Kenya Revenue Authority v Doshi Iron Mongers Ltd & another (Civil Appeal E015 of 2021) [2024] KECA 176 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 176 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E015 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

FEBRUARY 23, 2024

BETWEEN

KENYA REVENUE AUTHORITY ..... APPELLANT

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

DOSHI IRON MONGERS LTD ..... 2ND RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 23rd July, 2019 in Mombasa High Court Civil Case No. 105 of 2006)

JUDGMENT

1. The suit from which this appeal arises was commenced by the 1st respondent against the appellant by way of a plaint dated 16th May, 2006 which was amended on 13th May, 2002. In the plaint, it was pleaded that, on or about the 3rd and 4th days of October 2001, the appellant unlawfully seized and detained the 1st respondents assorted goods, whose particulars were disclosed in the plaint, and valued at Kshs. 7,126,010.00. It Weights and Measures Department, Coast Province, unlawfully seized and detained goods belonging to the 1st respondent valued at Kshs 6,296,140.00, particulars thereof being disclosed in the said plaint. The Weights and Measures Department is represented in these proceedings by the 2nd respondent, the Attorney General.

2. It was the 1st respondent's case that in or about February, 2006, the High Court sitting at Nairobi in High Court Miscellaneous Application No. 206 of 2004 held that the appellant and the Weights and Measures Department acted unlawfully and ultra vires their statutory rights in seizing and detaining the 1st respondent's goods; that when the 1st respondent demanded the return of the goods and or their value and damages, the demand was only partially complied with; that on or about 26th May, 2006, after the filing of the suit, the Department of Weights and Measures returned the goods to the 1st respondent, by which time the said goods had expired and were completely worthless to the 1st respondent.

Hence a total loss claimed.

3. It was these actions that gave rise to the cause of action in which the 1st respondent sought to recover the value of the said goods in the total sum of Kshs 13,422,150.00 against the appellant and the 2nd respondent, damages for the detention of the goods and or conversion, interests and costs.

4. In its defence, the appellant averred that the 1st respondent's goods were deposited in the customs warehouse pending their verification and importation status; that the goods in question were not the subject of the dispute in High Court Miscellaneous Application No. 206 of 2004, that the facts in both cases were different, and hence, the judgement in that case was inapplicable to the matter before the court; that the suit was incompetent for want of compliance with the mandatory provisions of the *Kenya Revenue Authority Act* and the *Government Proceedings Act*; and that the suit was statutorily time barred and was an abuse of the court process.

5. On its part, the Attorney General, the 2nd respondent herein, denied that the 1st respondent's goods were seized or detained, as well as the value placed thereon; and that, if the said goods were seized or detained, then the seizure was as a result of complaints received by the 2nd respondent to the effect that there was an influx of counterfeit goods in the local market. The said respondent further denied that it partially complied with the demands to return the said goods or that the goods expired. Accordingly, the 2nd respondent denied the sum claimed by the 1st respondent and contended that the suit was filed in breach of section 13A of the *Government Proceedings Act*, as well as section 3(1) of the *Public Authorities Limitation Act*.

6. There was a reply to the defence by the 1st respondent whose effect was to join issue with the appellants' defence.

7. PW1, Ashok Doshi, the 1st respondent's managing director, adopted the contents of his witness statement in which he stated that, on 3rd and 4th October 2001, the appellant seized various goods belonging to the 1st respondent under three Seizure Notices referred to as "Notice of Goods Deposited in Customs Warehouse" No. 064997 dated 3rd October, 2001, No. 064998 dated 4th October, 2001 and No. 084742 dated 4th October 2001, all valued at Kshs 7,126,000.00. However, pursuant to the judgements in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 and Nairobi HCCC No. 678 of 2004 – *Doshi Ironmongers Ltd v the Department of Weights and Measures* delivered on 26th May, 2006, though the 2nd respondent released the 1st respondent's detained goods, the goods had expired and were of no value as they were unmarketable. Their value was placed at Kshs 6,296,140.00.

8. According to the 1st respondent, the court in Nairobi High Court Misc. Application No. 206 of 2004 declared that the appellant had acted unlawfully and unconstitutionally in seizing and detaining the 1st respondent's said goods; and that, notwithstanding the said decision and the subsequent demands, the appellant did not release the goods it had seized.

9. In his evidence, PW1 produced documents filed by the 1st respondent including notices evidencing seizure of the goods by the appellant and 2nd respondent, and the invoice revealing the value of the goods. Also produced was the judgment in Court of Appeal Civil Appeal No. 162 of 2006 in which the decision in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 was upheld.

10. According to PW1, HCCC No. 678 of 2004 concerned the seizure by Weights and Measures Department of the Ministry of Trade in which the said 2nd respondent was ordered to return the goods. To prove the destruction and expiry of the pens, the witness produced a letter dated 26th May, 2006

by which the Provincial Weights and Measures Officer, Coast Province, disclosed that the pens had expired and had to be destroyed.

11. While admitting that there was a demand that the goods be cleared within 2 months, PW1 insisted that the 1st respondent did avail the documents evidencing clearance. As regards the expired goods, the witness disclosed that the 1st respondent kept the same as exhibits in the case.

12. On its part, the appellant called two witnesses, Samuel Kariuki Githigi, DW 1 and Pius Mbovu, DW2. DW1 was the appellant's Chief Manager, policy division, Customs Department. Though he did not handle the matter at the time of the alleged incident, he relied on records kept by the appellant. His evidence was that the goods were seized upon information that the same were unaccustomed and counterfeit, and that the intention of the appellant's officers was to establish if the goods had been properly imported into Kenya and due taxes paid; that the 1st respondent was given a period of 60 days to have the goods cleared or the same be forfeited to the state for disposal; and that the appellant only learnt of the availability of the requisite documents from the Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 court file. Although he was unable to confirm how the goods were dealt with, he insisted that the goods, subject matter in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 were different from those in the instant suit. It was his evidence that the documents availed and exhibited by the 1st respondent, including customs declarations and payment for entries, had inconsistences and could not be relied upon by the court; and that there was a further inconsistency in the documents by the use of cartons as opposed to cases and dozens.

13. On cross-examination, the witness admitted that it is not the duty of the appellant to establish the standards of good entering the Kenyan Market; that though the raid was carried out, having not participated in the operation, he did not know how the operation was carried out; that he did not know whether or not the 1st respondent followed up the matter to have the goods released; and that he was not aware if any complaint had been made to the police regarding the authenticity of the invoice issued by Simran Ltd.

14. Pius Mbovu, a revenue collector with the appellant based at Kisii testified as DW2. Like DW1, he did not handle the case at the time, and his role in the matter was limited to the inquiry about a company called Simran Ltd. In his evidence, he checked their system for the pin number given, which revealed that the same belonged to a company called Tropical Brands Company Ltd, and not Simran Ltd; that the invoice from Simran was not genuine as the PIN and VAT Number indicated were not the same as those of Simran Limited; that he was however unaware that one could change his business name; that there is no obligation that one confirms the accuracy of a PIN certificate of a purchaser of goods; that, when they visited Simran Ltd, they were given an invoice with the correct PIN Number.

15. The 2nd respondent did not call any witness.

16. In his judgement, the learned trial Judge found that it was not in dispute that the appellant seized goods from the 1st respondent's premises on 3rd and 4th October 2001, and had the same removed to a customs warehouse; that the dispute was the legality of the seizure; that, pursuant to the provisions of sections 34 and 200 of the *Customs & Excise Act* (hereinafter "the Act") as read with rule 267 of the *Customs and Excise Regulations* (herein "the Regulations"), deposit into customs warehouse is to enable the importer pay the duty due while a seizure occurs where the goods are subject to forfeiture pursuant to Section 196; that deposit into a customs warehouse is as envisaged under section 34; that such deposit occurs from the period the goods are discharged at the port of entry, and is meant to place the goods at the disposal of the revenue authority for purposes of assessment, levy and collection of duty payable; that all goods imported into the county must pass by the customs warehouse as a clearance

and forwarding stage; and that the notice of disposal is thus a notice by the customs warehouse to acknowledge that the goods have been so deposited.

17. According to the learned Judge, seizure, on the other hand, occurs where the importer or owner of the goods is reasonably suspected to have committed an offence with regard to his goods, subject to forfeiture; that the seizure is exercised pending determination by the Commissioner as to whether an offence has been committed to merit prosecution; that, where the goods are so seized, the same are taken into a customs warehouse or such other place considered appropriate by the proper officer; that, if the contention by the appellant and the 2nd respondent was that the goods had been dealt with in a manner to raise reasonable suspicion of an offence having been committed, then the proper procedure was to invoke the provisions of sections 199 and 200 of the *Act*; and that, as this was not done, the subsequent forfeiture allegedly carried out by the appellant was unlawful.

18. It was further found that the Notices of Goods Deposited in the Customs Warehouse indicated that the goods were so deposited pending confirmation of quality by Kenya Bureau of Standards, as well as verification and confirmation of importation status; that the only other notice given was that the goods be cleared within two months, or be disposed of as deemed fit by the Commissioner; that, on the face of the documents, there was nothing to support the appellant's contention that the 1st respondent was asked to provide the documents, and that it failed to do so; that, based on the decision of Osiemo, J in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004, the employment of F89 as opposed to C53 was fatal to the action by the appellant, and that all actions flowing therefrom were null and of no effect; that the actions of the appellant were thus unlawful and wrongful; and that the alleged forfeiture, which was never proved, was itself wrong and unlawful, and thus tortious.

19. The learned Judge then entered judgment for the 1st respondent against the appellant and the 2nd respondent in the sum of Kshs. 7,126,010.00 and Kshs. 6,296,140.00 respectively. He further found that the actions of the appellant and the 2nd respondent were high-handed, oppressive and arbitrary since they deprived the 1st respondent of possession and title of its goods and awarded the 1st respondent general damages for conversion in the sum of Kshs. 300,000/= each against the appellant and the 1st respondent. In addition, he awarded the 1st respondent interest at court rates from the date of the suit as regards the special damages, while general damages were to attract interest from the date of the judgment plus costs of the suit.

20. Aggrieved by that decision, the appellant lodged the present appeal in which it is contended in the amended memorandum of appeal dated 13th April, 2022, that the trial court erred in law and in fact: in failing to appreciate that the appellant had reasonable grounds to seize the 1st respondent's goods in a Custom's Warehouse; in disregarding the crucial evidence by the appellant especially the documents used in proving the special damages of Kshs 7,126,010.00, which were ingenuine, contradictory and unreliable; in failing to appreciate that the reasons for depositing the 1st respondent's goods was pending confirmation and verification of the import status of the goods and also for the confirmation of quality by Kenya Bureau of Standards; in applying the judgement in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 to the case, and yet the goods seized in both cases were not the same; in failing to appreciate that the 1st respondent failed to produce the documents to prove lawful importation of the goods when the goods were deposited in the customs warehouse; in failing to find that the 1st respondent failed to prove lawful importation of the goods and payment of duties as envisaged under section 208 of the *Act*; and in awarding the 1st respondent Kshs 7,126,010.00 as special damages and Kshs 300,000.00 as general damages plus interest on both, yet the 1st respondent failed to prove its claims.

21. On its part, the 2nd respondent filed a Notice of Cross Appeal dated 5th October, 2021 in which it complained that the learned Judged erred in law and in fact : in awarding the 1st respondent special damages of Kshs 6,296,140.00 when no document was produced to prove that figure; by solely relying on a document that was used to prove that the released goods had expired when, on the face of it, the letter had so many discrepancies, and in not allowing the 2nd respondent's witness to submit the original letter; by awarding general damages of Kshs 300,000.00 when the 1st respondent did not prove his claim against the 2nd respondent; and in disregarding the fact that the claim against the 2nd respondent was res judicata, having already been determined in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004.

22. We heard this appeal on the Court's GoTo Meeting virtual platform on 2nd October, 2023 during which learned counsel, Ms. Beatrice Odundo appeared for the appellant. learned counsel, Mr. Willis Oluga, appeared for the 1st respondent, and learned counsel, Mrs. Waswa, appeared for the 2nd respondent. Learned counsel relied on their written submissions, which they briefly highlighted.

23. According to the appellant, the learned Judge failed to consider the evidence of the appellant's Witness, DW1 Samwel Kariuki Githigi, and of the documents produced by him showing that the 1st respondent never produced any documents to prove that the goods had been lawfully imported into the country and duty paid on them. It was further contended that the documents that the 1st respondent produced in court, especially the invoice dated 2nd August 2001 by Simran Limited with a value of Kshs. 6,239,250.00, were discredited by the appellant's defence witnesses as not being genuine in that the PIN No. P000612376 V indicated on the said invoice belongs to Tropikal Brands and not Simran Limited; that the Value Added Tax (VAT) No. 11201 indicated on the said invoice did not exist in the appellant's data system; that the VAT amount of Kshs. 951,750.00 indicated in the said invoice was never paid to the appellant; the genuine PIN for Simran Limited is PIN No. P051xxx462 Z and its VAT No. is 010xxx6K; and that Simran Limited is a distributor of packaged foodstuffs, and does not deal with the items (Bic Ball Pens) indicated in the Invoice dated 2nd August 2001.

24. According to the appellant, the sums of Kshs. 670,670.00 and Kshs. 216,000.00 were never proved as there were no receipts or documents to confirm that the said amounts went towards paying for those goods; that, contrary to section 208 of the Act as read with section 107 of the *Evidence Act*, the trial court failed to consider that the 1st respondent did not produce any documentation to the appellant at the time when the goods were detained or before the court to prove that it paid taxes for the detained goods, a burden that was on the 1st respondent; that the trial Judge erred in finding that the appellant acted ultra vires when it used form F89 as opposed C53 to detain the 1st respondent's goods, contrary to section 196(c) of the said *Act*. The appellant relied on H.C Petition No. 322 of 2011 - Crywan Enterprises Ltd Versus Kenya Revenue Authority on the powers given to the appellant to keep the goods in safe custody until duties were paid, as well as H .C Petition No. 5 of 2016, *Ebrahim Odhiambo Okore v Kenya Revenue Authority* for the position that the appellant had powers to seize the goods based on reasonable grounds. According to the appellant, had the trial court considered the above authorities and the relevant tax laws, it would have come to the conclusion that the acts of the appellant to impound the goods were not unlawful or wrongful.

25. It was contended that the 1st respondent failed to prove that the goods in question were legally imported into the country in accordance with the relevant laws, or to claim the same within the prescribed period of time of 2 months indicated on the form F89, which led to forfeiture of the goods to the government. Reliance was placed on *Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & Another* [2006] eKLR for the proposition that equity aids the vigilant and not the indolent.

26. It was further submitted that the learned Judge was wrong when he applied the decision in Nairobi High Court Miscellaneous Application Number 206 of 2004; that the goods detained by the appellant vide forms F89 No. 064997 dated 3rd October 2001, No. 064998 dated 4th October 2001 and No. 084242 dated 4th October 2001 were not part of the subject matter of the High Court Miscellaneous Application Number 206 of 2004; that the goods that were seized by the appellant in Nairobi High Court Miscellaneous Application Number 206 of 2004 on 28th August 2003 were under Forms 89 Nos, 106510 and 106511, and cannot be said to be the same; and that the dates in the Forms F 89, the years and circumstances under which the goods were seized in the two cases are different.

27. It was further submitted that the trial court did not give reasons as to how it arrived to its conclusion on quantum, which includes general damages of Kshs. 300,000 and special damages for the sum of Kshs. 7, 126,010.00; that it is trite law that the trial judge must justify or explain why a claimant is entitled to an award; and that the exercise of discretion must not be capricious or whimsical. Cited in support of this position were *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR a n d *Butt vs Khan* [1978] eKLR 349 for the proposition that discretion to award damages must be exercised judicially, and that an appellate court will disturb an award of damages if shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and therefore arrived at a figure which was either inordinately high or low.

28. It was submitted on the authority of *Satwant Singh Dhanjal & 2 others t/a Paramount Hauliers v Kenya Revenue Authority* [2017] eKLR that special damages must not only be specifically pleaded, but must also be strictly proved; that trial court failed to consider that the documents produced by the 1st respondent were invoices which did not prove that it incurred such expenses; that this was contrary to the holding in *Kenya Ltd formerly Caltex Oil (K) Ltd v Janevams Ltd* [2015] eKLR that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements, such as the word "paid" on the invoice; that the documents produced by the 1st respondent did not tally with the documents upon which the goods in question were detained; and that the trial court failed to consider that the 1st respondent did not discharge its burden of proof that it actually incurred the expense of Kshs. 7,126,010.00 to warrant the court to award the same.

29. It was further submitted on the authority of the case of *Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & Another* [2015] eKLR that interest should not be viewed as a punishment to the losing party; that, even though the trial court has jurisdiction to award interest on the court awards, such a discretion should be exercised judicially as held in *Salim & Another v Kikava* [1989] KLR 534; and *Mohamed & M Mohamed v Asmon Shomte* (1960) E.A 1062, that the trial Judge was misguided in awarding interest on both the special and general damages from the date of filing suit as the amount was not a liquidated amount; that the court had to assess damages and that, if the interest is computed, the amounts to be paid are excessive, punitive and appear to enrich the 1st respondent unfairly; that the case was in court since 2006, and that the delay in hearing the matter cannot be solely the fault of the appellant as the court proceedings clearly show the various reasons as to why the case was not heard expeditiously; and that, therefore, interest for both claims for special and general damages is erroneous, and should be set aside.

30. Regarding costs, it was submitted that although it is a matter left for the court's discretion, in the course of exercising such discretions, the court is to be guided by the provisions of sections 1A, IB & 3A and 27 of the *Civil Procedure Act*.

31. According to the appellant, the trial court overlooked its evidence in arriving at its judgment, and hence justifying this Court in interfering as was the case in *Obadiah Manasseh Musera v Mwenchelesi and Another* [2007] eKLR where it was held that an appellate court may interfere with the trial judge's

finding if it is satisfied that the trial judge misunderstood the weight and bearing of the evidence before him and arrived at an unsupportable conclusion.

32. The 2nd respondent, on its part, contended that there was no document filed in court to support or prove the 1st respondent's claim of Kshs 6,296,140.00; that, on the authority of *China Wu Yi Limited v Irele Leah Musau* [2022] eKLR, special damages should be clearly and specifically pleaded and strictly proved; that the claim against the 2nd respondent in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 in which the 1st respondent claimed Kshs 178,000,000.00 having been struck out and the claim declined for lack of evidence, the doctrine of res judicata ought to have been invoked based on *Florence Maritime Services Limited & Another v The Cabinet Secretary for Transport & Infrastructure & 3 others* [2015] eKLR; that, while there was no witness statement filed by the 2nd respondent, its witness was present in court during the hearing; that the said witness sought to clarify on the letter already produced by the 1st respondent; that the said witness ought to have been allowed to produce the original letter being the maker thereof; that the award of Kshs 300,000.00 for general damages was not merited, having not been proved "beyond reasonable doubt"; that, since the 2nd respondent was not a party to the actions by the appellant, he ought not to be compelled to pay costs.

33. It was submitted on behalf of the 1st respondent that the contention that the appellant had reasonable grounds for seizing the 1st respondent's goods, as well as the issue of confirmation of the quality of the goods by Kenya Bureau of Standards, were not raised before the High Court; that the appellant's defence was that the goods were deposited in a customs warehouse pending verification and importation status; that it was not the defence that they were put into the customs warehouse to enable the importer pay duty, but that there was suspicion that an offence had been committed; that the issue before the High Court was the legality and legal propriety of the appellant's action; and that the learned Judge was right in finding that the proper procedure was to invoke sections 199 and 200 of the *Act* and that, having not done so, the forfeiture was illegal.

34. It was contended further that the learned Judge considered the appellant's evidence as regards the process and the procedure used to seize the 1st respondent's goods and rightly rejected it;

> that the fact that the appellant did not pursue criminal action as regards the "genuiness" of the PIN for Simran Ltd is a pointer that the said allegation was merely fabricated; that the unanimous decisions of the High Court and the Court of Appeal is that Form 89 is not recognised under the *Customs and Excise Act*, and that seizure notice should be in Form C53; that the appellant has no role in quality assurance of goods, as the same is a preserve of Kenya Bureau of Standards under the Standard Act, and hence the appellant could not seize the goods on suspicion that they were of poor quality; and that, under sections 34 and 39 of the *Act* where goods are detained in a customs warehouse to await conformation of their importation status, such detention cannot be for more than 21 days (See *Kenya Revenue Authority v Doshi Iron Mongers & Another* [2016] eKLR).

35. According to the 1st respondent, even if the detention was for purposes of verifying the importation status of the goods, the fact that the appellant detained them for longer than 21 days until they expired was a breach of the law; that it is not correct that the learned Judge applied the decision in Nairobi High Court Miscellaneous Application Number 206 of 2004, but only referred to the finding that the use of Form 89 as opposed to Form C53 was fatal; that the goods seized during the raid on 23rd August, 2002 and 28th August 2002 applied to both cases; that there was no evidence to prove that the 1st respondent was called upon to produce lawful importation or payment of duties; that proof of special damages must not necessarily be by receipts (see *the Commissioner of Customs & Excise v*

Emmanuel Hatangimbabazi Mbs Civil Appeal No. E016 of 2020); that, without objection, the 1st respondent produced invoices and import declaration forms to prove purchase of the goods; that the appellant cannot fault the 1st respondent for failure to produce the very documents they had seized; and that it was not demonstrated that the award made in respect of general damages was excessive to warrant interference.

36. In addition, it was submitted that there was no appeal against the decision overruling the objection to produce the letter dated 26th May 2006; that the 1st respondent did not seek the same prayers in this claim as the claim in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 in order for res judicata, which was in any case not pleaded, to apply; that the allegation that the 2nd respondent's witness was denied a hearing is not one of the grounds of appeal; that, in any event, the decision to deny the 2nd respondent's witness a hearing was based on the fact that he had not made any statement; and that no appeal was filed against the said decision despite the indication by the 2nd respondent that it intended to do so.

37. We have considered the issues raised before us in this appeal.

In our view, the following issues fall for determination:

1. what was the basis for the seizure and detention of the 1st respondent's goods by the appellant and the 2nd respondent, and whether there was justification on the part of the appellant and the 2nd respondent for such action;
2. whether the claims by the 1st respondent for special damages was sufficiently proved;
3. whether the learned Judge applied the judgement in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 to the case and, if so, whether it was proper to do so in the circumstances;
4. whether the 1st respondent was entitled to an award of general damages in the sum of Kshs 300,000.00 each from the appellant and the 2nd respondent;
    1. whether the 1st respondent's claim was res judicata;
    2. whether the 2nd respondent was denied the opportunity to call its witness;
    3. whether the award of interest was proper; and
    4. whether the order as to costs was properly made.

38. In determining these issues, we are alive to our duty as a first appellate court. As held by this Court in *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123, we are enjoined to reconsider the evidence, evaluate it and draw our own conclusion of facts and law. We would only depart from the factual findings by the trial court if they were not based on evidence on record;where the said Court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* (1986) KLR 661; or where its discretion was exercised injudiciously as was held in *Mbogo & Another v Shah* (1968) EA 93.

39. What prompted the suit before the trial court were the appellant's and 2nd respondent's action in seizing the 1st respondent's goods. It is not in doubt that the appellant seized goods from the 1st respondent's premises on the 3rd and 4th October 2001 and had the same removed to a customs warehouse pursuant to Forms (F89) No. 106510 and 106511. That action was taken vide "Notice of Goods Deposited in Customs Warehouse". According to the learned Judge, deposit into customs warehouse under section 34 of the Act is to enable the importer pay the duty due while a seizure occurs where the goods are subject to forfeiture pursuant to Section 196. According to the learned Judge, the former occurs from

the period the goods are discharged at the port of entry, and is in order to place the goods at the disposal of the Revenue authority for purposes of assessment, levy and collection of duty payable and, therefore, the notice of disposal is a notice by the customs warehouse to acknowledge that the goods have been so deposited.

40. However, the learned Judge also found that, seizure occurs where the importer or owner of the goods is reasonably suspected to have acted or omitted to act in a manner that made the goods subject to forfeiture pending determination by the Commissioner as to whether an offence has been committed to warrant prosecution. It was his view that, if the contention by the appellant and the 2nd respondent was that the goods had been dealt with in a manner to raise reasonable suspicion of an offence having been committed, then the proper procedure was to invoke the provisions of sections 199 and 200 of the *Act* which, in this case, was not the provision under which the seizure and detention was undertaken, thus rendering the subsequent forfeiture allegedly done by the appellant unlawful.

41. This Court has had occasion to deal with form F89, the same form that was used by the appellant and the 2nd respondent herein in *Kenya Revenue Authority v Doshi Iron Mongers & another* [2016] eKLR where it noted as follows:

> "This brings us to the issues pertaining to Customs Form F89, and whether the use of the same by the appellant was ultra vires the *Customs & Excise Act*, as held by the learned Judge. The form was said to be a customs and excise form and is headed:
>
> > 'Notice of Goods deposited in Customs Warehouse' We have gone through the *Customs and Excise Act* and noted that all the forms that are supposed to be used for custom purposes are listed exhaustively in the First schedule. F89 is however not one of those. We are unable to find the provision of law on which the said form is underpinned."

42. Concerning the propriety of the use of the subject form, this Court expressed itself as hereunder:

> " The other finding on Form F89 challenged by the appellant is the learned Judge's finding that the *Customs & Excise Act* does not make provision or give power to a proper officer to seize goods pending investigations when issuing the customs Form F89.
>
> It is correct to say that where a proper officer intends to seize goods that are suspected to be uncustomed, or which are found to not have been compliant with the Customs & Excise Act, the proper officer should issue the seizure notice which should be in form C53 (r 267). This notice provides for a totally different procedure for claiming back the property. Where however, the F89 is used, the goods are not seized. They are supposed to remain in the warehouse, or wherever they are, as the proper officer awaits the owner of the goods to avail proof of compliance or actual payment of any taxes due.
>
> Under Sections 34 and 39 of *CAP 472*, where goods are detained in a customs warehouse to await investigations as to whether duty has been paid, or for any other purposes, such detention cannot be for more than twenty one days. According to the learned Judge, the fact that the said goods were detained, ostensibly for purposes of investigations, using the F89, then such detention had no sanction of the law as it exceeded the 21 days provided for under *CAP 472*, hence his finding that the use of the said form was ultra vires.
>
> This procedure to detain goods pending investigations, has been properly invoked, in cases where there was suspicion that a motor vehicle's customs duty had not been fully paid. See *Jacinta Wanjiru Kamau v District Criminal Investigation Officer Bomet & 2 Others*, See also

Tornado Carriers Limited v Kenya Revenue Authority & 2 Others, Petition No. 235 [2012], where some lorries had been held on suspicion of diverting and dumping goods that were not meant to be for home use."

43. Section 26(1) (d) of the *Act* provides that:

> all goods which have been unloaded or landed shall be conveyed to a customs area and, if the proper officer so requires, shall be deposited in a transit shed or in a customs warehouse:

44. In our view, this is the statutory underpinning for the use of form 89. The section contemplates circumstances where the goods are placed in the custom warehouse pending proof of compliance or actual payment of any taxes due. Form 89 does not therefore apply to situations where the goods have been released from the warehouse, but are subsequently seized on suspicion that an offence may have been committed. In this case, notwithstanding the fact that the goods were in possession of the 2nd respondent, the appellant and the 2nd respondent improperly resorted to the use of form 89 as a vehicle through which to effect the seizure and to detain the goods. That vehicle was clearly not the mode through which the appellant and the 2nd respondent could lawfully seize the 2nd respondent's goods. As appreciated by this Court in the afore-cited case, the proper form for that purpose ought to have been form C53 as provided in rule 267 of the *Rules*.

45. This Court in the case aforesaid concluded that:

> " From the foregoing analysis, it is clear that the learned Judge cannot be faulted for finding that the use of the F89 form was ultra vires. The same was not anchored on *Cap 472*, it was used for the wrong purposes, and further, it was signed by persons who had no authority to sign customs documents."

46. In this case, we likewise find no reason to fault the learned Judge for finding that the appellant and the 2nd respondent acted unlawfully when they purported to seize the 2nd respondent's goods under a provision of the law that did not allow them to do so. Additionally, it is clear that the period for which the appellant and the 2nd respondent kept the said goods was in excess of the 21 days allowed and, hence, their action was unjustified. The argument advanced before us in this appeal regarding non-payment of tax was not pleaded by the appellant, and cannot be raised at this stage of the proceedings.

47. The next question is whether special damages awarded to the 1st respondent were sufficiently proved. The law on special damages was restated by this Court in the case of *Ikumbu v Wanjiru* (Civil Appeal 157 of 2017) [2022] KECA 81 (KLR) where it held that:

> " Having laid the basis for the claim, we now proceed to address the prerequisites for sustaining a claim of this nature, being a special damages claim. We take it from the decision of this court in *Hahn v Singh* [1985] KLR 716 for the holding, inter alia, that special damages must not only be claimed specifically but must also be proved strictly, with a caveat that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves. In this appeal, as we have already alluded to above, the respondent tendered evidence through PW2 a registered valuer. She admitted on oath that she did not have receipts to show the costs of the improvements. There was no further pressure for her to avail them. Neither did the appellant seek the court's authority to have these renovations valued by a valuer of his own choice. The trial Judge cannot therefore be faulted for allowing the same."

48. What amounts to strict proof was explained by this Court in *Nizar Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited* Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, where it was held that:

> " the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

49. In this case, and as regards the claim against the appellant, the 2nd respondent produced invoice/cash sale No. 37 dated 2nd August 2001 from Simran Ltd in the sum of Kshs 6,239,250.00. That invoice was clearly stamped "paid", and no objection was raised regarding its production. Having been produced without any objection, the appellant cannot be heard in this appeal to take issue with the authenticity of the same document. This Court in *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority* [2009] KLR 720, when dealing with failure to object to the production of a document stated:

> " However, as to the agreement dated 30th May 1998 exhibit 8, we find it difficult to appreciate the grounds for its rejection by the learned Judge. It appeared to him to have been tailor made for the case and he was not comfortable with the rubberstamps on it. In fact he felt it was a forged document .... The document was among the plaintiff's list of documents filed on 23rd March 2005 long before the hearing of the suit commenced. It was listed as No 3. Discoveries were done and that was why it was filed. The respondent also filed its list of documents. There was no objection from the respondent that the document was tailor-made for the case or that its rubberstamps were forged. At the hearing PW8 produced it as an exhibit without any objection from the respondent and indeed the record shows that the witness was not cross-examined on the agreement. The agreement was not challenged on the ground that it was tailor-made for the case nor on the ground that the rubberstamps for both parties appeared to have been made by one person Thus as to the agreement, both PW1 and PW2 who made it gave evidence and were not cross-examined on the issue raised by the learned Judge in his judgement as a ground for rejecting it. We find no basis for the learned Judge introducing that extraneous aspect in his judgement and using the same to reject the agreement, exhibit 8. It is now settled that, it is dangerous for a Court to canvass its own matters in its judgement and to rely on evidence not canvassed before it by the parties."

50. Dealing with the evidential weight of invoices similar to the one produced in this case, the Court held that:

> " We take cognisance of the fact that an invoice is not a receipt for goods supplied unless it is specifically endorsed to the effect that the goods for which invoice was prepared were paid for. In such a case the endorsement should be visible on the invoice and then the invoice plus the endorsement on it can be treated as receipt for payment. What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsement such as the word "paid" on the invoice and that would turn the status of the invoice into a receipt."

51. In a case that bears striking similarities to the present case as regards the issue of proof of the special damages, this Court in *Commissioner of Customs & Excise v Hatangimbabazi* (Civil Appeal E016 of 2020) [2023] KECA 380 (KLR) expressed itself as follows:

> " With regard to the award for repair costs of Kshs 2,142,180.00 the learned trial Judge found, correctly in our view, that the same were specifically pleaded and that the receipts in support

of the claim were "produced by consent" and the respondent "deeply cross examined over them." The judge noted further that although the appellant questioned the authenticity or genuineness of the receipts on the basis that the entities issuing them were not in KRA's database,

> 'no document was produced to prove that fact and no attempt was made to have the possible fraud of forgery investigated by the police.'

The judge concluded that,

> "on a balance of probabilities, the [respondent] has proved that he did incur the costs of Kshs 2,142,180 in repairs of the truck and its trailer"

and awarded the same. We are unable to fault the learned judge. The appellant did not present any evidence to impugn the receipts that were produced or to demonstrate, as it claimed, that the same were not genuine. The receipts bore the title "cash sale/invoice" and had revenue stamps and need not have been marked "paid" as claimed by the appellant to be evidence of expenses incurred. The complaint that the receipts that were produced in support of the claim were photocopies rather than originals is a matter that should have been raised before the trial court. No objection was taken in that regard. As the judge noted, they were produced by consent. We do not have a basis for interfering with the award by the trial Judge for repair costs."

52. Regarding the allegation that, based on the evidence of DW1, the invoice was not genuine, we note from the record that, when asked what steps had been taken by the appellant in light of the allegations that the invoice may have been forged, and what role, if any, the 1st respondent played in the generation of the said document, DW1 replied:

> " There is no obligation for one to verify the genuiness of a PIN number disclosed. Having found that the invoice was suspect, we did not pursue any criminal case. If one pays VAT but the person receiving does not react the purchase (sic) cannot be held liable."

53. The 1st respondent however claimed the sum of Kshs 7,126,010.00, which comprised Kshs 6,239,250.00 as the value of the seized goods and VAT in the sum of Kshs 951,750.00. As we have already stated, the amount indicated in the invoice was Kshs 6,239,250.00, and that it was in respect of 585 cartons of ball pens, 430 cartons of ball pens and 109 cartons of ball pens. Whereas those items were specified in the amended plaint, the other items therein do not appear in the invoice. Accordingly, the only sum claimed and supported by the invoice was Kshs 6,239,250.00. There were three receipts numbers 237088, 345972 and 384814 totalling the sum of Kshs 443,217.00. In our view the amount that the 1st respondent proved against the appellant was therefore Kshs 6,682,467.00 and not the Kshs 7,126,010.00 as claimed.

54. As regards the claim against the 2nd respondent for Kshs 6,296,140.00, there was no document produced by the 1st respondent showing the value of the said goods. In fact, in re- examination by Mr Khana, PW1 conceded that:

> " Today in court I do not have any document proving the value of the expired goods."

55. In arriving at his decision, the learned Judge expressed himself as hereunder:

> " The value of the goods as tabulated at paragraph 5 of the amended plaint and proved by the evidence of PW 1 including the documents produced as exhibits P1 & P2. I have had regard of the said documents in particular the invoices and import declaration forms and I do find that the plaintiff has suffered the loss of the goods which loss I find to have been occasioned by the two defendants severally."

56. Whereas the sum of Kshs 6,296,140.00 was contained in the invoice dated 2nd August 2001 from Simran Ltd in support of the claim against the appellant, there was no invoice in support of the claim against the 2nd respondent, and the import declaration forms did not specifically indicate the value of the goods seized by the 2nd respondent as Kshs 6,296,140.00. Our examination of the judgement of the learned trial Judge does not reveal any reason as to why that award was made, and we find none. Accordingly, we agree with the 2nd respondent that the claim of Kshs 6,296,140.00 against the 2nd respondent was not strictly proved.

57. On whether the learned Judge applied the judgement in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 to the case, from the judgement, the learned Judge's only reference to the said decision was as follows:

> " On account of the procedure and the forms employed by the defendant I do find, as Osiemo J found in Nairobi H.C. Misc. No. 1206 of 2004, that employment of F89 as opposed to C53 was fatal to the action by the 1st Defendant and it follows that all actions flowing therefore were null and of no effect. That being my finding, the actions of the 1st defendant were thus unlawful and wrongful."

58. In our understanding, the learned Judge did not apply the judgement in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004 to the case. Rather, what the learned Judge applied was the ratio in Nairobi High Court Miscellaneous Civil Application No. 206 of 2004. Nowhere did the learned judge transpose the two cases.

59. On the award of general damages, the learned Judge expressed himself as hereunder:

> " On general damages, having found that the seizure of the goods was unlawful and wrongful, I do consider it that the actions by the defendants were high- handed, oppressive and arbitrary. Having taken the goods as they did and deprived the plaintiff of possession and title thereof I do award to the plaintiff general damages for conversion in the sum of Kshs. 300,000/= against each of the defendant."

60. In its plaint, the 1st respondent sought, inter alia, "damages for detention and conversion". This Court in *Commissioner of Customs & Excise v Hatangimbabazi* (supra) while dealing with a similar claim noted that:

> " in the present case there was, as already stated, a prayer for "general damages for wrongful seizure" of his vehicle which, undoubtedly, is a remedy available for wrongful seizure and detention. See *DT Dobie & Co Ltd v Joseph Muchina & another* [1982] KLR 1. Furthermore, it is an established principle that for this court to disturb an award of damages, the appellant is obliged to demonstrate that the same is so inordinately high or low so as to represent an entirely erroneous estimate or that the trial court proceeded on wrong principles or misapprehended the evidence in some material respect with the consequence that the trial

court arrived at an inordinately high or low amount. See *Butt v Khan* [1978] eKLR. The appellant has not done so."

61. Contrary to the submissions by the appellant and the 2nd respondent, the learned Judge justified the award of general damages on the conduct of the appellant and the 2nd respondent which, in his view, was "high-handed, oppressive and arbitrary". We have no reason to fault the learned Judge in so finding because it is clear that the appellant failed to release the seized goods even after being directed by the court to do so, while the 2nd respondent released the same when, as acknowledged by the 2nd respondent, they were of no use to the 1st respondent. Therefore, no basis has been laid us to interfere with that award.

62. On whether the 1st respondent's claim was res judicata, we agree that the defence of res judicata was not expressly pleaded. Order 2 rule 4(1) of the *Civil Procedure Rules* provides that:

> A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> a. which he alleges makes any claim or defence of the opposite party not maintainable;
>
> b. which, if not specifically pleaded, might take the opposite party by surprise; or
>
> c. which raises issues of fact not arising out of the preceding pleading.

63. Pleadings do operate to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. See *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR.

64. In Independent *Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, this Court cited an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings*" and stated that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

65. The law, as we understand it, is that to condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. See *Esso Petroleum Co. Ltd v Southport Corporation* [1956] AC 218 at 238; and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

66. Res judicata is a doctrine that is predicated upon certain factual matters. This was appreciated by this Court in the *Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others* [2017] eKLR where it stated that:

> " ...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. The former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and de termined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
>
> The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR they rendered the elements as;
>
> a. the former judgment or order must be final;
>
> b. the judgment or order must be on merits;
>
> c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. there must be between the first and the second action identity of parties, of subject matter and cause of action."

67. It would therefore be unfair not to plead the same by a party who intends to rely thereon as the opposite party would thereby be taken by surprise. The mere fact that the parties were the same, and the reliefs sought may have been similar, does not necessarily give rise to the defence of res judicata if the cause of action in the subsequent suit arose after the determination of the earlier suit. In this case, the case against the 2nd respondent was that, following the decision ordering the 2nd respondent to release the detained goods, the 2nd respondent released them but, by then, the goods had expired. Obviously, the 1st respondent, when it instituted the earlier suit, could not have known that the goods had expired. The fact of the expiry of the goods came to the 1st respondent's knowledge after the earlier decision had been rendered.

68. In the case of *Siri Ram Kaura v M J E Morgan* [1961] EA 462, the predecessor of this Court expressed itself as follows:

> " The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue,

was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata .... The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application." [Emphasis ours].

69. Was the 2nd respondent denied the opportunity to call its witness? Though the 1st respondent contended that this issue was not in the Notice of Cross Appeal, the 2nd respondent alluded to the fact that the learned Judge erred in not allowing the 2nd respondent's witness to submit the original letter. While not an epitome of impeccable, elegant or paragon drafting, we will give the 2nd respondent the latitude of treating that statement as a ground alleging denial of the right to call the witness.

70. In order to determine this issue, it is important to set out the brief background of the circumstances that led to the impugned decision. From the record, on 8th February 2018, an application by the 2nd respondent was granted to enable them file their witness statements and documents and, by consent, the 2nd respondent was given 30 days to do so. By 19th April 2018, the 2nd respondent had not complied with the said directions even though the 2nd respondent's counsel informed the court that she was ready to proceed with the 1st respondent's case, and the matter proceeded to hearing. On 10th July 2018, upon close of the appellant's case, the 2nd respondent requested the court to allow its witness who had not filed a witness statement to testify as an expert, which request was declined by the court vide a ruling delivered on the same day. The 2nd respondent sought stay of the ruling and applied for certified copies of the proceedings for the purposes of an intended appeal. No such appeal was filed. In our view, and in light of that conduct, the 2nd respondent cannot be heard to now complain that it was denied an opportunity to present its witness. As was held by this Court in *Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998:

> " Whereas the right to be heard is a basic natural- justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

71. That brings us to the award of interest. The decision whether or not to award interest is at the discretion of the court. Discretion, as has been held, simply means the faculty of deciding or determining in accordance with the circumstances of the particular case, and what seems just, fair, right, equitable and reasonable in those circumstances. See *Kiriisa v Attorney-General and Another* [1990-1994] EA 258.

72. A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In matters of discretion, it has been held that authorities are not of much value since no two cases are exactly alike and, even if they were, the Court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect putting an end to the discretion. See *Evans v Bartlam* [1937] AC 473; *Jenking v Bushby* [1891] 1 CH 484. Thus, in matters of discretion, no one case can be an authority for another. See *Nanyuki Equator Sacco Co-Operative Society Limited v Nyeri Sacco Society & Another* Civil Application No. Nai. 86 of 2005.

73. Being an exercise of discretion, in deciding the appeal, we are guided by the Supreme Court's decision in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* (2019) eKLR in which it was held that:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:
>
> > 'In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:
> >
> > (l) error of law or principle;
> >
> > (2) taking account of irrelevant considerations;
> >
> > (3) failing to take account of a relevant consideration; or
> >
> > (4) the decision is plainly wrong.'"

74. In the same vein, it was held by this Court in *Price & Another v Hilder* [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. It is settled law that the discretion must be exercised judiciously, and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously.

75. On the issue as to the award of interest on special and general damages, it was held by Sir William Duffus, the then President of the predecessor of this Court, the East African Court of Appeal, in *Dipak Emporium v Bond's Clothing* [1973] EA 553, whose leading judgement the other two judges of the Court (Spry, VP and Mustafa, JA) concurred with:

> " The court's right to award interest is based on section 26(1) of the *Civil Procedure Act* (Cap 5) which states that 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 prior to 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 payment or to such earlier date as the court thinks fit. Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgement."

76. In this case, the learned Judge awarded the 1st respondent interest at court rates from the date of the suit as regards the special damages, while general damages were to attract interest from the date of the judgment. We have no reason to interfere with that decision. In our view, the fact that a matter is in court for unduly long period is not a proper reason for denying the successful party, who is otherwise entitled to interest.

77. As the 1st respondent was the successful party, and as the general principle holds that costs follow the event, we likewise see no reason to interfere with the award of costs.

78. Having considered the appeal and the cross-appeal before us, we hereby partly allow the appellant's appeal by setting aside the award against it of Kshs 7,126,010.00. We hereby substitute therefor an award of Kshs 6,682,467.00. Likewise, we hereby partly allow the 2nd respondent's Notice of Cross Appeal and set aside the award against it of Kshs 6,296,140.00. Save for the foregoing, we see no reason to interfere with the other awards in the impugned judgment. In view of the fact that both the appellant and the 2nd respondent are only partly successful in the proceedings before this Court, we make no order as to the costs in the appeal.

79. Orders accordingly

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2024.

A.K. MURGOR

.....

JUDGE OF APPEAL

DR. K.I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR