Kenya Power and Lighting Co Ltd v Mbaya (Suing as the legal representative of the Estate of Mzee Mbaya Nzulwa) (Civil Appeal E087 of 2021) [2024] KECA 826 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 826 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E087 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JULY 12, 2024

BETWEEN

KENYA POWER AND LIGHTING CO LTD .... APPELLANT

AND

KASSIM MZEE MBAYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MZEE MBAYA NZULWA) .... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 17th November 2000 in HCCC No. 39 of 2014)

JUDGMENT

1. This is an appeal from the judgment and decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 17th November 2020 in HCCC No. 39 of 2014 in determination of the claim by Mzee Mbaya Nzulwa (Deceased), who sued the appellant, Kenya Power and Lighting Company Ltd, vide a Plaint dated 20th January 2014 praying for judgment against the appellant for: general damages; special damages of Kshs. 8,012,900; interest thereon at court rates; costs of the suit; and any other and further relief that the court may deem fit to grant.

2. The deceased case was that he owned a house on Plot No. 105/Section II/MN Barsheba Mombasa, which house was connected to electricity supplied by the appellant; that, on or about 6th March 2012 at 7:00pm, a power surge occurred at the appellant's supply lines located at Barsheba in the Kisauni area resulting in a fire that completely burnt the deceased's house together with all household items therein; and that the power surge and the ensuing fire was as a result of the appellant's negligence and recklessness.

3. The deceased set out the particulars of negligence and recklessness against the appellant as follows:

   " i) Installation and use of faulty electricity equipments (sic).

ii. Failing to replace, repair and or fix faulty electricity.

iii. Failing to put up proper safety measures to avoid power surges and braking (sic) out of fire.

iv. Failing to contain the power surge and fire in time so as to prevent burning of the Defendant's (sic) house and household items."

4. The deceased averred that, as a result of the fire incident, he was rendered destitute and homeless, and that he suffered loss and damage; and that the appellant was strictly liable for the said incident, and the loss that was suffered. The deceased pleaded the particulars of loss and damage, including loss of electronic equipment, furniture, stored items, clothing, household items, personal items and building material; the cost of reconstruction of the house; rental income; cash and other miscellaneous items, which amounted to Kshs. 8,012,900.

5. Following the death of the deceased on 3rd September 2015, his son, Kassim Mzee Mbaya, the respondent herein, obtained a limited grant of letters of administration ad litem issued on 12th May 2017 and filed a Notice of Motion dated 31st May 2017 seeking to be joined in the suit as the legal representative of the deceased's estate. By a ruling dated 2nd February 2018, the High Court (P. J. O. Otieno, J.) found that the suit had abated, and observed that the respondent ought to have sought revival of the suit in the same application for substitution. The court nonetheless allowed the application and ordered that the suit be revived for purposes of being heard on the merits. In its decision, the court stated:

> " 14. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the Applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the court's duty to sustain claims for purposes of them being heard on the merits.
>
> 15. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea.
>
> 15. Answering to that call, I allow the application to have the Applicant substituted for the deceased plaintiff. Having done so I further order that the suit be revived for purposes of being heard on the merits."

6. The respondent amended the plaint accordingly vide the Amended Plaint dated 19th February 2018 to incorporate the substitution.

7. In response, the appellant filed its Statement of Defence dated 22nd April 2014 and Amended on 5th March 2018 in response to the respondent's Amended Plaint. In its amended statement of defence, the appellant denied all the averments and allegations contained in the Amended Plaint. In particular, it denied: that the deceased was the owner of a house situate on Plot No. 105/Section II/MN Barsheba Mombasa, which was allegedly connected to electricity; the occurrence of the power surge and fire incident on 6th March 2017, which allegedly burned down the respondent's house together with all household items therein; that the alleged power surge or fire was a result of its negligence; the particulars of the alleged negligence and recklessness; and the particulars of loss and damage set out in the Amended Plaint.

8. The appellant averred that, if the deceased suffered loss and damage, the alleged loss and damage was caused by the sole and/or contributory negligence of the deceased which it particularised as follows:

> "a) Failing to install and maintain effective and working electric power circuit breakers in the premises
>
> b. Installing too many electrical appliances causing overloading and short circuit.
>
> c. Failing to properly and completely earth the electric appliances or maintaining appropriate and proper earthing systems
>
> d. Causing and keeping defective wiring on the premises
>
> e. Failing to install and or maintain properly installed electric wires on the premises
>
> f. Using and utilizing defective, worn out and substandard electric materials, wires, apparatus, appliances, devices, and equipment upon their premises
>
> g. Failing to install and regularly inspect monitor and analyze power guards, power surge detectors, stabilizers for like purpose in order to guard against risk and damage
>
> h. Failing to prevent the fire from occurring
>
> i. Failing to detect the faults in their electric system, appliances and installations until it was too late
>
> j. Failing to switch off electricity when required and necessary."

9. In addition to its defence aforesaid, the appellant averred that the respondent's suit was bad in law, incompetent and unmaintainable; and that the appellant was non-suited. The appellant urged the court to dismiss the suit with costs.

10. When the suit came up for pre-trial conference on 12th June 2018, the court gave the appellant the last chance to file its witness statements together with any evidential documents intended to be relied on in its defence and directed that, if no such witness statements and documents were filed within 30 days and, in any event, by 13 July 2018, the appellant would have no liberty to call any witnesses or rely on any documents at the trial.

11. When the case came up again for pre-trial conference on 23rd January 2019, the court made an order that the appellant, having filed no witness statements or documents, shall call no witness at the trial, or produce any evidential documents as exhibits in its defence.

12. The suit eventually proceeded to hearing when the respondent sought leave to have his Supplementary List of Documents filed on 26th February 2020 admitted in evidence, which was opposed by counsel for the appellant, who stated that they would be prejudiced as they has also been shut out on the basis that the appellant had not filed its documents in good time in obedience to the pre-trial directions.

13. In its decision, the court observed that it would be prejudicial, if not a show of double standards, to allow the respondent to produce documents so late in the day; and that the documents filed after the pre-trial directions without leave of the court were prejudicial to the fair hearing of the suit. Consequently, it struck out the respondent's Supplementary List of Documents filed on 26th February 2020 and expunged them from the record.

14. At the hearing, the respondent called 3 witnesses and closed his case. On its part, the appellant closed its case without calling any witnesses, and neither did it produce any evidential documents in its defence.

15. In its judgment dated 17th November 2020, the High Court (P. J. O. Otieno, J.) found that the respondent's evidence, which was corroborated by two officers with the Mombasa Fire Brigade who attended the scene of the incident and testified as PW2 and PW3, proved that there was indeed a fire ignited by the appellant's electric supply post due to sparks occasioned by surging power lines; that the fire was ignited and occasioned by the electric power transmitted by the appellant's supply lines; and that their testimonies remained unchallenged. The learned Judge stated that:

> "This finding is informed by the statutory provisions found in the *Energy Act* which mandates the licensee, in this case the defendant, to be responsible from the installation, inspection and maintenance of the installations supplying the electric power ....
>
> These provisions and their predecessor under the Electric Power Act (repealed) have been interpreted in innumerable decisions by this Court and the Court of Appeal to impose a duty of care upon the defendant owing to the fact that the commodity they deal in, electric power, is inherently dangerous if not properly maintained."

16. In its considered view, the court found that the fire resulting in destruction of the deceased's house and household goods was the result of negligence on the part of the appellant, and of its breach of duty imposed by the state; and that the appellant was liable to the respondent for the consequent loss and damage.

17. In addition to the foregoing, the trial court held that the evidence adduced by the respondent to the effect that the house was burnt to the ground leaving nothing to be salvaged was in itself indicative of the alleged loss and damage. He took judicial notice of the fact that, naturally, no-one expects that one day the contents of his dwelling house would become an issue in such litigation so as to keep an inventory and evidence of the possessions in such a dwelling house; and that it was not pertinent that no documents were produced to support the list and value of the property alleged to have been contained in the house.

18. Turning to the issue as to the ownership of the house in question, the court concluded that the fact that the house was built on a parcel of land which did not belong to the deceased was not a difficult one as the law in Kenya recognizes the concept of "a house without land", a unique but commonly practiced tenure in the coastal region as observed in the case of Abdul Razak Khalifa Salima vs. Harun Rashid Khatr [2018] eKLR.

19. In its judgment, the trial court found that no evidence had been adduced to prove the particulars loss occasioned to the respondent on account of the alleged value of the house and the property that would be reasonably expected to be contained therein to facilitate occupation and enjoyment thereof. According to the learned Judge, the loss could not be restricted and limited to special damages. In this regard, he stated:

> "28. In this matter, other than and over and above the material loss, I do see trauma and general inconvenience caused to the family when suddenly they were rendered homeless. Such is the loss that is unquantifiable from the onset and remains at large.
>
> 29. Based on the proved loss by fire and giving regard to the fact that there was certainly trauma and general disturbance and inconvenience occasioned, I

assess general damages due and owing to the plaintiff from the defendant in the sum of Kshs. 3,000,000/=. In coming up with this award, I have given regard of the fact that there must have been those items in the house including beds, cooking equipment and utensils, personal clothing and electronics that an ordinary family living in that part of Mombasa city would own as of basic necessity. I have constituted such in the global award I have made."

20. In sum, the trial court declined to award the respondents special damages in the pleaded sum of Kshs. 8,012,900 but, instead, entered judgment against the appellant in the sum of Kshs. 3,000,000 on account of general damages plus costs and interest from the date of judgment until payment in full.

21. It is this award of Kshs. 3,000,000 as general damages that raises the issue as to whether the learned Judge was justified to take into account the unascertained or estimated value of the household goods in determining the quantum of general damages.

22. Dissatisfied, the appellant moved to this Court on appeal on 8 grounds set out in its Memorandum of Appeal dated 17th September 2021, namely that:

" 1) The Learned Trial Judge erred in law and fact by awarding general damages for trauma and general disturbance and inconvenience occasioned when the same was not pleaded by the Respondent.

2. The Learned Trial Judge erred in law and fact by awarding the Respondent an excessive sum of Kshs. 3,000,000/= (Kenya Shillings Three Million), a figure that was plucked from the air with no basis in law.

3. The Learned Trial Judge erred in law and fact by awarding general damages for trauma and general disturbance and inconvenience, yet no evidence was led by the Respondent to that effect.

4. The Learned Trial Judge erred in law and fact by failing to consider and address the issue of locus standi yet the same was among the issues before him for determination.

5. The Learned Trial Judge erred in law and fact by making a finding on the concept of house without land; an issue that was not before him for determination thus arriving at a wrong determination.

6. The Learned Trial Judge erred in law in failing to hold that on the evidence adduced, the Respondent had failed to establish a case on a balance of probability.

7. The Learned Trial Judge erred in law and fact by setting upon a journey to quantify general damages that would serve to repair the loss and compensate the Respondent in the absence of proof of special damages claimed.

8. The Learned Trial Judge erred in law and fact by allowing the respondent's suit against the Appellant with costs."

23. Accordingly, the appellant prayed that:

" (a) This Honourable Court allow this Appeal in its entirety.

b. The Judgment in Civil Suit No. 39 of 2014 Kassim Mzee Mbaya (Suing as the Legal Representative of the Estate of Mzee Mbaya Nzulwa) vs Kenya Power & Lighting Company Ltd be set aside and in place there be an order dismissing the entire suit.

c. Costs of Civil Suit No. 39 of 2014 Kassim Mzee Mbaya (Suing as the Legal Representative of the Estate of Mzee Mbaya Nzulwa) vs Kenya Power & Lighting Company Ltd and this Appeal be awarded to the Appellant."

24. Equally dissatisfied, the respondent filed a Cross-Appeal dated 29th October 2021 against the impugned judgment on 4 grounds, namely that:

"

" 1. The Learned Trial Judge erred in law and fact by finding that the Respondent had failed to prove special damages pleaded and thereby arrived at a wrong conclusion.

2. The Trial Judge erred in Law and fact by awarding the sum of Ksh. 3,000,000/ = as general damages for the unquantifiable loss which is far much below the reasonable unquantifiable loss.

3. The Trial Learned Judge erred in Law by failing to properly evaluate the evidence on record and instead

considered irrelevant matters and thereby arrived at a wrong conclusion.

2. The Trial Learned Judge erred in Law and fact by allowing the Appellants submission as substitute of evidence yet the Appellant had failed to call any evidence to testify on its behalf."

25. On the grounds aforesaid, the respondent prayed that:

" (a) The Appeal be dismissed with costs.

b. The Cross Appeal be allowed.

c. The Judgment in Civil Suit No. 39 of 2014 Kassim Mzee Mbaya versus Kenya Power & Lighting Co. Ltd delivered on 17th November 2020 be set aside and judgment be entered as prayed for in the Plaint dated 20th January 2014.

d. Costs of the Appeal and Civil Suit No. 39 of 2014 be awarded to the Respondent."

26. In support of the appeal, learned counsel for the appellant, M/s. Oloo & Chatur, filed written submissions and list of authorities dated 29th June 2022 citing the cases of Dharamshi vs. Karsan [1974] EA 41; and Securicor Courier (K) Ltd vs. Benson David Onyango [2008] eKLR for the proposition that general damages are not allowable in addition to quantified damages; Idi Ayub Omari Shabani vs. City Council of Nairobi [1985] eKLR for the proposition that, if the plaintiff brings actions for damages, it is not enough to list down the particulars, but that the same have to be proved; Galaxy Paints Company vs. Falcon Guards Ltd [2000] eKLR, highlighting the principle that the issues for determination in a suit generally flow from the pleadings, and that a court can only pronounce judgment on issues arising from the pleadings, or such issues as the parties have framed for the court's

determination; and Rebecca Mijide Mungole & another vs. Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR for the proposition that, where a suit has abated, it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted; and that a prayer for the revival of a suit cannot be allowed as a matter of course or right.

27. Opposing the appeal, learned counsel for the respondent, M/s. Khatib & Company, filed written submissions dated 2nd August 2022. Counsel cited the cases of FM (Minor suing through Mother and next friend MWM) vs. JNM & another [2020] eKLR, which set out the duties of this Court in a first appeal; Vyas Industries vs. Diocese of Meru [1976] eKLR where the predecessor of this Court affirmed the holding in Odd Jobs vs. Mubia [1970] EA 476 that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for its decision; Caliph Properties Limited vs. Barbel Sharma & another [2015] eKLR, highlighting the doctrine of equity, namely that he that comes to equity must come with clean hands, and must also do equity; and that he who comes to equity must fulfil all or substantially all his outstanding obligations before insisting on his rights; and David Kiptum Korir vs. Kenya Commercial Bank & another [2021] eKLR for the proposition that the expression 'costs shall follow the event' means that the party who, on the whole, succeeds in the action, gets the general costs of the action.

28. On the grounds aforesaid, the respondent urged the Court to dismiss the appeal, allow his cross-appeal and enter judgment in his favour as prayed in the plaint.

29. The appellant opposed the respondent's cross-appeal, contending that it is defective as it does not comply with the mandatory provisions of rule 93(3) of the Court of Appeal Rules (now rule 95(3) of the 2022 Rules), which requires a notice of cross-appeal to be substantially in Form G as set out in the First Schedule and signed by or on behalf of the respondent.

30. This being a first appeal, our mandate takes root in the case of Ng'ati Farmers' Co-Operative Society Ltd. vs. Ledidi & 15 Others [2009] KLR 331 where this Court held:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

31. This mandate was underscored in Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 thus:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

32. That said, we are conscious of the cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd [1958] E.A 424 that:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

33. In our considered view, the main issues that fall for our determination in this appeal are: (i) whether the learned Judge was at fault in failing to consider the issue of the respondent's locus standi to continue with the suit; (ii) whether the learned Judge was at fault in recognizing the customary practice founded on the concept of "house without land"; (iii) whether the learned Judge was correct in awarding the respondent general damages in the sum of Kshs. 3,000,000 in place of the sum of Kshs. 8,012,900 as prayed in the plaint; (iv) whether the learned Judge was at fault in finding that the respondent had failed to prove special damages as pleaded; (v) whether the respondent's cross-appeal satisfies the mandatory provisions of rule 95(3) of the Court of Appeal Rules, 2022; and (vi) what orders ought we to make in determination of the appeal and cross-appeal, including orders on costs.

34. On the 1st issue as to whether the respondent had the locus standi to continue with the suit filed by the deceased, the appellant submitted that the original Plaintiff died on 3rd September 2015 as shown on the death certificate on record; that the Chief Magistrate's Court issued a limited grant of letters of administration ad litem on 12th May 2017 in Succession Cause No. 144 of 2017; that the Plaintiff's legal representative (the respondent) lodged an application dated 31st May 2017 to be joined in the suit in place of the deceased; that the application was time-barred as the suit had abated 1 year after the Plaintiff's death on 3rd September 2016; that no application for extension of time was brought as mandated under Order 24 rule 3(2) of the Civil Procedure Rules; that, consequently, the respondent did not have locus standi to continue with the suit there having been no application before the court for extension of time, and in the absence of a specific prayer for substitution, lifting of the abatement and/or extension of time; that, in the supporting affidavit annexed to the respondent's application, no reasonable or plausible explanation had been given to explain the delay of 1 year 8 months in bringing the application; that the delay was inordinate; and that the suit ought to have been dismissed with costs.

35. Even though the learned Judge found that the suit had abated and observed that the respondent ought to have sought its revival in the same application for substitution, the court nonetheless allowed the application and ordered that the suit be revived and heard on its merits. In its ruling dated 2nd February 2018, the trial court invoked its inherent jurisdiction to sustain the respondent's claim for hearing on its merits in the spirit of the constitutional principle enshrined in Article 159(2) (d), which impels courts and tribunals to administer justice without undue regard to technicalities of procedure.

36. We also take to mind the fact that the learned Judge's ruling aforesaid remains unchallenged, and that the issue is raised for the first time in the substantive appeal before us. Indeed, the record as put to us does not contain any evidence to suggest that the appellant lodged an appeal against the trial Court's ruling dated 2nd February 2018. Accordingly, the issue as to whether the respondent had locus standi to continue with the suit as filed by the deceased comes too late in the day and cannot be entertained in the absence of the requisite notice of appeal in that regard.

37. As held by the Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, a notice of appeal is a jurisdictional prerequisite

that allows the Court to determine the merits or demerits of a decision intended to be appealed against. In so far as no such notice was lodged, this ground of appeal fails.

38. Turning to the 2nd issue as to the propriety of the recognition by the learned Judge of the customary conception of "house without land," the appellant submitted that the issue was neither pleaded nor raised in the proceedings leading to the impugned judgment; that the parties were not invited to lead evidence or make submissions thereon; and that the trial court erred in law by raising the issue suo moto, and by pronouncing itself thereon.

39. We take to mind this Court's decision in Ann Wairimu Wanjohi vs. James Wambiru Mukabi [2021] eKLR where the Court observed that:

> " (27) In Odd Jobs vs Mubia (supra), the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. In Vyas Industries vs Diocese of Meru [1976] eKLR, the Eastern Africa Court of Appeal applied and approved Odd Jobs vs. Mubia (supra), holding that, as the advocate for the appellant had led evidence during the trial and addressed the court on the unpleaded issue, the trial court could base its decision on the unpleaded issue, as the issue had been left for the court's decision during the trial
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> ....
>
> (33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.
>
> In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings." [Emphasis ours]

40. It is noteworthy, though, that, among the issued raised in the respondent's List of Issues dated 28th June 2018 was the question as to whether the Plaintiff was the owner of a house on Plot No. 105/ Section II/MN Barsheba Mombasa, which was supplied with electricity. The transcript of proceedings on record clearly shows that the issue was raised and dealt with at the trial when the respondent was cross-examined by counsel for the appellant whereupon he stated that the house was built on another person's land; that the landlord was called Warefe; and that it was "a house without land". In their written submissions to the trial court dated 5th June 2019, counsel for the respondent reiterated his testimony that the deceased was the owner of the suit property which was destroyed by fire and the corroborating evidence of the house plan, building quotation and photographs of the suit premises had not been challenged or contradicted.

41. In the appellant's written submissions to the trial court dated 8th July 2020, learned counsel contended that the issue as to whether the respondent could be defined as the owner of the house in question, and not as a third party, ought to have been pleaded and not left to be raised in written submission.

42. Notwithstanding the competing claims raised at the hearing in the trial court with regard to ownership of the house in issue in the alleged absence of express pleadings, the learned Judge proceeded to pronounce himself on the judicial recognition of the concept of "house without land" all in the context of the validity of the respondent's claim for compensation on account of loss and damage occasioned by the alleged electrical faults that ignited the fire which burnt down the deceased's house. To our mind, it is not uncommon for a trial court to properly address itself to a pertinent issue, though not expressly pleaded in the exact words used in the impugned decision, provided that such an issue is relevant in the context of the claims before it as was the case here.

43. Suffice it to observe that the question as to whether the deceased actually owned the damaged house was in issue. The only point of departure was whether such ownership could be inferred from the cultural conception of "house without land". In *Famau Mwenye & 19 others vs. Mariam Binti Said, Malindi HCCC No. 34 of 2005* Ouko, J. (as he then was) described the concept of house without land as –

> "... land tenure unique ... to Mombasa which has baffled scholars, practitioners and even jurists. That land system is only referred to as 'house without land'. That is, the owner of the house is different from the owner of the land on which it stands. It therefore defies the common law concept of land expressed in the Latin maxim, cujus est solum ejus est usque ad coelum [meaning, 'whose is the soil, his is also that which is above it']."

44. It is noteworthy that the question as to whether the deceased was the owner of the house on Plot No. 105/Section II/MN Barsheba Mombasa was undoubtedly an issue for determination based on the parties pleadings, list of issues, the evidence and submissions. The exact nature of the deceased ownership of the "house without land" was raised in the course of the trial and, in any event, was not challenged or controverted by the appellant. Accordingly, the learned Judge cannot be faulted for observing that the nature of the deceased's ownership, apart from being unchallenged, presented no difficulty as this unique tenure of home ownership commonly practiced in coastal Kenya was not hitherto strange to the courts, the same having been judicially recognized in earlier cases (see Abdukrazak Khalifa Salimu vs. Harun Rashid Khator & 2 Others [2018] eKLR) and under the repealed Land Titles Act (Cap. 282). Likewise, the appeal fails on that score.

45. On the closely related 3rd and 4th issues as to whether the trial court should have awarded the respondent damages in the sum of Kshs. 8,012,900 as prayed, the appellant submitted that the court agreed with the appellant that no evidence had been adduced to prove special damages, but proceeded to award a sum of Kshs. 3,000,000 in "a global" award in general damages having given regard to the fact that there must have been items in the house including beddings, cooking equipment, utensils and personal clothing that an ordinary family living in that part of Mombasa city would own as a basic necessity; and that there was no justification to award the said sum without any legal basis. According to the appellant, the learned Judge practically plucked the figure out of the air and, in any event, the respondent (the son of the deceased) confirmed that most of the things burnt in the house belonged to him and not to the deceased who originally filed suit; and that the other items in the house belonged to his siblings.

46. On their part, learned counsel for the respondent submitted that the Superior Court held that, in the absence of proof to the standards expected in special damages, the loss remains at large; that, when it is at large, the Court sets upon a journey to assess and quantify damages that would serve to repair the loss and compensate the injured party; that, on finding the appellant negligent for causing the fire, the

trial Court went further to appreciate the extent of loss occasioned by the fire to award general damages prayed for in his amended plaint; and that, therefore, the learned Judge was not at fault in awarding Kshs. 3,000,000 in general damages.

47. According to the respondent, the loss incurred by the Plaintiff was evident, though unquantifiable and, in the circumstances, the trial Court, in its wisdom and findings guided by the circumstances of the case, found it just and fair to exercise its discretion to award the respondent the sum of Kshs. 3,000,000 in general damages.

48. As observed in the opening paragraph hereof, the respondent prayed for general damages and special damages of Kshs. 8,012,900. However, the claim for special damages was rightfully dismissed for want of specific proof. The only question that falls to be determined is whether the learned Judge was at fault in awarding Kshs. 3,000,000 in general damages and, if so, whether he ought to have taken account of the household goods lost in the fire in determining the quantum of general damages.

49. In principle, general damages are recoverable for unquantifiable loss and damage resulting from an infringement of a legal right or duty. It is noteworthy that the trial court rightfully found that the fire was caused by the appellant's negligence and breach of duty. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd (1992) KLR 177 stated that:

> " General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty." [Emphasis ours]

50. In its judgment, the trial court correctly found that no evidence had been adduced to specifically prove the loss occasioned to the respondent on account of the alleged value of the house and the property that would be reasonably expected to be contained therein to facilitate occupation and enjoyment thereof. Accordingly, the respondent's claim for special damages in the sum of Kshs. 8,012,900 claimed in the amended plaint and in the cross-appeal fails.

51. On the other hand, the learned Judge was, in our considered view, correct in taking to mind the trauma, general disturbance and inconvenience for which he awarded general damages. To our mind, the loss could not be restricted and limited to special damages, which were not specifically proved. In view of the foregoing, we find no fault in the Judge's award of general damages on account of trauma, general disturbance and inconvenience resulting from the appellant's negligence and breach of duty of care. However, the respondent having failed to prove the claim for special damages, we disagree with the learned Judge's observation in the concluding part of paragraph 29 of the impugned judgment where he purported to take account of the value of various household goods in determining what he termed as "a global award" in general damages.

52. On the authority of Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia (1982 –88) 1 KAR 727, we find it necessary to interfere with the learned Judge's award of KShs. 3,000,000 in general damages, an amount in determination of which the learned Judge took account of matters reserved for consideration in quantifiable awards of special damages. We form this view on the afore-cited authority where Kneller, JA. observed At p.730:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango V. Manyoka [1961] E.A. 705,

709, 713; Lukenya Ranching And Farming Co-operatives Society Ltd V. Kavoloto [1970] E.A., 414, 418, 419. This Court follows the same principles." [Emphasis added]

53. Likewise, in Gicheru vs. Morton and Another (2005) 2 KLR 333 the Court of Appeal stated:

> " In order to justify reversing the trial judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled." [Emphasis added]

54. In the same vein, in Butt vs. Khan [1982-88] KAR 1, it was held as follows:

> " An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low." [Emphasis ours]

55. Having considered the record as put to us, the rival submissions and the afore-cited authorities, we find that the learned Judge took into consideration certain matters that he ought not to have taken into consideration in determining the respondent's claim for general damages. In particular, he took into consideration the estimated value of household goods destroyed in the fire. Consequently, we find it necessary to set aside the "global award" of KShs. 3,000,000 and substitute therefor a sum of KShs. 2,000,000 in general damages for the trauma, disturbance and inconvenience suffered by the respondent and his household in consequence of the fire that destroyed their home. We make this award taking judicial notice of the pain and suffering, the trauma, disturbance and inconvenience, the respondent suffered as the ordinary course of nature on account of the tragic fire (see section 60(1)(m)) of the *Evidence Act*, Cap. 80.)

56. On the issue as to whether the learned Judge was at fault in declining to award special damages, the appellant submitted that the trial court was correct in doing so as the respondent adduced no evidence in support thereof.

57. On his part, the respondent faults the learned Judge for striking out and expunging from the record the supplementary list of documents which was meant to support the special damages claim.

58. In our considered view, we find that the learned Judge's decision was well-founded as the respondent had filed the said documents late and without leave of the court; and that the respondent was not entitled to preferential treatment to the detriment of the appellant, who was earlier barred from producing any evidential documents having failed to file them within the period allowed in terms of the court's directions. Moreover, the trial court's decision to expunge the respondent's documents remains unchallenged and is raised for the first time in his submissions herein. Accordingly, we find no fault in the learned Judge's finding that the respondent did not prove his claim for special damages.

59. Turning to the 5th issue as to the propriety of the respondent's cross-appeal, we call to mind the mandatory provisions of rule 95(3) of the Rules of this Court, which reads:

> 95. (3) A notice of cross-appeal shall be substantially in Form G as set out in the First Schedule and signed by or on behalf of the respondent.

60. Having considered the form of the respondent's cross- appeal and the reliefs sought thereunder, we find nothing to suggest that the same does not substantially comply with rule 95(3) of the Rules of

this Court, or that it is otherwise fatally defective. However, that is not to say that it has any merit with regard to the amount claimed.

61. Turning to the final issue of costs, counsel for the appellant submitted that, the trial court having found that the respondent's claim for special damages was not proved, and given that there was no basis for an award of general damages, his suit should have been dismissed with costs to the Appellant.

62. According to the respondent, costs follow the event, and a court has the discretion to award costs. Counsel for the respondent submitted that the evidential documents in support of his claim for special damages were unjustly expunged from the record on a procedural technicality against the spirit of Article 159(2) (d) of *the Constitution*, and that the trial court ought to have admitted the evidential documents. In the circumstances, the respondent contends that he is entitled to costs of the appeal, the cross-appeal, as well as costs of the suit in the trial court.

63. As the High Court of Kenya at Nairobi in Party of Independent Candidate of Kenya & another vs. Mutula Kilonzo & 2 others [2013] eKLR observed while citing with approval the words of Murray CJ in Levben Products vs. Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227:

> " It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial Judge is given discretion .... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at .... In the second place, the general rule is that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

64. As Richard Kuloba in Judicial Hints on Civil Procedure (2nd Edn), the learned author states as follows at p.101:

> " The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs- the court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course."

65. As between the appellant and the respondent, the respondent has succeeded in having his claim for general damages sustained albeit in the lesser sum of KShs. 2,000,000 being part of the amount awarded by the trial court. On the other hand, the appellant has substantially failed in its appeal. As costs follow the event, we find that the respondent's claim for costs in the appeal succeeds, but that his claim for costs in the cross-appeal largely fails in so far as he sought an award higher than the sums awarded by the trial court and reduced as aforesaid.

66. Having carefully considered the appeal, the respondent's cross-appeal, the record as put to us, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal and cross-appeal have no merit and are hereby dismissed. Consequently, we hereby order and direct that:

    a. the Judgment and Decree of the High Court of Kenya at Mombasa (P. J. O. Otieno, J.) delivered on 17th November 2000 is hereby upheld in part, and to the extent only that

    the sum awarded in general damages is hereby substituted for KShs. 2,000,000; and

b. that The parties shall bear their own costs of the appeal and of the cross-appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

1