REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO E081 OF 2021

VINE FRESH (EAST AFRICA) LIMITED……..
……..PLAINTIFF

VERSUS

MURANGA FREIGHT LOGISTICS LIMITED……DEFENDANT

JUDGMENT

THE CLAIM

Vine Fresh (East Africa) Limited (hereinafter referred to as the plaintiff) filed this suit on 25/3/2021 vide a plaint dated 18/3/2021. The plaintiff sued Muranga Freight Logistics Limited (hereinafter referred to as the defendant) on account of negligence and breach of contract following non-delivery of goods. The plaintiff averred that on 25/3/2018, it contracted the defendant to deliver mangoes valued at Ksh. 3,494,484/= from Nairobi to Mombasa Port destined to a customer in Russia. That the plaintiff handed the goods to the defendant and paid the requisite consideration. The plaintiff further averred that the defendant failed to deliver the goods as contracted and alleged that the defendant's motor vehicle used to ferry the goods had been involved in a road accident, causing the goods to be damaged and others lost while on transit.

The plaintiff pleaded several particulars of negligence and breach of contract against the defendant. I will not reproduce the particulars since the parties entered into a consent on liability. The plaintiff thus prays for judgment against the defendant for:

a) Special damages of Ksh. 4,437,340/=;
b) Costs of this suit;
c) Interest on the above;
d) Any further relief that this Honourable court may deem fit to grant.

THE DEFENCE

The defendant entered appearance on 13/7/2021 and filed a statement of defence on the same day in which it denied the plaintiff's claim. The defendant admitted that an accident occurred involving the motor vehicle that was carrying the plaintiff's goods but denied that the same was as a result of negligence on the part of their driver. The defendant averred that the accident was caused by a third party driver whose particulars were unknown to the defendant. The defendant prayed that the plaintiff's suit be dismissed with costs.

CONSENT ON LIABILITY

The record indicates that on 20/5/2024, the parties recorded a consent on liability in which the plaintiff was held 20% liable whereas the defendant was held 80% liable. The consent was adopted as an order of the court.

THE EVIDENCE

The Plaintiff's Case

The Plaintiff called two witnesses in support of its case. PW 1 Peter Muiruri Kuria testified that he was a Marine Surveyor. That he assessed and prepared a report on the loss that had been incurred by the plaintiff. He produced the report and invoice on what he charged for the assessment. PW 2 George Karatu testified that he was a Claims officer working with Mua Insurance Company, formerly known as Phoenix E.A. Assurance Company Limited. The witness confirmed that following the loss, they paid Ksh. 4,338,540/= to the

plaintiff and Ksh. 98,600/= to the Loss adjuster. The witness produced several documents in support of the plaintiff's case.

The Defence Case

The defendant did not call any witness.

MAIN ISSUES FOR DETERMINATION

In my opinion, the main issues for determination are as follows:

i. Whether the plaintiff suffered loss and damage as a result of the alleged incident;
ii. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
iii. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on its evidence on record and submitted that it had proven its case. The submissions touched on mathematical calculations to justify the claim. The plaintiff urged the court to award judgment in its favour as prayed.

THE DEFENDANT'S SUBMISSIONS

The defendant submitted that subrogation was not automatic. That it arises only after the insurer has fully discharged its obligation by paying the insured. The defendant submitted that the insurer must prove actual and full indemnification as a prerequisite for invoking subrogation rights. The defendant further submitted that the plaintiff relied on a discharge voucher to prove full payment to the insured but no supporting documentation such as bank transfer records, cheque copies or confirmation from the insured's representatives was adduced. The defendant argued that a discharge voucher does not constitute proof of actual payment without corroborating evidence. That in the absence of bank transfer records, cheque or other financial records, the voucher is mere hearsay and cannot establish indemnification.

The defendant also engaged in mathematical calculations and submitted that the value of the recovered mangoes should be more than what was pleaded in the plaint. The defendant argued that the plaintiff cannot adopt a market value in US dollars for the claim then adopt a lower figure for the recovered mangoes. That the plaintiff failed to adduce sufficient evidence to prove that the recovered mangoes were sold locally. The defendant argued that the plaintiff claimed the value of the Reefer container yet it did not belong to the plaintiff. That the plaintiff did not produce evidence to show that they paid for the Reefer container. It was also argued that there was no assessment report to show the extent of the damage to the container and the fact that it was declared a total loss. The defendant submitted that the plaintiff had failed to prove its case on a balance of probabilities and urged the court to dismiss the suit with costs. The defendant relied on the following authorities:

a) ***Grace Anyona Mbinda v Jubilee Insurance Company Limited [2021] eKLR;***
b) ***Ryce Motors Limited & another v Elias Muroki [1996] eKLR;***
c) ***Linus Fredrick Msaky v Lazaro Thuram Richoro & another [2016] eKLR.***

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record. The plaintiff pleaded special damages as follows:

a) Value of lost and damaged goods……Ksh. 4,338,540/=;
b) Loss adjuster's fee……Ksh. 98,600/=;

Total……Ksh. 4,437,140/=

The suit is brought under the doctrine of subrogation. In the authority of ***Leli Chaka Ndoro v Maree Ahmed & S.M. Lardhib [2017] KEHC 7713 (KLR),*** the Court held:

"The principle of subrogation applies where there is a contract of insurance. If the 'insured risk' takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. The assumption is that the loss would have accrued due to the acts of a third party. By the principle of subrogation, the insurer is put in the position of the insured and is entitled to claim compensation from the 3rd party tortfeasor. The extent of the

compensation is not more than what has been paid to the insured. Subrogation therefore presupposes the existence of an insurance contract."

In **"General Principles of Law"** 6th edition (E.R. Hardy Ivamy", the author states as follows at page 493: -

"*In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of "subrogation' are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance. Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity."*

In **"Bird's Modern Insurance Law"** (7th edition) – JOHN BIRDS, the author states as follows in chapter 15 under **"subrogation"**: -

"This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer's right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The "fundamental rule of insurance law" is "that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified". A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points-: subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance."

In ***Halsbury's Laws of England 4th Edition 2003 Reissue Volume 25 at Paragraph 490*** where the circumstances under which the doctrine applies are set out in the following terms :

"Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject matter insured, he thereupon becomes entitled to take

over the interest of the assured in whatever may remain of the subject matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss….in so far as the assured has been indemnified by that payment for the loss."

The learned author while examining the extent of the right of subrogation opined as follows:

"…In short, the insurer, on payment of the loss, is entitled to the advantage of every right of the assured, whether it consists in contract or in remedy for tort, or to anything he has received or is entitled to receive in diminution of the loss. The insurer is not entitled to sue a third party in the name of the assured unless the assured has assigned to the insurer his right of action."

The foregoing reveals that the right to subrogation does not arise until the insurer has indemnified the insured. This implies that for such a claim to succeed, there must be evidence to prove that the insured was indemnified for the loss or damage. In ***David Gichiri & 3 others v Emmah Kerubo Sese [2021] KEHC 7144 (KLR)***, the court observed:

"Undeniably in this case, the insurance company is yet to make good the Respondent's claim but has seemingly assumed to step into the shoes of their insured. The invocation of the doctrine of subrogation by the insurance company is therefore premature, their rights thereunder not having crystalized."

In the circumstances of this case, there must be evidence to show that the insurer indemnified the insured. The plaintiff relies on a discharge voucher signed by the insured to prove that payment was made. The discharge voucher produced in evidence indicates that the insured received Ksh. 4,338,540/= on 20/8/2018, being the total loss. The voucher is signed by the plaintiff's general manager. The defendant argues that a discharge voucher is not proof of payment. That the plaintiff ought to have produced in evidence bank records showing the transactions or cheques or receipts. Ordinarily, payment is proved by bank transfer slips, RTGS confirmations, cheque copies and clearance, bank statements including mobile money transfer statements and payment receipts.

Does the discharge voucher prove that the insurer settled the insured's claim? In the case of ***Kamau v Kevian Kenya Ltd [2023] KEELRC 627 (KLR)***, the court held that:

"In law, a duly executed discharge voucher is equated to a contract. It has a binding effect on the parties unless it is impugned on the usual grounds of vitiating a contract. Unless

successfully assailed, a discharge voucher has the effect of closing the matter it addresses and may constitute a bar to further claims on the issue."

In ***Trinity Prime Investment Ltd v Lion of Kenya Insurance Co Ltd [2015] KECA 793 (KLR)***, the Court of Appeal observed:

"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."

A similar position was held by the Court of Appeal in the authority of ***Coastal Bottlers Limited v Kimathi Mithika [2018] KECA 523 (KLR).***

In essence, a discharge voucher is sufficient proof of the contents therein, unless it is established that the same was executed through fraud, misrepresentation or is tainted by anything that would vitiate a contract. The import of the discharge voucher relied upon by the plaintiff is that the insured acknowledged having been paid the sum of Ksh. 4,338,540/= by the insurer on account of the claim herein. In my view, the only person who may validly challenge the discharge voucher would be the insured, and not a third party who was not privy to the discharge. As already stated, a discharge voucher is a binding contract between the parties to the agreement. I doubt that a third party would be entitled to challenge the same without contrary evidence.

It should also be remembered that the plaintiff is required to prove its case on a balance of probabilities and not beyond reasonable doubt. My view is that the discharge voucher constituted *prima facie* evidence of payment or settlement of the claim. It could only be controverted by contrary evidence. In the absence of contrary evidence, and being guided by the above authorities, my finding is that the discharge voucher produced in evidence is sufficient proof that the insurer settled the claim by the insured. It was not necessary for the plaintiff to produce bank records or payment receipts or even call a representative from the insured company to confirm payment or settlement of the claim. As such, the insurer was entitled to claim under the doctrine of subrogation.

There is already a consent on liability. Having found that the insurer was entitled to claim under subrogation, the next issue would relate to how much the plaintiff is entitled to. The plaintiff's claim is basically one for special damages. It is trite law that special damages must be specifically pleaded and strictly proved. In ***Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** the court said:

"It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded"

In ***Ouma v Nairobi City Council [1976] KLR 304*** after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L.J's Judgment on page 532 and 533 in ***Ratcliffe v Evans [1832] 2Q.B. 524*** an English leading case on pleading and proof of damage:

" The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

Similarly, in the case of ***Hahn v Singh [1985] KLR 716,*** it was held that:

"... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."

In the case of ***Christine Mwigina Akonya v Samuel Kairu Chege [2017] KEHC 1484 (KLR)***, Joel Ngugi J (as he then was) held that:

"Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual

receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. See Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR; Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR; Sanya Hassan v Soma Properties Ltd. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a pro forma invoice will not suffice." (Emphasis supplied)

In ***Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR),*** the Court of Appeal held:

"A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent's loss, or the replacement value of the respondent's equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent's equipment supposedly withheld by the appellant."

There is no dispute as to the number of cartons that were being ferried, the number of cartons salvaged, those destroyed, those stolen and those sold locally. In the authority of ***Kwanza Estates Limited v Jomo Kenyatta University of Agriculture and Technology [2024] KESC 74 (KLR)***, the Supreme Court of Kenya underscored the duty to mitigate loss in case of breach or frustration of a contract. The court had this to say:

"***This mutual duty to mitigate loss underscores the importance of collaboration in navigating contractual challenges. This duty to mitigate was elaborated in African Highland Produce Limited v John Kisorio [2001] eKLR, where the Court of Appeal held that;***

'It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect.'

The duty to mitigate arises as soon as the injured party realizes an interest has been injured. They must act in the interest of both parties, provided this does not require them

to suffer additional injury or engage in unreasonable expenditure or speculative litigation. Whether the actions in mitigation are reasonable depends on the specific facts of each case, with the burden of proving failure to mitigate resting on the defendant (See African Highland Produce Limited v John Kisorio [2001] eKLR, citing Halsbury's Laws of England, Vol 11, Page 289, 3rd Edn 1955).”

The plaintiff promptly mitigated the loss by selling the recovered and fit mangoes locally. The amount received from the sale of the mangoes locally has been discounted from the claim. In their submissions, the parties adopted a similar formula in calculating the loss. The only point of departure is where the defendant calculated the value of the mangoes sold locally in US dollars whereas the plaintiff calculated in Kenya shillings. I do not agree with the defendant that the proceeds from the local sale should be calculated in US dollars as per the original price that would have been fetched had the mangoes been sold abroad. In my view, the calculations with respect to any salvage ought to be as per what was actually received in terms of proceeds and not what was expected. It is obvious that the mangoes could not fetch the same price they would have, had they been sold abroad. Calculating the proceeds in terms of US dollars based on the original unit price is unfounded.

The defendant argued that the plaintiff relied on invoices raised to the local purchasers of the mangoes and that there is no evidence that they eventually paid for the mangoes. The defendant forgets that the amount in terms of proceeds is not claimed as a loss but is discounted from the claim. In the circumstances, the plaintiff has no obligation to prove that they received the proceeds. It is enough for the plaintiff to show that they mitigated the loss and in what manner. The invoices are sufficient proof of sale. That is enough to enable the court discount the amount from the claim. It is to the advantage of the defendant that the amount is discounted.

The defendant also argued that the Reefer container did not belong to the plaintiff and that the plaintiff did not prove that they had any proprietary interest in the same. The plaintiff produced in evidence an invoice by Maersk Line or Maersk Kenya Limited raised to the plaintiff for the recovery of the container. The container could have belonged to a third party but the plaintiff was required to indemnify the third party for the loss. There is evidence that the plaintiff’s insurer paid for the loss. It does not matter that the plaintiff was

not the owner of the Reefer container. What matters is that the plaintiff suffered loss in respect of the container, which was insured, and that they were indemnified by the insurer. The plaintiff had a duty to indemnify the owner of the container.

Another argument was raised by the defendant that there was no assessment report on the Reefer container. Indeed, no such report was produced in evidence. This is a claim based on the doctrine of subrogation. It is not a material damage claim, strictly speaking. A formal damage report is helpful evidence of the quantum and extent of damage, but it is not invariably a strict legal prerequisite if other credible evidence shows the loss was incurred and compensated. The plaintiff produced a copy of an invoice indicating that Maersk Kenya Limited made a demand to the plaintiff of US dollars 16,825 for the loss of the container. There is evidence contained in the Loss adjuster's report that the container was insured at Ksh. 1,000,000/=. As already indicated, there is evidence that the insurer paid the plaintiff for the loss. The defendant did not call evidence to dispute that the container was damaged. I am satisfied that the payment related to loss or damage connected to the claim. I do not think that a damage assessment report was mandatory in the circumstances.

Having made the above considerations, I proceed to determine the amount payable to the plaintiff. For the loss of mangoes, both parties agree that it should be the total value of mangoes lost and damaged, less the salvage. The parties also agree that the exchange rate for the US dollar was Ksh. 101.387/= at that time. I will create a table for ease of illustration:

S/NO	DESCRIPTION	QUANTITY IN CARTONS	VALUE IN US DOLLARS	VALUE IN KSH.
1.	STOLEN MANGOES	1,976	12,448.80	1,262,146.48
2.	DESTROYED MANGOES	2,597	16,361.10	1,658,802.84
3.	SOLD MANGOES	947	5,966.10	604,884.98
4.	GROSS LOSS	5,520	34,776	3,525,834.31

The consignment was meant for export and not for the local market. It should therefore be taken, in the first instance, that the plaintiff lost the whole consignment as a result of the accident. The loss should however take into consideration the mitigating circumstances. 947 cartons were sold locally. The Loss adjuster's report indicates that the salvage value was Ksh. 31,350/=, being the proceeds for the sale of mangoes in the local market. It is not clear how the value was arrived at. The invoices produced in evidence by the plaintiff relating to the local sale amount to Ksh. 16,425/= and account for 324 cartons only. This implies that 623 cartons are not accounted for.

The price at which the mangoes were sold locally was not constant. There is no evidence to show that the 623 cartons were sold locally and how much they fetched. Any figure attached to the said cartons as salvage value would be speculative. Mitigation cannot be used as a sword and shield. In my view, the plaintiff cannot rely on mitigation to justify a reduced export value while simultaneously refusing to account for the proceeds of salvage. This prevents verification of actual loss and risks compensating the plaintiff beyond indemnity. The doctrine of indemnity requires that the plaintiff (or subrogated insurer) be restored to the pre-loss position, not to be placed in a better one. It is my view that the insurer can only recover what the insured could have recovered. If the insured failed to account for salvage, the insurer inherits that weakness and any ambiguity in salvage accounting works against the plaintiff/insurer, not the defendant.

Since the plaintiff has failed to account for 623 cartons meant for export or prove that they were sold locally at a cheaper price, I will adopt their export value as the salvage value. As such, the salvage value for the 623 cartons would be USD 3,924.90 which translates to Ksh. 397,933.83/=. Consequently, the plaintiff's award for the loss of mangoes would work out as follows:

a) Gross loss……Ksh. 3,525,834.31
b) Less total salvage……Ksh. 414,358.83
c) Amount due……**Ksh. 3,111,475.48**

As for the Reefer container, the sum insured was Ksh. 1,000,000/= and the salvage value was indicated in the report as Ksh. 105,250/=. Therefore, what is due is Ksh. 894,750/=.

Policy excess was indicated as Ksh. 50,694/=. The total award amounts to Ksh. **3,955,531.48/=.**

DISPOSITION

In summary, I hold that the plaintiff has proven his case on a balance of probability as against the defendant. Consequently, I make the following awards:

1) Total Special damages.....Ksh. 3,955,531.480/=
   Less 20% contribution.....Ksh. 791,106.296/=
   Balance due to the plaintiff.....**Ksh. 3,164,425.184/=**

The plaintiff is also awarded costs of the suit and interest. The guiding principles in respect of interest are set out in section 26 of the Civil Procedure Act which provides that:

"(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.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

In the case of ***Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR***, the court stated that:

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the Court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix."

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of ***Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4* (8th April 2015)** stated in part, as follows:

"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that <u>for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment</u>……Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see ***Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR).***

Consequently, interest on the special damages awarded shall accrue from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 22ND DAY OF DECEMBER, 2025.

Y.A SHIKANDA

<u>SENIOR PRINCIPAL MAGISTRATE.</u>