



**Wetende v Luyali t/a Lumo Blues Guest House (Civil Appeal
E057 of 2020) [2026] KECA 342 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 342 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E057 OF 2020
MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA
FEBRUARY 27, 2026**

BETWEEN

JEREMIAH MAKORE WETENDE APPELLANT

AND

SOLOMON LUYALI T/A LUMO BLUES GUEST HOUSE RESPONDENT

*(Being an appeal from the Judgment and decree of the High Court of Kenya at
Kakamega (W. Musyoka J) dated the 18th day of October 2019 in HCCA No. 12 of 2018)*

JUDGMENT

1. This is an appeal against the judgment of the High Court of Kenya at Kakamega, which arose from *Civil Appeal No. 12 of 2018*. The first appeal originated from the judgment and decree in *Kakamega SRMCCC No. 176 of 2017*, where the appellant, Jeremiah Makore Wetende, filed suit against the respondent, Solomon Luyali. T/A Lumo Blues Guest House. He claimed that he had booked himself in the respondent's facility and or establishment in Kakamega town on the evening of 24th February, 2015, and was allocated room 11 upon paying the necessary charges. He had a laptop and a tablet phone which items he left in the room as he went out looking for a place to dine. When he got back, he found his room broken into and the two items stolen.
2. He pleaded that the respondent, as the proprietor of the facility, owed him a duty of care to ensure the safety of guests and their property, and that this duty had been breached when his room was accessed and his belongings stolen.
3. The appellant quantified the value of the stolen items at Kshs.75,999/-. However, in his prayers in the plaint, he sought general damages to restore him to the position he was before the damage was occasioned, rather than specifically claiming the aforesaid as special damages.



4. The respondent, in his defence denied liability and disputed the factual basis of the claim. He challenged the circumstances of the alleged theft and the quantification of the loss. He denied the tort of negligence and in particular the alleged breach of the statutory duty of care.
5. The trial magistrate, having heard the dispute, entered judgment in favour of the appellant, holding the respondent liable for the loss and damage. He accordingly awarded the appellant the sum of Kshs.75,999/- together with costs and interest. The award was made on the basis of the quantified value of the stolen items, notwithstanding that the plaintiff had prayed for general damages only.
6. Aggrieved, the respondent lodged *Civil Appeal No. 12 of 2018* before the High Court of Kenya at Kakamega, “the first appellate court”. Upon re-evaluation of the record, the first appellate court found that the appellant’s claim was in substance one for special damages, since the loss of the laptop and tablet was specific, quantifiable, and liquidated. However, the appellant had not prayed for special damages in his pleadings, instead sought general damages. The first appellate court held that the trial court erred in awarding special damages when they had not been specifically pleaded and proved, reiterating that parties are bound by their pleadings. Consequently, the first appellate court allowed the appeal, set aside the trial court’s award, and dismissed the appellant’s suit with costs.
7. It is against this reversal that the dispute is now before this Court, on second appeal where the appellant seeks a further opinion on whether the first appellate court was correct in its determination.
8. Four grounds of appeal are advanced in that regard to wit; that the first appellate court erred and misdirected itself in law by: departing from the issues raised by the parties and framing issues not pleaded thereby arriving at a wrong conclusion; failing to take into account the appellant’s submissions; failing to exercise judicial discretion judiciously by awarding the respondent costs both in the first appellate court and in the trial court despite a finding that the respondent was at fault; and in delivering a judgment that was not only unconscionable but also an affront to the provisions of Article 159(2)(d) of the Constitution of Kenya which underlines substantial justice as opposed to procedural technicalities. It is upon these grounds that the appellant seeks this Court to set aside the judgment of the first appellate court together with the decree arising therefrom, substitute the same with a finding in his favour, and award him the costs of this appeal as well as those incurred in the first appellate court and the trial court.
9. When the appeal came up for hearing, Mr. Maloba, learned counsel appeared for the appellant, whereas Mr. Matete, learned counsel appeared for the respondent. Both opted to rely fully on their respective written submissions which they had filed and exchanged in arguing their respective positions on the appeal.
10. In his submissions, counsel for the appellant condensed his arguments around two thematic areas, whether the first appellate court erred in finding that the trial court awarded special damages instead of general damages and secondly, whether it erred in awarding costs to the respondent despite upholding the trial court’s finding that the respondent was negligent.
11. On the first issue, counsel contended that the trial court’s award was firmly anchored on receipts produced in evidence, which clearly demonstrated the value of the lost items. He argued that the first appellate court misapplied the settled principle on special damages by treating the award as one improperly granted, despite the fact that the pleadings and exhibits had sufficiently particularized the loss. To support this position, reliance was placed on Daniel Gatibi Gachomo v Kenya Union of Teachers Nyeri Branch [2014] eKLR, where this Court reiterated that rules of pleading are designed to crystallize issues for determination and to ensure parties are aware of the case they must meet.



12. Similarly, in *Charles C. Sande v Kenya Co-operative Creameries Ltd*, Civil Appeal No. 154 of 1992, the Court underscored that, pleadings serve to give fair warning of the claim being advanced, and that technical objections should not defeat substantive justice. The appellant distinguished the authorities relied upon by the first appellate court, being *Capital Fish Kenya Ltd v Kenya Power & Lighting Co. Ltd* [2016] eKLR and *Caltex Oil (Kenya) Ltd v Rono Ltd* [2016] eKLR, noting that in those cases the claims for special damages failed because they were neither particularized nor proved, whereas in the present appeal the receipts and quantified sums were placed before the trial court and formed the basis of the award. He submitted that the first appellate court erred by applying the requirement of pleading of special damages mechanically, without regard to the circumstances of this case, contrary to the spirit of Article 159(2)(d) of the *Constitution* which enjoins courts to administer justice without undue regard to procedural technicalities.
13. On the second issue, counsel contended that the discretion on costs was exercised injudiciously. He pointed out that the first appellate court expressly affirmed the trial court's finding that the respondent was at fault, yet paradoxically awarded him costs both in the appeal and in the trial court. Counsel submitted that this was a departure from the general principle that costs follow the event, and that no reasons were given by the first appellate court to justify such departure. He invoked the guidance of Kuloba J. in his book "Judicial Hints on Civil Procedure" to the effect that costs should not be denied to a successful party unless it is shown that he acted unreasonably. In counsel's view, once liability was held against the respondent, the proper exercise of discretion would have been to award costs to the appellant, who was the victim of the respondent's negligence. He therefore urged this Court to find that the first appellate court erred both in its treatment of the damages claim and in its award of costs, and to allow the appeal accordingly.
14. In opposition, counsel for the respondent maintained that the award made by the trial court, was a liquidated sum and therefore constituted a claim for special damages. He emphasized that the law requires special damages to be specifically pleaded and strictly proved, and that parties are bound by their pleadings. In his view, the appellant's plaint, as drawn, only prayed for general damages "to restore the plaintiff to the original condition before the damage was occasioned," and did not contain a prayer for special damages.
15. Counsel submitted that courts have consistently held that it is not their role to draft pleadings or grant prayers on behalf of litigants that have not been prayed for. He contended that the first appellate Court was right in finding that there was no claim for special damages before the trial court, and consequently right in setting aside the award. On this basis, the respondent urged this Court to dismiss the appeal with costs, affirming that the appellant's failure to plead special damages was fatal to his case and that the High Court properly applied the law in its judgment. Counsel did not address the issue of costs in his submissions.
16. This being a second appeal, this Court is reminded of its duty under Section 72(1) of the *Civil Procedure Act* which limits second appeals to this court to consideration of matters of law only. This Court has consistently affirmed this position, for instance in *Kenya Breweries Ltd v Godfrey Odongo* [2010] eKLR where it was stated:

"In a second appeal, the Court of Appeal confines itself to matters of law only. The Court will not interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence at all, or on a misapprehension of the evidence, or the courts below demonstrably acted on wrong principles in reaching their findings."



17. It is therefore our task to interrogate whether the first appellate Court correctly applied the law in setting aside the trial court's award and dismissing the appellant's claim. In other words, the appeal turns on whether the first appellate erred in law in holding that the trial magistrate awarded special damages when none had been specifically pleaded, and whether it properly exercised discretion in awarding costs to the respondent despite affirming the finding of negligence against him by the trial court.
18. On the first issue, the law is settled that special damages must be specifically pleaded and strictly proved. This Court in *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* (*supra*) held that:
- “It is trite law that special damages must not only be pleaded but must also be strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”
19. Likewise, in *Caltex Oil (Kenya) Limited v Rono Limited* (*supra*), the Court emphasized that special damages cannot be awarded unless they are particularized in the pleadings and supported by evidence. In the present case, the appellant only prayed for general damages from the respondent “to restore him to the original condition before the damage was occasioned”. While receipts were produced showing the purchase price of the stolen items, the prayer remained couched as a claim for general damages. The trial court nonetheless awarded the quantified sum as special damages. The first appellate court correctly identified this award as one of special damages and held that it was improperly granted since it had not been specifically pleaded and proved.
20. Case law firmly establishes that parties are bound by their pleadings, meaning evidence must align with what's stated in the initial filings, and proof at variance with the pleadings must be disregarded, forming a core principle for defining case issues, as held *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* [2014] eKLR. Similarly, the court itself is as bound by the pleadings as they are themselves. It is not part of the trial court to enter into any other inquiry regarding pleadings. See *Kahora v Ng'ang'a* [2025] KEHC 11888(KLR). Lastly, it is also settled legal proposition that no party should be permitted to travel beyond its pleadings unless they are amended during the hearing. See *Githaga v Mwangi* [2024] KEHC 13449(KLR).
21. In this case as long as the prayer remained for general damages, the trial court had no business turning it into special damages. It was not the business of the trial court to rewrite the prayers. The appellant had the opportunity during the hearing to amend the prayer so as to accord with the evidence, which opportunity he took no advantage of. He can only blame himself for the mishap.
22. On the second issue of costs, the general principle is that costs follow the event, though the court retains discretion to depart from this principle provided reasons are given. In *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR, this Court held that:

“Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See Section 27 (1) of the *Civil Procedure Act*.

In the case *Devram Dattan v Dawda* [1949] EACA 35 it was held:

‘It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts...If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the



discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance.’

Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule.

In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation. In our view the learned Judge’s order was wrong.

For the foregoing reasons, the plaintiff’s appeal only succeeds as to the award of interest and costs on the principal sum awarded by the learned Judge (Mwera, J). The rest of the grounds of appeal are rejected.”

23. In the present case, the first appellate court upheld the finding of negligence against the respondent but nonetheless awarded him costs but not in both the first appellate court and in the subordinate court as claimed by the appellant. The costs awarded were in respect of the first appeal only. Nevertheless, the judgment did not disclose reasons for this departure. While costs are discretionary, the absence of reasons renders the exercise of discretion questionable. Once liability was affirmed against the respondent, the proper exercise of discretion would have been to deny him costs or to explain why costs were awarded despite the finding of fault.
24. In the result, we find no error of law in the first appellate court’s conclusion that the trial court improperly awarded special damages not pleaded. The dismissal of the appellant’s claim was therefore proper. However, on the issue of costs, we are satisfied that the first appellate court erred in principle by awarding costs to the respondent without giving reasons, notwithstanding the finding of negligence against him.
25. Accordingly, the appeal succeeds only to the extent of setting aside the order on costs. We substitute therefor an order that each party shall bear his own costs in this Court as well as in the first appellate court.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

