eKLR*. In short, the Record of Appeal and the Supplementary Record of Appeal have been rendered moot and non-starters and are for dismissal.
26. The appeal came before us for hearing on 25th March 2025 via the virtual platform. Mr. Ngumbi and Mr. Onyiso, learned counsel, appeared for the appellants. Ms. Guserwa, learned counsel, appeared for the 1st to 15th respondents and Mr. Karungo, learned counsel, appeared for the 16th respondent.



27. Mr. Ngumbi relied on their written submissions and reiterated that the government of Kenya did not owe the respondents a special duty of care and that the respondents did not make an application for special protection. That the 16th respondent should not have relied on the letter from the Hon. Attorney General addressed to the Permanent Secretary Office of the President advising that liability should be admitted, since it was not copied to them and was protected by advocate client privilege.

28. This is a first appeal. The principles guiding first appeals were stated in this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

29. With that in mind we have considered the Record of Appeal, the Supplementary Record of Appeal, and the parties' rival submissions and the issues that fall for consideration are:

- i. Whether this appeal is incompetent, because it was filed out of time, and does not include necessary documents in the record and supplementary record of appeal,
- ii. Whether the issue on liability can be raised before this Court at this stage,
- iii. Whether there was a valid consent between the parties on quantum recorded in the superior court.
- iv. Whether the award on quantum was justified or inordinately high.

30. The first issue is whether this appeal was filed out of time and necessary documents were not filed as provided by Rule 89 (1) (K) and therefore, it should be struck out. The procedure for striking out an appeal is found in Rule 86 which provides that:

86. A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—
- a. that no appeal lies; or
 - b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal, shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.”

31. In this Court's decision of *Kenindia Assurance Co. Ltd v Monica Moraa* [2016] KECA 687 (KLR) it was held that:

- “14. While we accept that jurisdiction is everything and without it a court must down its tools, Rule 84 of the Rules of this Court requires a party challenging the competence of an appeal on the ground that no appeal lies or that an essential step in the proceedings has not been taken, or has not been taken



within the prescribed time to do so within thirty days from the date of service of the notice of appeal or the record of appeal. That requirement is intended to avoid a situation where a party keeps a secret weapon only to unleash it at the eleventh hour.

15. A party wishing to challenge the competence of an appeal should do so at the earliest opportunity. In this case, the appellant has not had an opportunity to respond to the respondent's submissions on the competence of the appeal. Rule 104 (b) of the rules of the Court provides:

“104. Arguments at hearing

At the hearing of an appeal –

- a.
- b. A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84.”

32. Further, in *Agricultural Development Corporation v Richard Kipkoech Aiyabei* [2020] KECA 129 (KLR) this Court pronounced itself on the competency of an appeal thus:

“Our take on the above rules is that there is no provision in the said rules for an oral application made either orally in Court or through submissions, whether oral or written. No cross application has been filed by the respondent seeking to strike out the notice of appeal on which the application under consideration is anchored in terms of the procedure laid down in either rules 83 or 84 of the rules of the Court as the case may be. The above being the correct position in law for faulting a defective notice of appeal, we decline the respondent's invitation through his written submissions for us to fault the notice of appeal on which the application is anchored. We therefore find the application properly laid before us. We proceed to render our reasons on merit for granting the interlocutory orders of 22nd July 2020.”

33. The respondents failed to either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, on grounds that it was filed out of time, or that some necessary documents were left out of the record. Such an application to strike out the notice of appeal or the appeal itself, ought to have been brought before the expiry of thirty days after the date of service of the notice of appeal or record of appeal. The respondents merely submitted on the competency of the appeal. In the premise, we find that this issue has been overtaken by events, and we shall proceed to determine the appeal on merit.
34. Regarding liability, the superior court rendered its ruling on 23rd November 2017, and found the appellants jointly and severally liable to the respondents. The appellants did not appeal against this ruling and the matter proceeded for hearing on quantum. On 20th February 2018, Ms. Mutinda learned counsel, appeared in the superior court for the appellants and claimed that they were not aware of the matter. Her prayer for the matter to be adjourned to give them an opportunity to file their defence was declined by the court.
35. Ms. Mutinda proceeded to cross-examine the respondents' witnesses and we note that the appellants did not, at any stage, appeal against the court's ruling. Having rested on their laurels, we do not think that they can come astir this late in the day and purport to appeal the said ruling.



36. Turning to the quantum, the learned Judge assigned 15% loss of business per truck per annum for a period of 6 years based on the value of each truck. He then awarded them the demurrage charges because of the destruction of the trucks, and the value of goods destroyed as particularized in the plaint.
37. The appellants contended that the respondents exaggerated the value of their motor vehicles in the plaint vis-à-vis the values in the valuation reports. That all the vehicles for Intra- speed Logistics Ltd were pleaded at higher values than what was indicated in the valuation report by Zolm International Limited. The respondents on the other hand urged that the judgment that awarded 15% for loss of business per truck per annum for 6 years and directed parties to calculate the loss in that regard was not partial and the award on loss was within the meaning of Order 21 Rule 5 of the Civil Procedure Rules
38. Regarding the value of the motor vehicles the learned Judge observed as follows in his judgment:
- “The value of the plaintiffs’ trucks appears in the documents filed on their behalf and all along there was no indication that any objection would be raised with respect to valuations. PW4 Mr. Abubakar Katende who gave evidence stated his qualifications and experience. He is also a certified practitioner who personally undertook their valuations. Expert evidence can only be challenged by expert evidence.
- The defendants have not presented any evidence to challenge the valuations presented. Some questions have been raised as to the signatory of the reports. Mr. Katende did not claim to be the signatory. The report was signed by the Managing Director of the company.”
39. It is trite that expert evidence can only be countered by other expert evidence. The appellants tendered no such evidence to challenge that of the respondent. In addition, although the trial court is not necessarily bound to accept the evidence of an expert and must reject such evidence if it has no sound basis, where an expert who is properly qualified in his or her field gives an opinion and the reasons on which the opinion is based, the court will respect the opinion. (See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742). In this case the trial Judge had the advantage of seeing and hearing the expert testify, and he believed his evidence. No basis as has been established for us as an appellate court to differ with the trial court in that regard.
40. Regarding the loss of business, Mr. Tom Mugenga particularized the loss incurred for the period from January 2008 to December 2010, due to the destruction of his eight trucks. This was a period of three years. In assessing the award the learned Judge stated as follows:
- “Considering the nature of their business but with little any (sic) evidence to guide the court, I consider it fair and just to assign 15% loss of business per truck per annum for a period of 6 years based on the value of each truck to cater for loss of business. I leave it to the parties to calculate the loss in that regard.”
41. This Court in the case of *Samuel Kariuki Nyangoti v Johaan Distelberger*, Civil Appeal No. 59 of [2017] KECA 691 (KLR), referred to the case of *Ryce Motors Limited & Anor v Elias Muroki*, Civil Appeal No. 119 of 1995 (Mombasa) [1996] eKLR. In *Ryce Motors Limited* (supra), Kshs. 2, 830, 500.00 awarded as special damages for loss of profits to the respondent was set aside. The respondent’s 26- sitter omnibus used as a matatu had been written off in an accident, and the award was set aside for the reason that he had not supported his claim by acceptable evidence, notwithstanding that the appellants had admitted liability for the accident and liability had been apportioned between the appellants.



42. The Court stated as follows:

“That decision is ex-facie inconsistent with the Court’s previous decisions in so far as it implies that loss of profits from an income generating vehicle which is written off is strictly a claim for special damages and will fail unless specifically pleaded and strictly proved by documentary evidence. The term “special” and “general” damages have different meaning depending on the context in which the term is used – whether in the context of liability, proof of loss or pleadings (see McGregor on Damages 15th Ed. PP.13-17). The judgment does not disclose the state of pleadings but it seems from the judgment that the claim for loss of profits from the written-off matatu was pleaded as a claim for special damages and based on precise calculations. Whatever the case, from what we have already said particularly in the classification of a claim for loss of use of income generating chattel we prefer to be guided, and apply the said previous decisions of the Court.”

43. The previous decisions that guided the Court to in its decision above were such *Jebrook Sugarcane Growers Co. Limited v. Jackson Chege Busi*, Civil Appeal No. 10 of 1991 (Kisumu) (unreported), where the court in allowing a claim for general damages for loss of user of a lorry relied on Halsbury’s Laws of England Vol. 11 3rd Edition p.226 para 394 which states as follows:

“The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages. ...

Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or a jury doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess”

44. The other case referred to was *Chinese Technical Team for Kenya National Sports Complex & 2 others v Chabari M’Ingaruni*, Court of Appeal Civil Appeal No. 293 of 1998 (unreported). In this case a claim for loss of use of a vehicle – a matatu, apparently written off in an accident, was allowed for a period of six months, despite there being no supporting documentary proof by way of books of accounts produced. The court was satisfied that the vehicle was used as a means of earning income for the deceased plaintiff.

45. From the foregoing, we are satisfied that the learned Judge did not err. He did the best that could be done with insufficient material to form a conclusion on the loss of business.

46. However, we note that the respondents prayed for loss of business for three years. The court will generally not award that which is not pleaded. A claim is circumscribed by what is specifically prayed for in the pleadings. The relief granted must align with what was pleaded and proved. As such, the court ought not to have awarded loss of business for six years.

47. As to the consent recorded in the superior court on 8th November 2018, the Record of Appeal reflects that parties were represented by learned counsel as follows: Mr. Onyiso for the appellants, Ms. Geserwa



for the 1st to 15th respondents and Mr. Karuga for the 16th respondent. The parties recorded a consent in the following terms:

“By consent, the parties hereby confirm the schedule dated 21/09/2018 relating to loss of business and interest, save for the figure on the proposed costs at page 3 of the said schedule which costs shall be agreed and if not, subjected to taxation by a taxing trustee.”

48. We ruminated over the circumstances of this case to establish whether they justified our interference with the consent judgment. We called to mind this Court’s decision in the case of *Flora Wasike v Destimo Wamboko* [1988] 1 KAR 625, in which Hancox JA (as he then was) said:

“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

49. Later in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited & Another* [1998] KECA 236 (KLR) the Court of Appeal pronounced itself thus:

“In the case of *Brooke Bond Liebig (T) Limited v Mallya* [1975] E.A. 266, Law JA, stated the law at

p. 269 in these terms:-

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani v Kassam* (1952), 19 EACA 131, where the following passage from *Seton on Judgments and Orders*, 7th edition, Vol.1 p.124 was approved:

‘prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.’

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the compromise in terms so clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. As Windham, J, said, in the introduction to the passage quoted above from *Hirani’s* case, a court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

50. In the appeal before us the learned Judge amended his decree on the 8th of November 2018 to incorporate the parties’ consent. The appellants have not advanced any grounds that would justify the setting aside of a contract to persuade us to set aside a consent that they all recorded in court. As such, we find no basis to interfere with it, except to assign 15% loss of business per truck per annum for a period of three years in place of six years as explained earlier in this judgment.



51. We have anxiously considered the Record of Appeal, the grounds thereof, the submissions of the parties and the issues raising. In the end, the appellants' appeal succeeds only in part, to the extent that:

- i. The order assigning 15% loss of business per truck per annum for a period of six years be and is hereby set aside;
- ii. We substitute therefor, an order assigning 15% loss of business per truck per annum for a period of three years.
- iii. Each party to bear its own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

