

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. E079 OF 2024**

**MANSUR ABUD KHAMIS.....**

**APPELLANT**

**VERSUS**

**CORPORATE INSURANCE COMPANY LIMITED .....**

**RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Judgment and Decree of the Honourable A. Munyuny, Adjudicator, delivered on 13.11.2024 in Migori SCCCOM No. E079 of 2024. The Appellant was the Claimant in the Small Claims Court.
  
2. The Memorandum of Appeal dated 18.11.2024 raised the following Grounds:
  - a. The Trial Court erred in law and fact in failing to consider, evaluate and balance pleadings, submissions and evidence thereby reaching an erroneous conclusion that the Appellant did not prove his case on a balance of probabilities.
  - b. The Trial Court erred in law and fact in dismissing the Appellant's claim on the grounds that loss of user was a special damage that required strict proof.

- c. The learned magistrate was biased against the appellant.
3. The last ground is dismissed *in limine* as it is a question of fact, and the same did not arise from the issues in the court below.
  4. The Statement of Claim dated 27.2.2023 claimed loss of user of Ksh. 936,000/= and repair costs of Ksh. 996,000/=.
  5. The Appellant pleaded that he was the owner of motor vehicle registration number KCW 312H insured by the Respondent vide policy number C01/080/1/002285/19, commencing on 18.10.2020 to 17.10.2021.
  6. It was the Appellant's case that while the policy was still in force, the said motor vehicle was involved in an accident. The Respondent was promptly informed.
  7. Subsequently, a suit was instituted in Migori CMCC No. E028 of 2020 by which a judgement for Ksh. 2,787,137/= was awarded against the Appellant.
  8. The Respondent failed to indemnify the Appellant as a result of which the accident motor vehicle was proclaimed by Stellan Auctioneers causing the Appellant loss.
  9. The Respondent filed a Response dated 28.6.2024 by which it was averred that the Respondent did not insure the Claimant's

motor vehicle and was not promptly informed after the alleged accident.

10. The matter proceeded under Section 30 of the Small Claims Court Act. The court rendered its judgment on 13.11.2024, by which it dismissed the case of the Appellant. the said section provides as follows:

Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.

### **Submissions**

11. The appellant filed incomplete submissions on 17.1.2025. They submitted that the respondent had a duty to indemnify the appellant. This was for the loss of use of a commercial vehicle for 72 days. They maintained that a person injured by another's negligence is entitled to an award of damages. Reliance was placed on the case of **Jackson Mwabili v Peterson Mateli [2020] KEHC 2814 (KLR)**, where E. C. Mwita J, as he then was, held that :

46. The above decisions are clear that loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were

damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user.

12. The court will never know what I was in the unfiled section of the submissions. However, the court shall take into account that a party cannot find a claim in the submissions. They are neither evidence nor pleadings. Mwera J posited the following when considering the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim in the case of **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:**

**“Indeed, and strictly speaking, submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to**

**submit. So, submissions are not necessarily the case.”**

13. Submissions are not, strictly speaking, part of the case, the absence of which may prejudice a party. Their presence or absence does not in any way prejudice a case as held in **Ngang’a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

**“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”**

14. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the

question in the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

**“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”**

15. The Respondent filed submissions dated 12.01.2026. They submitted that they specifically denied the Claimant’s averments and specifically stated that, as per the said policy, the Respondent company had no obligation to indemnify the Appellant herein since the policy did not create any such liability. There was a further submission that it is a settled principle that an appellate court will not lightly interfere with findings of fact made by a trial court unless it is demonstrated that the court failed to take into account relevant evidence.

16. They relied on the case **Majid v Toza [2023] KEHC 20487 (KLR)**, in which the court Hancock 2 JA (as he then

was) in the case of **Ephantus Mwangi & Another V. Duncan Mwangi Wambugu [1982-88] 1 KAR 278** who stated:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the finding...

The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.

17. It was submitted that there was thus no error of law or fact as the magistrate properly considered the case before her.

18. They submitted that this was consequential loss and that Kenyan courts have consistently held that loss of use is a consequential loss which is not recoverable under a standard insurance policy unless expressly provided for. Reliance was placed in the case of **Concord Insurance Company Ltd v Alinyo & another (Suing as Legal Representatives of Wellington Alinyo - Deceased)** [2005] KECA 291 (KLR).

19. It was further submitted that the court found that the Appellant failed to adduce sufficient and credible evidence to

establish or quantify the alleged loss of use during the period the motor vehicle was said to have been unavailable. In particular, the evidence adduced, the invoices, were found to fail to amount to sufficient evidence of payment. It was their submissions that did not prove income. They only establish the amounts billed, not income. They relied on the case of **Great Lakes Transport Co. (U) Ltd V Kenya Revenue Authority** [2009] Keca 461 (KLR).

20. Their further submissions were that “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. Reliance was placed on the case of **Kyule v Thuku & another** [2025] KEMC 227 (KLR) and the case of **Ndishu & another v Muriungi** [2022] KEHC 2 (KLR).

21. It was the Respondent’s submissions that, although the Appellant alleged that the motor vehicle was attached and held for a period of seventy-two days, no credible evidence was tendered to demonstrate the actual loss allegedly suffered during that period. They sought support for the case of **David Bagine v Martin Bundi** [1997] KECA 54 (KLR).

22. They concluded that there was no suggestion that the magistrate had any personal interest in the matter, acted improperly, or considered extraneous factors. On the contrary, the judgment demonstrates that the court considered the

pleadings, evaluated the evidence tendered, and applied the law to the facts before it. Reliance was placed on the case of **Mutwol v Mutwol & 4 others [2024] KEELC 14135 (KLR)**

### **Analysis**

23. This being an Appeal from the Small Claims Court, the duty of the court is circumscribed under 38 of the Small Claims Court Act, which provides as follows:

(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

(2) An appeal from any decision or order referred to in subsection (1) shall be final.

24. An Appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matters of law it is. An appeal on matters of law is akin to a second appeal to the Court of Appeal. The duty of a second Appellate Court was set out in the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] KECA 894 (KLR)**

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

(See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).”

25. To this court, even where the matter involves the application of judicial discretion, such discretion, though unfettered, must be exercised in accordance with the law. This Court is therefore persuaded that the exercise of judicial discretion is a point of law. In **Peter Gichuki King'ara Vs Iebc & 2 Others, Nyeri Civil Appeal No. 31 Of 2013** (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the Court of Appeal held as follows: -

“It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court.

The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence - with the caveat that the appeal court did not see the witness demeanour - is an issue of law.”

26. The Appellant had the burden of prove on the allegation of breach of the contract of insurance. The Respondent’s case was that the Respondent was not liable to pay loss of user and

repair costs, which were consequential losses. On my revaluation, the Appellant's case was based on an indemnity claim for the loss suffered as a result of the proclamation and attachment of the insured motor vehicle, which was held by auctioneers for 72 days.

27. Loss of user and repair costs were not direct costs from the accident but were costs consequential upon the execution process. These were not costs from the road traffic accident but consequential costs. The direct cost included the judgement sum that was due to the Plaintiff in Migori CMCC No. E028 of 2020 and the losses incurred under the policy or relating to the loss of the insured motorvehicle through damage or sale.

28. Per clause 4 of the policy of insurance, the Respondent was not under any obligation to settle consequential loss. In **Burdis v Livsey** [2002] 3 WLR 702, the English Court of Appeal stated at page 792 paragraph 84 as doth:

“When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre - accident condition.”

29. The immediate and direct loss that the insured could suffer as a result of breach of the terms of the policy by failure to indemnify the insured was the value of the load body of the

lorry and not the loss of user. The loss of the user in the case was alleged to have occurred subsequent to the alleged breach of the policy. It was as such peculiar to the circumstances of the insured. It was a consequential loss that was irrecoverable under the policy. The Court of Appeal, Omolo, Tunoi & Githinji, Jj.A. in **Concord Insurance Company Ltd v Alinyo & another (Suing as Legal Representatives of Wellington Alinyo - Deceased)** [2005] KECA 291 (KLR), posited as follows:

On the question of the measure of damages, it is contended that the learned Judge erred in law in awarding consequential loss and in not finding that the insured had not mitigated the loss. This was not a claim for damages in tort. The damages awardable for breach of the terms of the policy were not at large. They were circumscribed by the terms of the policy. The liability of Concord for consequential loss was specifically excepted by the terms of the policy. The decisions of this Court in Corporate Insurance Company v Loise Wanjiru Wachira Civil Appeal No. 151 of 1995 (unreported) and Madison Insurance Company Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic Civil Appeal No. 203 of 2003 (unreported) left no lingering doubt that consequential loss is not recoverable in a standard form policy of insurance unless expressly covered by the policy.

30. Appellant was not entitled to the relief sought in the lower court. Like the claim for loss of user, the claim for repair of the motorvehicle was a special damage claim that ought to have been specifically pleaded and strictly proved. The parts of the motorvehicle alleged to have been wasted away due to rust were not pleaded, and the basis for a claim of Ksh. 60,000/= for repair costs was not laid. The Appellant was bound by his pleadings, from which he could not deviate. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

31. Having found that consequential loss is not payable, it is unnecessary to proceed to the question whether the same was proved. It is correct that the Court of Appeal in the case of In **David Bagine v Martin Bundi** [1997] eKLR cited the judgment by *Lord Goddard CJ.* in **Bonham Carter v Hyde Park Hotel Limited** (1948) 64 TLR 177), where he said that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.

In *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the

32. However, this cannot be gone into, since it is clear that the respondent was not liable by dint of the claim being a consequential loss. It must be noted that part of the claim is on questions of fact for which the court has no jurisdiction.

33. The net effect of the foregoing is that the appeal herein lacks merit and is therefore dismissed.

34. On costs, the award of costs in this court are governed by Section 27 of the Civil Procedure Act. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows: -

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of

legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

35. Since costs follow the event, the Respondent is entitled to costs of the Appeal. A sum of Ksh 75,000/= will be right and just.

**Determination**

36. In the upshot, I make the following Orders:

- i. The Appeal lacks merit and is dismissed.
- ii. The Respondent shall have costs of this Appeal of Ksh 75,000/=.
- iii. The file is closed.

**DELIVERED, DATED and SIGNED at NYERI on this 12<sup>TH</sup> day of March, 2026.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of:**

Mr. Achola for the Appellant

No Appearance for the Respondent

Court Assistant – Michael / Martin