IN THE COURT OF APPEAL
AT NAIROBI

[CORAM: W. KARANJA, M'INOTI & ACHODE, JJ.A]

CIVIL APPEAL NO. 140 OF 2019

(CONSOLIDATED WTH CIVIL APPEAL NO. 225 OF 2019)

BETWEEN

DAVID NJUGUNA NGOTHO.....1ST APPELLANT

ELIZABETH NJERI NGIGI.....2ND APPELLANT

AND

FAMILY BANK LIMITED.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 3rd October, 2018

in

HCCC No. 11A of 2015).

****

JUDGMENT OF THE COURT

1. There are two related appeals before the Court, namely ***Civil Appeal No. 140 of 2019*** lodged by ***the 1st appellant, David Njuguna Ngotho,*** and ***Civil Appeal No. 225 of 2019,*** filed by *the* ***2nd appellant, Elizabeth Njeri Ngigi***. The two appeals were heard back-to-back, but because they arise from the same judgment, involve the same subject matter and the same parties, we find it

convenient to prepare a joint judgment

instead of separate ones, which will only occasion unnecessary repetition. Accordingly, pursuant to the discretion conferred on the Court by ***rule 106*** of the ***Court of Appeal Rules*** and for the reasons we have given, the two appeals are hereby consolidated for purposes of this judgment.

2. The background to the appeal is as follows. By a plaint dated 16th December 2018, the 1st appellant, who is since deceased and is represented in this appeal by his two personal representatives, ***Serah Wairimu Njuguna*** and ***Rachel Wangui Njuguna*** commenced proceedings in the High Court at Kajiado against ***the respondent, Family Bank Ltd***. and ***Josephat Matei*** trading as ***Twinstar Auctioneers***. For convenience we shall refer to the deceased as "the appellant". On 29th September 2016 the respondent obtained leave and issued a third party notice to the 2nd appellant, from whom it sought indemnity should it be found liable to the 1st appellant.

3. In his plaint, the 1st appellant pleaded that on 31st March 2015, he was lawfully carrying on his business of general merchandise and cereals at Rongai under the name and style of ***Kahoro Cereals*** when auctioneers instructed by

the respondent, without any lawful justification, trespassed into

his business and carted away his goods and tools of trade, rendering him a pauper instantly. He further pleaded that he had had no dealings with the respondent and neither had he taken a loan from it nor offered his business as security.

4. The applicant further pleaded that as a result of the unlawful attachment and sale of his goods, he was unable to pay rent and his landlord evicted him, cutting short his 10-year lease with an unexpired period of 8 years and 9 months. As a result, he suffered loss and damage and by way of remedies, he prayed for ***Kshs.174,218,100.00*** made up as follows:

Special Damages

i. ***Unlawfully attached and sold goods - Kshs 4, 400,700***
ii. ***Construction and demolition of premises - Kshs 1,440,000***
iii. ***Rent paid from 1st April to 31st July 2025 - Ksh 120,000***
iv. ***Salary of 6 workers for 89 days - Kshs 347,100***
v. ***1 month's salary in lieu of notice for the workers - Kshs 100, 800***
vi. ***Business Licenses for 2015 - Kshs 9,500***

Other Damages

i. Loss of goodwill - Kshs. 3,000,000

ii. Loss of reputation - Kshs 30,000,000

iii. Loss of daily income from 31.03.15 to 30.11.15 - Kshs 7,200,000

iv. Loss of future earnings for 8 years and 9 months - Kshs 127, 600,000

Total - Kshs 174, 218, 100

5. The respondent filed its defence on 1st February 2016 and denied the 1st appellant's claim. The respondent denied that it sent auctioneers against the 1st appellant but added that, if it did, it was in accordance with the loan agreement entered into between the parties and after the 1st appellant had defaulted on his obligations thereunder. It was the respondent's further averment that the 1st appellant had applied from it and it granted him a loan facility which entitled it to attach his property upon breach of the terms of the agreement.

6. As regards the damages claimed by the 1st appellant, the respondent put him to strict proof, denied that he had suffered the tabulated losses, and characterised the claim as exaggerated and not reflecting the true financial position of 1st appellant's business and the alleged losses.

7. In its third party notice, the respondent averred that it entered into a loan agreement with the 2nd appellant for ***Kshs. 1,500,000***. She represented to the respondent that Kahoro Cereals was her business and offered cereals stock worth ***Kshs 2,200,000.00*** from the said business as security for the loan. In addition, she provided the licence, business permit and permit to operate a cereals store in the name of Kahoro Cereals.

8. The 2nd appellant, who for reasons best known to himself the 1st appellant did not make a party to his appeal, delivered her defence on 16th October 2016 which she amended on 22nd February 2017. She admitted that she had used the name of Kahoro Cereals to obtain a loan from the respondent and that she defaulted on the loan to the tune of ***Kshs 1,500,000***, but pleaded that the respondent was not entitled to attach the 1st appellant's goods because the business did not belong to her. Otherwise, she denied the 1st appellant's claim as well as that of the respondent for indemnity, and blamed the respondent solely for the 1st appellant's woes.

9. The 1st appellant filed a reply to the respondent's defence on 19th February 2016, while the respondent filed a reply to the 2nd appellant's amended defence on 15th March 2017.

10. ***Nyakundi, J.*** heard the suit and by the judgment impugned in this appeal, found that the business from which the respondent attached goods was owned by the 1st appellant rather than the 2nd appellant; that the 1st appellant was not privy to the loan agreement between the respondent and the 2nd appellant and therefore, it was not enforceable against him; that the attachment, seizure and sale of the 1st appellant's goods was wrongful and constituted trespass; that the auctioneers were agents of the respondent and, therefore, the respondent was liable for their actions; and that the 1st appellant's predicaments were occasioned by the 2nd appellant who misrepresented that Kahoro Cereals was her benefit and that she was the one who benefited from the loan, but failed to repay the same.

11. As regards damages, the court held that the 1st appellant had not proved the bulk of his claim for special and general damages except the following:

i. ***General damages for wrongful attachment of goods and loss of business opportunity – Kshs 7,000,000***
ii. ***Rent - Kshs 120,000***
iii. ***Business license - Kshs 9,500***
iv. ***Loss of goodwill - Kshs 500,000***
v. ***Value of attached goods - Kshs 300,000***

12. Accordingly, the court awarded the 1st appellant the above sums, together with costs of the suit.

13. The 1st appellant was aggrieved and filed ***Civil Appeal No. 140 of 2019***. On her part, the 2nd appellant was also aggrieved and filed ***Civil Appeal No. 225 of 2019*** against the same judgment.

14. As regards the 1st appellant's appeal, we note that the trial court having found in his favour on the question of liability, the only issue before us relates to whether the High Court erred in disallowing items on his claim for damages. The 1st appellant presented a lengthy memorandum of appeal with 15 grounds of appeal, which we think lack focus on the real issue in dispute. Indeed, in his written submissions dated 24th March 2025, the 1st appellant tried to redeem himself by attempting to focus on the issue of award of damages, and

abandoned the other extraneous and prolixious issues set forth in the memorandum of appeal.

15. As far as is relevant to the appeal, the 1st appellant submitted that the High Court erred by failing to find that he had pleaded and proved the special or liquidated damages, which were computed by ***Kigo Njenga & Company Accountants***. It was his contention that he adduced evidence which showed that he was earning a daily income of *Kshs 30,000*, translating to *Kshs 900,000* per month, which the court failed to consider. He also faulted the trial court for failing to accept his expert evidence in the absence of contradictory evidence.

16. Next, the 1st appellant submitted that the trial court erred by treating the proclamation issued by the auctioneers as evidence of the value of the attached goods. It was contended that the auctioneer was not a valuer, did not appear in court to produce the proclamation, and that his evidence could not displace that of the 1st appellant's expert.

17. It was also the 1st appellant's submission that the High Court erred further by disallowing his claim for loss of future earnings whereas he had produced in evidence

the lease

agreement which was terminated as a result of the unlawful attachment. It was urged that the termination of the lease occasioned the 1st appellant loss for the remainder of the unexpired period of the lease and that he was entitled to the award for loss of future earning for 8 years and 9 months.

18. Lastly, the 1st appellant faulted the trial court for failing to award him interest, which he had prayed for.

19. As regards the 2nd appellant, her memorandum of appeal is based on some 16 grounds, many of which are overlapping and repetitive. However, in her written submissions dated 22nd April 2025, she reduced them to only four grounds. She submitted that the High Court erred by finding that the respondent had proved her liability and contribution yet there was no provision in the loan agreement between her and the respondent that she would indemnify the respondent. In her view, there was no proper question on liability for trial between her and the respondent. She added that she was not responsible for the respondent's attachment of the 1st appellant's goods.

20. It was the 2nd appellant's further submission that the respondent was solely liable to the 1st appellant in

that

whereas she had a relationship with the respondent, she had none with the 1st appellant. For those reasons she urged the Court to allow her appeal.

21. The respondent opposed the appeal vide written submissions dated 27th March 2025 in which it defended the findings of the trial court as regards award of damages. As regards special damages, the respondent submitted that although they were pleaded, they were not strictly proved as required by the law.

22. It was the respondent's submission that the trial court properly rejected the 1st appellant's evidence of the value of the attached goods because it was deliberately tailor-made for the case, and that the court was right in adopting the values that were in the notification of sale. On the claim for construction and demolition, the respondent submitted that the High Court properly found that there was no correlation between the unlawful attachment and the claim. As for the claim for salaries for workers' payment in lieu of notice, the respondent submitted that the 1st appellant did not adduce any evidence to substantiate and support the claim.

23. Lastly, on the claim for goodwill and loss of reputation, the respondent submitted that the 1st appellant did not demonstrate the basis and justification for ***Kshs 3,000,000*** for loss of goodwill and ***Kshs 30,000,000*** for loss of reputation. Further, that the 1st appellant did not lead any evidence to show that his suppliers refused to supply goods on credit due to the wrongful attachment, so as to justify a claim for loss of reputation. Accordingly, the respondent urged the Court to dismiss the appeal with costs.

24. We have carefully considered this appeal and the submissions by the parties. We have also borne in mind our duty as a first appellate court. As has been stated time and again, our duty is to reconsider the evidence on record, assess and re-evaluate it and make appropriate conclusions on such evidence, but always remembering and making allowance for the fact that we do not have the advantage of the trial court, which saw and heard the witnesses as they testified. Thus, on matters of credibility of witnesses, we shall not lightly differ with the trial court. Indeed, in ***Jaban v. Olenja*** [1986] KLR 661 it was held:

"…this Court has held that it will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

25. As we earlier pointed out the 1st appellant's appeal does not challenge the findings of the trial court as regards liability. The issue in the appeal is the award of damages and interest. The 1st appellant had claimed special damages made up of unlawfully sold goods of ***Kshs 4,400,700***; construction and demolition at ***Kshs 1,440,000***; rent of ***Kshs 120,000***; salary of 6 workers at ***Kshs 347,100***; 1 months' salary in lieu of notice at ***Kshs 100,800*** and business license at ***Kshs 9,500***. Of that claim, the court awarded the 1st appellant only the rent and business license and rejected the claim on the value of sold goods, construction and demolition, salary and payment in lieu of notice.

26. On the costs of unlawfully sold goods, the court noted that it was confronted with two inconsistent and mutually exclusive pieces of evidence. The first was a document

prepared by the

1st appellant dated 1st April 2015, containing the goods allegedly taken away by the auctioneers worth ***Kshs 4,004,700***. The second was the proclamation dated 16th March 2015 and notice of sale dated 31st March 2015 containing the goods that were actually taken away and their estimated costs.

27. After considering the two documents, the trial court found the amounts in the notice of sale more credible and those in the 1st appellant's documents to be exaggerated. One of the reason that the learned judge gave for preferring the notification for sale over the 1st appellant's document was that the latter had many items, such as laptops, that did not appear in the former. Secondly, the evidence presented by the 1st appellant on his stock was only for the first three months of 2015 and did not extend to the previous year to give a clear picture of his alleged consistent stock.

28. In the circumstances the court found, reasonably in our view, that the 1st appellant's document was tailor-made for the claim rather than a true reflection of the actual stock, and that the notification of sale was the closet to reality. In this regard the learned judge expressed himself thus:

"In premises, this court is 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."

29. We agree with the High Court in that regard and have no valid basis for disturbing that finding and conclusion.

30. The second head under special damages claimed by the 1st appellant and denied by the High Court was for cost of construction and demolition assessed at ***Kshs 1,400,000***. On this claim, the court found that there was no evidence that in the course of the attachment the auctioneers damaged the premises and that there was no correlation between the wrongful attachment and the claim for construction and demolition. As correctly observed by the court, the evidence adduced by the 1st appellant's witness, ***James Ndungu Mwaniki (PW8)*** showed that the repairs to the premises were done long before the attachment complained of and there was no evidence adduced before the court of any post-attachment repairs. We are equally satisfied that there is no merit in the 1st appellant's complaint as regards this particular head.

31. The other head relates to salaries for workers and pay in lieu of notice. The 1st appellant's claim in this regard was salaries for 3 men at ***Kshs 700*** per day for 89 days, making ***Kshs 186,900*** and 3 women at ***Kshs 600*** per day for 89 days, making ***Kshs 160,200***. There was also a

claim for all the six

workers for one month's salary in lieu of notice. In all, the total claim for the workers was ***Kshs. 347,100***.

32. This being a special damage already incurred at the time of lodging the claim, the 1st appellant was obliged, not only to plead it, but to prove it strictly. The evidence in support of the claim was adduced by two witnesses, ***Peter Njoroge Mboce*** and ***David Ndunga Ng'ang'a*** who testified that they were employed by the 1st appellant. There was however nothing to substantiate that evidence in terms of supporting documents vouching for employment and payment, such as payment vouchers or payment acknowledgments. Indeed, Ng'ang'a testified that the 1st appellant had not paid him, meaning that the 1st appellant had not incurred any payment or expense in that regard. These two witnesses testified about themselves, meaning that there was absolutely no evidence adduced relating to the other alleged four employees. In these circumstances, we agree with the trial court that the 1st appellant did not prove this head as required by the law.

33. The 1st appellant claimed ***Kshs 127,600,000*** as loss of future earnings. In support of the claim, he relied on a

document titled ***“Report and Financial Statement the***

Year Ended 31st December 2014" and dated 20th June 2015, prepared by ***Kigo Njenga & Company Accountants***. For the first three months of 2015 up to 31st March 2015, the 1st appellant relied on unaudited accounts prepared by the same firm. After considering the report, the trial court was not persuaded that it reflected the true financial position of the appellant's business. The court expressed itself as follows:

> ***"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."

34. Once more, like the 1st appellant's evidence on the unlawfully attached and sold goods, it is patently clear to us that the above accounts were purposely prepared to support the 1st appellant's claim, rather than to show a true and accurate reflection of the financial position of his

business. No accounts, for example, for 2011-2012 or 2012-2013 financial

years were availed to render credence to those of 2013-2014. In fact, from a consideration of the evidence on record, no such accounts were ever prepared. But more importantly, for a business generating the kind of moneys the 1st appellant alleged, it was too telling when he admitted that he had no tax records because he had never filed any tax returns for the business. We cannot fault the trial judge for refusing to accept the 1st appellant's accounts as a true reflection of his business financial standing.

35. The 1st appellant heavily criticised the learned judge for disregarding the evidence of an expert witness. As far as we are aware, the court is not obliged to accept evidence, however incredible, merely because it has been tendered by an expert. The proper approach, to expert evidence is as explained by this Court in ***Ndolo v. Ndolo*** [2008] 1 KLR (GF) 742:

> "***[B]ut as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say -"because this is the evidence of an expert, I believe it."***

That, we think, is the proper

direction which a court dealing with the opinion of an expert or experts must give itself and the assessors when it is necessary to direct the assessors on such evidence. Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent grounds(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it" **(Emphasis added).**

36. The same view was reiterated in ***Amosam Builders v. Betty Ngando Gachie & 2 Others***, CA No. 193 of 2021 where the Court stated:

> ***"There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it a long with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it."***

(Emphasis added).

37. The last issue in the 1st appellant's appeal is the question of interest. He prayed for interest, but the trial court did not address the issue. Whether or not to award interest and costs is at the discretion of the trial court. ***Section 26 (1)*** of the ***Civil Procedure Act*** provides as follows:

> ***"26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."***

38. When it comes to exercise of discretion by the trial court, this Court does not readily interfere, unless it is demonstrated that the exercise of discretion was wrong in principle or based on failure to consider relevant factors or on consideration of irrelevant factors. In ***United India Insurance Co. Ltd v. East African Underwriters (Kenya) Ltd.*** [1985] E.A 898 the Court explained as

follows*:*

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

39. As we have noted, the trial court did not address the question of interest, so we cannot say it exercised its discretion and denied the same because there are no apparent reasons why the 1st appellant was not awarded interest. In the circumstances, we find that the 1st appellant was entitled to interest at court rates from the date of the judgment of the trial court.

40. Turning to the 2nd appellant's appeal, the High Court found that the 1st appellant's predicaments were occasioned by

the

2nd appellant who knowingly used a business that was not hers as security and benefited from the loan, but failed to repay it. Further that having obtained the letter of offer for the loan from the respondent, it was dishonest of the 2nd appellant to purport to offer the 1st appellant's goods as security for the loan while aware that she had no possessory right to those goods. The Court concluded thus:

> ***"From the evidence, there is a nexus between the loan amount advanced to the third party and the trespass to the plaintiff's 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."***

41. On the contention that the High Court erred by granting the third party notice, we note that on or about 29th September 2016, the High Court allowed the respondent's chamber summons dated 8th September 2016 which brought in the 2nd appellant as the third party. The 2nd appellant never appealed against that ruling and thereafter fully participated in the proceedings until

judgment. We think it is too late in the day

for the 2nd appellant to turn round in this appeal and contend that she ought not to have been joined as a third party.

42. As regards her complaint that the High Court erred in finding her liable, we do not think there is any substance in her contention. She readily admitted in her defence to having used the 1st appellant's documents to procure the loan of ***Kshs 1,500,000.00*** from the respondent, which she obtained and defaulted in paying. The evidence also showed that she gave the 1st appellant's stock as collateral. The High Court properly found that she was the real mischief maker in this saga that led to the attachment of the 1st appellant's goods and was, therefore, liable to the respondent.

43. Nor do we find any substance in the 2nd appellant's contention that she could not be found liable to the respondent because there was no provision for indemnity in the loan agreement. The liability as a third party is not dependent on agreement between the third party and the party issuing the notice, but is a question of fact and law whether wrongdoing has been proved against the third party to warrant an order of indemnity.

44. For the above reasons, we have come to the conclusion that the consolidated appeal has no merit except only on the question of interest payable to the 1st appellant. The same is accordingly, dismissed to that extent. Bearing in mind that the appeal has substantially failed, we direct each party to bear its own costs in this appeal. It is so ordered.

Dated and delivered at Nairobi this 24th day of October, 2025.

W. KARANJA

……
JUDGE OF APPEAL

K. M'INOTI

……
JUDGE OF APPEAL

L. ACHODE

……
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.