UAP Insurance Company Limited v Maina & another (Civil Appeal E078 of 2021) [2024] KECA 392 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 392 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E078 OF 2021

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

APRIL 12, 2024

BETWEEN

UAP INSURANCE COMPANY LIMITED ..... APPELLANT

AND

SAMUEL GACHINI MAINA ..... 1ST RESPONDENT

GEORGE WANGONDU WANYAGA T/A SAWA SAWA PAINTS AND ALLIED PRODUCTS ..... 2ND RESPONDENT

(An Appeal from the Judgment and decree of the High Court of Kenya at Nakuru (T. Matheka J.) delivered on 23rd April 2020 in Nakuru High Court Civil Appeal No. 155 of 2017 arising from the original judgment in Nakuru Chief Magistrate's Civil Case No. 589 of 2013)

JUDGMENT

1. This appeal arises from a judgment delivered by the High Court of Kenya at Nakuru (T. Matheka J.) on 23rd April 2020 in Nakuru H. C. Civil Appeal No. 155 of 2017, in which the High Court allowed an appeal filed by the Respondents herein, Samuel Gachini Maina and George Wangondu Wanyaga T/A Sawa Sawa Paints and Allied Products, and set aside the judgment of the trial Court which had been rendered in favour of UAP Insurance Company Limited, the Appellant herein. The Respondents were the plaintiffs in the trial Court, and instituted a suit in the Chief Magistrate's Court in Nakuru in Chief Magistrate Court Civil Suit No. 589 of 2013 by a plaint dated 3rd July 2013 wherein they pleaded that sometime in 2011, they bought a motor vehicle Registration No. KBN 293W, Toyota Hiace at a cost of Kshs 2,250,000/= and insured the same with the Appellant under a comprehensive policy the terms of which were that the Appellant would indemnify the Respondents against accidental loss of, or damage to the motor vehicle and its accessories and spare parts in case of an accident.

2. That on 9th November 2011 the insured motor vehicle was involved in an accident along the Ahero - Kisumu Road and severely damaged, and that the Appellant instead of compensating the Respondents

with a new motor vehicle or payment of the full sum insured opted to repair the damaged motor vehicle through its agent. The Respondents pleaded that the Appellant did a shoddy job and used substandard parts in an attempt to restore the said vehicle to its original position which made the vehicle worse and immobile, and the Respondents informed the Appellant of the same upon inspecting the repair works. The Respondents asserted that as a result of the said accident, they suffered great loss of user due to the Appellant's negligence in the repairs. The Respondents' claim against the Appellant was for replacement or a new motor vehicle and/ or alternative payment of the full sum insured amounting to Kshs 2,250,000/-, loss of user of the said motor vehicle from 9th November 2011 till payment in full assessed at Kshs 41,640/- per month.

3. The Appellant in their defence dated 6th June 2014, pleaded that it had the option to replace the damaged vehicle, repair the same and/ or declare the damaged vehicle a write off and pay the insured sum less salvage value, and that the damage from the accident on 9th November 2011 was assessed at Kshs 721,810/- which was less than 50% of the pre-accident value of the vehicle, and it therefore opted to repair the same instead of declaring it a write off. The Appellant confirmed that the Respondents raised issues with the repairs carried out by M/s Golden Motors Garage one of the garages on its panel, and it referred the dispute for arbitration on the state of the said motor vehicle to Motor Assessors Association of Kenya, who rendered a report dated 4th June 2012 which was acted upon and the vehicle was repaired as per the specifications. However, that in spite of all the efforts and repair, the Respondents insisted that they did not want the vehicle but needed to be paid its value and declined to collect the vehicle from the garage.

4. As a result, in July 2012, CFC Stanbic Bank, who were joint owners of the insured vehicle, having financed the same, and its interest having been noted in the insurance policy, claimed the vehicle for non-payment of the loan. The motor vehicle KBN 293W was delivered to M/s Sheflo Auctioneers Ltd, the agents of CFC Stanbic Bank and the Respondents were notified of the vehicle's repossession. Therefore, that the claims by the Respondents were misplaced, an attempt to unjustly gain from an accident, and the Appellant denied that it was obligated to pay for loss of user of Kshs 41,640/- per month which was in any case expressly excluded in the policy document and insurance trade practice.

5. After hearing the parties, the trial Court (L. Gicheha SPM), held that the Respondents had not proved their claim on a balance of probabilities and dismissed their case with costs on 19th October 2017. The Respondents, being aggrieved by the decision of the trial Magistrate, lodged the appeal in the High Court, which allowed the appeal and ordered the Appellant to pay the Respondents the insured value of the motor vehicle of Kshs 2,250,000/- with interest computed from 3rd July 2012, the sum of Kshs 25,000/- per month for the loss of user for 12 months (Kshs 300,000/-) computed from 17th January 2011 and the costs of the suit in the High Court and in the trial Court. The High Court in arriving at its judgment found that the Respondents had established their case on a balance of probabilities that the Appellant was in violation of the contract of insurance and having not released the motor vehicle, the Respondents suffered a complete loss.

6. The reasons given for this finding were that that the Appellant produced no proof that the motor vehicle had been released to the bank or the bank had actually taken possession of the motor vehicle; that even if the motor vehicle was released to the bank, the insurance policy was between the Respondents and the Appellant with a clause specifically acknowledging the bank's interest, and there was nothing therein saying that the Appellant was obligated to release the motor vehicle to the bank; that the fact that the motor vehicle was to be used for commercial purpose was not in dispute and the Respondents established that they were using the said motor vehicle for business, and therefore in the months the Appellant held the motor vehicle in the garage, they lost income and had no obligation to collect the motor vehicle whose repairs were not to their satisfaction.

7. The Appellant being aggrieved by the decision of the High Court, lodged an appeal in this Court, which we heard on the Court's virtual platform on 18th October 2023. During the hearing, learned counsel Mr. Lawrence Karanja, appeared for the Appellant, while learned counsel Mr. Oumo, appeared for the Respondent. Both counsel briefly highlighted their respective written submissions dated 11th August 2023 and 27th September 2023. This being a second appeal, we are mindful of our duty as set out in the decision of this Court in Stanley N Muriithi & Another vs Bernard Munene Ithiga [2016] eKLR (Waki, Karanja & Kiage JJ. A) as follows:

> " We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

8. The Appellant has raised eighteen (18) grounds of appeal in its Memorandum of Appeal dated 27th September 2021 challenging the findings of the High Court on three main issues of law, namely whether the CFC Stanbic Bank had a legal interest in the insured motor vehicle; if there was legal basis for the payment of the insured sum of Kshs 2,250,000/=; and whether the findings of the High Court on loss of user were on unpleaded issues.

9. On the first issue, the Appellant's counsel submitted that the Certificate of Registration of the subject motor vehicle produced in evidence captured both the Respondents and CFC Stanbic Bank as owners of the motor vehicle, and therefore both had an insurable interest on the property and the party who insured the motor vehicle stood at a fiduciary position to the other, and there had to be mechanisms to protect the financier's interest. Reference was made to the decision in the case of AIG Insurance Company Limited vs Benard Kiprotich Kirui [2022] eKLR on the determinants of an insurable interest. Reliance was also placed on the case of Joseph Chege Gitau vs CFC Stanbic Bank Limited [2008] eKLR for the proposition that the financier being a joint owner of the motor vehicle had every right to repossess the motor vehicle especially on the ground of default, since the Respondent admitted that they were in default for months.

10. The Appellant faulted the learned Judge of the High Court for failing to take these factors into consideration, despite the evidence adduced to the effect that there was a repossession order in the letter dated 7th November 2012, and that the release of the motor vehicle to the financier was not disproved by any of the Respondents. Further, that the release was done after the financier paid an additional Kshs 120,000/- for the additional repairs as per the policy, which the Respondents failed to furnish the Appellant with, thus acknowledging the financier's proprietary interest.

11. Therefore, that the Appellant acted lawfully in releasing the motor vehicle as confirmed in the letter dated 12th November 2012 authorizing the release to the financier's agent, M/s Sheflo Auctioneers Ltd. They contend that the Learned Judge erred in holding that the letter confirming the release was a sham while it was adduced in Court without any objection, and the pleadings clearly indicated that the issue of repossession by the financiers was not in dispute. Additionally, the Appellant established on a balance of probability that the said repossession was done lawfully, in the alternative, the Respondents did not adduce any evidence in rebuttal. Thus, once the Appellant produced evidence of repossession the burden of proof shifted to the Respondents which they failed to discharge by way of evidence and on a balance of probability.

12. The Respondents' counsel's position on the issue was that the Respondents' financier was merely an interested party, whose insurable interest was limited to the outstanding loan amount at any particular time and not the sum assured, and the fact that the third party was mentioned in the insurance policy

document did not grant the financier privity of the contract. Reliance was placed on the case of Aineah Likuyani Njirah vs Aga Khan Health Service [2013] eKLR, where the Court of Appeal defined privity of contract to mean that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms, and that even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burden from that contract enforced against him. Therefore, that the first appellate court was right in its decision that the Appellant insurer capriciously gave the Respondents' vehicle to a third party who was not privy to the insurance contract and who was merely mentioned in the insurance contract.

13. The counsel further submitted that the Certificate of Registration of the subject motor vehicle that captured the Respondent and the financier as owners of the suit motor vehicles did not grant the financier insurable interest, since the policy document expressly provided who the insured was, namely the Respondents, and the insurer as the Appellant, and did not expressly provide for the financier. Further, that clause M15 of the policy document which was as a hire purchase endorsement, only empowered the bank and the Appellant to transact only to the extent provided therein and nothing more, and the Appellant could not go beyond the terms of the said insurance contract and purport to release the suit motor vehicle to a third party. Reliance was placed on the case of National Bank of Kenya Ltd vs Pipe Plastic Sankolit (K) Ltd & Another [2001] eKLR where this Court held that a Court of law cannot re-write a contract between the parties and the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

14. We note that two facts arising in this issue are not in dispute namely that the Certificate of Registration of the subject insured motor vehicle indicated that the CFC Stanbic Bank Limited and Sawa Sawa Paints and Allied Products were the owners thereof, and that the insurance policy document at clause M15 contained a Hire Purchase Endorsement, which read as follows:

> " It is hereby declared and agreed that (hereinafter referred to as the Owners) are the owners of the Motor Vehicle described in the Schedule to this Policy and that the said Motor Vehicle is subject for a Hire Purchase Agreement made between the owners of the one part and the insured of the other part. It is further declared and agreed that they said owners are interested in any monies which but for this endorsement would be payable to the insured under this policy in respect of the loss or damage to the said Motor Vehicle (which loss or damage is not made good by repair reinstatement or replacement) and such monies shall be paid to the said owners as long as they are the owners of the vehicle and their receipt shall be a full and final discharge to the Company in respect of such loss or damage.
>
> Save as by this endorsement expressly agreed nothing herein shall modify or affect the rights or liabilities of the insured or the company respectively under or in connection with this Policy or any term provision or condition thereof."

15. Since most contracts of insurance are contracts of indemnity, whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of an event which is uncertain and upon which the insurer's liability arises, it follows the assured is required to have an interest in the subject matter of the insurance, for otherwise he will incur no loss through the happening of the insured event. This insurable interest is discernable from the assured's relationship with the subject matter of the insurance, and is explained in Chitty on Contracts, Volume Two -Specific Contracts 32nd Edition at paragraph 42-006 thus:

> "...That relationship may have a particular nature or certain manifestations which render the assured's interest insurable. For example, the assured may be prejudiced by the loss of or damage to the subject matter of the insurance (or may benefit from its preservation), because

he has a legal or equitable right pertaining to the subject matter, or because he will thereby become subject to a liability by reason thereof or because he will thereby be deprived of an opportunity to earn income or a profit in respect of the subject matter. Quite apart from such considerations, it may be that the assured's insurable interest arises out of commercial convenience. There are no fixed criteria which will determine the existence of an insurable interest. Each interest and each case must be analyzed on its own..."

16. In the present appeal, CFC Stanbic Bank Limited was legally recognised and registered as an owner of the insured motor vehicle by virtue of having financed its purchase, and therefore had an insurable interest in the said motor vehicle. Furthermore, the insurance policy entered into between the Respondents and Appellant specifically recognised CFC Stanbic Bank Limited's interest in the sum assured in the event that the loss incurred was not made good by the repair or reinstatement of the subject motor vehicle. The Respondents in this respect dispute the circumstances leading to the release by the Appellant of the insured motor vehicle to CFC Stanbic Bank, which they say was contrary to the insurance policy. It is notable in this regard that the learned Judge of the High Court found that in the letter dated 12th September 2021, the Appellant was "only pretending" to ask the Respondents to collect the motor vehicle because "by this time they had already released a motor vehicle to the bank, which was not a party to the insurance contract". Therefore, that the letter asking the Respondents to pay excess and then collect the motor vehicle from the repairs was clearly a sham and made in bad faith. In addition, that the Appellant and CFC Stanbic Bank Limited provided no proof of the repossession of the motor vehicle.

17. The basis of the findings by the learned Judge were various letters, namely a letter dated 3rd July 2012 by CFC Stanbic Bank Limited to the Appellant enclosing a cheque of Kshs 120,999.00 being payment of the excess amount and seeking release of the motor vehicle to its agent, a letter dated 12th September 2012 notifying that the vehicle had been repaired and was ready for release, and asking the Respondents to pay Kshs 112, 500/= as excess, a letter dated 7th November 2012 from CFC Stanbic Bank Limited to the Appellant which the learned Judge termed as "suspect", which was seeking the release of the motor vehicle on a repossession order following default of payment by the Respondents, and the response thereto by the Appellant dated 12th November 2012 authorizing the release of the motor vehicle to the Bank's agents. It is notable that the evidence of the Appellant's witness in the trial Court was that the excess payable as provided in the insurance policy was 5% of the insured sum, and the witness acknowledged that the excess sum was demanded from both the Appellant and Respondents as joint owners. However, that the Respondents did not pay the said sum, and that CFC Stanbic Bank Limited did.

18. We do not find any basis either from the evidence adduced or the law, for the findings by the learned Judge of the High Court, since the letters clearly indicated that the subject motor vehicle was repaired and ready for recollection by the Respondents as at 12th September 2012, CFC Stanbic Bank Limited had earlier on paid the excess and requested for the release of the vehicle in July 2012, and later repossessed the motor vehicle arising from default of payments under the hire-purchase agreement with the Respondents, and requested that the motor vehicle be released to it on 7th November 2022. It is notable that the Respondents did not indicate that they paid the excess nor collected the motor vehicle when requested to do so by the Appellant. It is also notable that under hire-purchase law, the owner of goods can terminate the hiring when there is default, and has a right to immediate possession of the goods which entitles him to take possession of the goods either from the hirer or any person detaining the goods. In the circumstances, the Respondents can only claim remedies or damages that may be due to them under the hire-purchase agreement.

19. On the second issue of the legal basis for the award of the insured sum to the Respondents, the Appellant's counsel submitted that the same would amount to unjust enrichment and upset the principles of insurance. They gave the principles of unjust enrichment to presuppose three things namely: that the defendant had been enriched by the receipt of a benefit; that he had been so enriched at the expenses of the plaintiff and that it would be unjust to allow him to retain the benefit. Further, the motor vehicle, the subject matter of the suit, was repossessed by the financiers through their agents upon request, and taking this into consideration, the amount awarded was excessive and would be indemnifying the joint owners of the motor vehicle twice. Reference was made to the decision by this Court in Madison Insurance Company Ltd vs Solomon Kinara T/A Kisii Physiotheraphy Clinic [2004] eKLR that the insurer contracts to indemnify the assured for what he may actually lose. It was submitted by counsel that the award was arrived at without taking into consideration the facts that the Respondents had not completed the payment for the said motor vehicle and had some arrears owed to the financier who was a joint owner and had repossessed it, and that the Appellant had discharged its duty under the insurance policy and the monies spent in repairing the motor vehicle to its pre-accident state.

20. It was asserted by counsel that it would therefore be unjust enrichment to pay the Respondents with the full insured amount as indemnity. The counsel cited clause M-15 of the policy to submit that the award of the full assured amount to the Respondent would also amount to breach of the policy, because being in default, the financiers were the ones entitled to be indemnified first, and the Respondents could then claim any excesses from the financiers. Further, that the learned Judge failed to consider that insurance contract are indemnity contracts and parties are not awarded an amount more than the insured amount. The counsel also faulted the learned Judge for failing to consider that there existed an additional hire purchase agreement contract between the financier and the Respondents, that the Appellant owed a duty to both the financier and the Respondent, and that the Respondents being in breach of the hire purchase agreement lost their right over the subject motor vehicle and entitled the financier to repossess the vehicle.

21. The Respondent's counsel, while citing the decision in the case of Doa Doa Tented Camp and Lodges Limited vs Jubilee Insurance Company of Kenya [2021] eKLR submitted that the Respondents were right to ask for compensation for the entire sum, since they had not recovered the subject motor vehicle to date from the Appellant for some extraneous and/ or irregular reason, and had a right to indemnity. It was counsel's assertion that there could be no unjust enrichment or profit where the Respondents had not received the motor vehicle, and that it was the Appellant who had come to this Court with unclean hands as it was seeking redress for the excess from both the Respondents and the financier in an attempt to unjustly enrich itself.

22. It is not in dispute that the object of the subject contract of insurance was indemnification. In such a contract, the insurer's obligation does not arise unless and until the assured has sustained a loss, and the contract remains one of indemnity even if it quantifies in advance the value of the potential loss. The loss which can be indemnified under an insurance contract may be physical damage to property, financial loss or a legal liability. Indemnity is defined as follows in Black's Law Dictionary, Ninth Edition at page 837:

> " 1. A duty to make good any loss, damage or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or composition for loss, damage, or liability in tort."

23. On the other hand, contracts such as life insurance which provide for the payment of a specified sum upon the happening of an event or accident are not contracts of indemnity, and are often described as contingency insurance. The insurer's liability in such a contract is to provide the specified benefits to the assured, and is generally not dependent on the assured suffering a loss which is the equivalent in value of the specified benefit. Where a contract is one of indemnity insurance (as opposed to a contingency insurance), there are at least three practical consequences as set out in Chitty on Contracts (supra) at paragraph 42-003: firstly, the assured is entitled only to compensation for his loss, and is not entitled to receive or retain any benefits which result in the assured being overcompensated. Secondly, the assured's course of action against the insurer arises upon the assured suffering the loss in question. Accordingly, once the loss has been sustained, subject to the terms of the contract, time then starts running. Thirdly, if the insurer refuses or fails to pay an indemnity as required by the contract, the insurer will not be liable to the assured for any damages above and beyond the amount of the indemnity under the contract.

24. The main legal question that we need to answer is whether the Respondents were compensated for the loss arising from the damage to the subject motor vehicle under the terms of the insurance contract. The Respondents claim that they were not compensated because the subject motor vehicle was not returned to them, hence they were entitled to the award of the insured sum. The contract of insurance in this regard had two options available to the Appellant in the event of accidental damage to the subject motor vehicle, that of the payment to the Respondents of the of the insured sum, or the repair, reinstatement or replacement of the motor vehicle. It is not disputed that the Appellant opted to repair the motor vehicle.

25. After the repair, and irrespective of whether it was satisfactory or not, one of the joint owners of the repaired motor vehicle repossessed the said motor vehicle, arising from the Respondents' liabilities. The option of payment of the insured sum was therefore no longer available to the Respondents. Any remedies that the Respondents may have in this regard will have to be pursued as against the co-owner, namely CFC Stanbic Bank Limited, which by repossessing the motor vehicle, effectively resulted in the exercise of the option of reinstatement on the part of the Appellant. In any event, it is notable that in the circumstances of this appeal, the cost of repairs forms the basis of the indemnity, and the Respondents could only claim the value of the damage that they demonstrated still persisted to the subject motor vehicle after the repair. The learned Judge of the High Court therefore erred in finding that the Appellant "was in violation of their contract of insurance and to date has never released the motor vehicle to the appellants (the respondents herein) the same becoming a complete loss for the appellants (the respondents herein)".

26. On the last issue, the Appellant's counsel submitted that it was trite law that parties are bound by their own pleadings, and that although the High Court had discretion in certain matters, being an impartial umpire it could not descend to the arena of conflict and introduce its own grounds where such grounds not pleaded, as held in Patrick Muiru Kamungua vs Kaylift Service Ltd & Another [2021] eKLR which cited Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR, and the case of Raila Amolo Odinga & Another vs IEBC & 2 Others [2017] eKLR cited in Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd [2018] eKLR. It was the counsel's submission that the learned Judge erred in awarding loss of user as the same had not been specifically pleaded nor strictly proved, and the same amounted to trial by ambush as the Appellant was confronted with issues it had not prepared for. Our attention was drawn to the case of Ndishu & Another vs Muriungi (Civil Appeal No. 3 of 2020) [2022] KEHC 2 (KLR) which cited the Court of Appeal decision in Hahn vs Singh, (1985) KLR 716 where it was held that special damages must not only be specifically claimed (pleaded) but also strictly proved. The counsel asserted that the Court erred

in awarding Kshs 25,000/- per month for loss of user as the same was arrived at without any legal justification since the insurance policy failed to provide for compensation for loss of user.

27. Counsel for the Respondents on his part drew this Court's attention to the Plaint they had filed and submitted that on the face of it, they had pleaded for loss of user. Further, that the High Court arrived at loss of user amounting to Kshs 25,000/- per month based on the receipts issued by the Respondent during the trial. Reliance was placed on the various decisions including that of this Court in the cases of Samuel Kariuki Nyangoti vs Johan Distelberger [2017] eKLR and Kanju & Another vs Tipper Hauliers Limited (Civil Appeal No. 43 of 2019) [2022] KEHC to submit that there has been a jurisprudential shift on the topic of whether the damage of loss of user is special damages or general damages after taking cognizance of the "African culture" of not keeping receipts and books of accounts, and that the fact that damages are difficult to estimate and cannot be assessed with certainty or precision, does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages. Additionally, the same victim could not lose a remedy in damages because of not keeping a book of accounts and the High Court was perfectly correct in awarding the damage of loss of user from the estimate provided.

28. In the plaint dated 3rd July 2013 filed in the trial Court, the Respondents claimed that the the subject motor vehicle was used for commercial purposes and that they had lost business, user, and were unable to service their loans during the conduct of the Appellant. They therefore sought as one of the remedies, loss of user of the said motor vehicle from 9th November 2011 to payment in full assessed at Kshs 41,640/= per month. It is necessary to clarify that the differences between general and special damages arise in three respects. The first is in relation to liability, and as explained in Hadley vs Baxendale (1854) 9 Ex 341, general damages are those that arise naturally, meaning in the normal course of things, whereas special damages are those that arise in extraordinary or exceptional circumstances that were not in the contemplation of the parties.

29. The second meaning and difference between general damages and special damages concerns proof, with general damages being those where as a result of injury caused, the law presumes some damage for which there is no measure of assessment and which is difficult to estimate, and quantification depends on the opinion of a reasonable man in the circumstances. Special damages on the other hand are those that arise as consequence of a breach of a contract or duty, and which require proof. Applying these meanings to the present appeal, the expected damages payable under the contract of insurance was the insured sum, and loss of user was clearly not an expected damage and was not provided for in the contract, and was therefore a special damage that arose consequent to the happening of the insured event.

30. The last distinction is in pleading general and special damage, with general damage being averred to in the pleadings and quantification left to the court, while special damage must not only be specifically averred but also strictly proved. This distinction is explained in McGregor on Damages-Nineteenth Edition at paragraph 49-002 as follows:

> " General damages consist in all items of loss which the claimant is not required to specify in his pleadings in order to permit proof and recovery in respect of them at the trial. Special damage consists in all items of loss which must be specified by him before they may be proved and recovery granted."

31. The sufficiency of particularity that is required to be pleaded for special damage to be proved depends on the type of loss and circumstances, but the existence of such a claim must be clear from the pleadings. It was held in Jackson K Kiptoo vs The Hon Attorney General [2009] KLR 657 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. In the present appeal we find that the loss of user was pleaded with sufficient particularity since the amount claimed and applicable period was specified, and the main issue is whether it was proved. The High Court in this respect found as follows:

> "47.... Hence even in this case, without those receipts, it is my finding in agreement with the trial Court that the appellants established they were using the said motor vehicle for business and in the months the respondent held the motor vehicle in the garage, they lost income. I differ with the trial court on the refusal to asses and award an amount for that loss."

32. Where the quantification of loss, such as loss of user, involves a hypothetical exercise, the Court does not apply the same balance of probabilities approach as it would to the proof of past facts, but instead estimates the loss by making the best attempt it can, as held in Parabola Investment Limited & Another vs Browallia Cal Limited (2011) QB 477 at 486 by Toulson LJ:

> " Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

33. However, a claimant is in the circumstances not given a free ride, and the law still expects and requires the claimant to deploy the best evidence reasonably available to him, to enable the Court to make reasonable assumptions about what would have happened. Therefore, the requirement for strict proof of the special damages stated by this Court in National Security Fund Board of Trustees vs Sifa International Limited [2016] eKLR will still obtain, and the flexibility allowed to a claimant is in the manner and methods of proof that are employed, which may not necessarily be the traditional receipts and payment vouchers. The learned Judge of the High Court in this respect proceeded as follows:

> " 50. The circumstances of this case speak for themselves. In this case, there is a basis for the claim for loss of user, and without the benefit of specific evidence, l would assess it at Kshs. 25,000/= per month. It took the respondent the best part of a year to get the m/vehicle supposedly ready for collection. After that year the appellants ought to have mitigated their damages. This sum will be paid for a period of l2months."

34. There was therefore no proof of any kind considered by the High Court in arriving at the award of loss of user of Kshs 25,000/= per month, and there was therefore no basis for the award. We therefore find that the learned Judge therefore erred in not taking into account the applicable principles of law in making the said award.

35. We accordingly find that this appeal is merited, and hereby set aside the judgment of the High Court of Kenya at Nakuru (T. Matheka J.) delivered on 23rd April 2020 in Nakuru High Court Civil Appeal No. 155 of 2017 in its entirety, and uphold the original judgment of the Chief Magistrate's Court in Nakuru (Hon. L. Gicheha SPM) in Nakuru Chief Magistrate's Civil Case No. 589 of 2013. Given the circumstances giving rise to the appeal, each party shall bear their own costs of the appeal.

36. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF APRIL, 2024.

P. NYAMWEYA

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR