



**Kenya Pipeline Company Ltd v Ndegwa & another (Civil Appeal  
235 of 2020) [2023] KECA 226 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 226 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 235 OF 2020  
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA  
MARCH 3, 2023**

**BETWEEN**

**KENYA PIPELINE COMPANY LTD ..... APPELLANT**

**AND**

**DUNCAN NDERITU NDEGWA ..... 1<sup>ST</sup> RESPONDENT**

**L. Z. ENGINEERING CONSTRUCTION LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at  
Nairobi (P. Nyamweya, J.) delivered on 1st August 2013 in H.C.C.C No. 2577 of 1990)*

**JUDGMENT**

1. Under a Building Contract entered into on or about 26<sup>th</sup> August 1988, the appellant, Kenya Pipeline Company Ltd, engaged the 2<sup>nd</sup> respondent, L. Z. Engineering Construction Ltd, to develop and construct houses on the appellant's property known as LR No. 12422/23, which is adjacent to the 1<sup>st</sup> respondent's land known as LR No. 12422/22, the two properties being separated by a road measuring 18 metres wide.
2. The Building Contract contained Articles of Agreement in which the appellant was described as "the employer" and the 2<sup>nd</sup> respondent as "the contractor". Under the Contract, the appellant undertook to nominate an architect and a quantity surveyor to whose duties and responsibilities we will shortly return. Accordingly, the appellant nominated M/s. Nyanja Associates as its architects and M/s. Murai as its quantity surveyors.
3. Pursuant to the Building Contract, the 2<sup>nd</sup> respondent embarked on and undertook the development and construction of houses in the appellant's property between 1989 and 1990. During the construction, the 2<sup>nd</sup> respondent allegedly trespassed onto the 1<sup>st</sup> respondent's property and committed the following torts, namely: excavating large portions leaving large pits and deep gaping holes; making



a network of roadway paths; removing therefrom and converting for their use large quantities of red/top soil and rocks forming part of the natural terrain; dumping debris, rubbish, foreign rocks, unwanted materials derived from the works, littering debris and other surplus, and unwanted mud grass; indiscriminately felling numerous indigenous trees; and parking heavy construction machinery on the property.

4. Offended by the 2<sup>nd</sup> respondent's conduct aforesaid, the 1<sup>st</sup> respondent raised a complaint with the appellant in writing on 26<sup>th</sup> January 1990. In response, the appellant wrote to the 2<sup>nd</sup> respondent on 31<sup>st</sup> January 1990 directing it to immediately stop the unauthorized activities complained of. By a letter dated 3<sup>rd</sup> February 1990 addressed to the appellant, the 2<sup>nd</sup> respondent undertook to "... restore the plot," adding that they were awaiting instructions from the 1<sup>st</sup> respondent on how they were to undertake the restoration. We find nothing on record to suggest that such restoration was ever undertaken as promised.
5. By a plaint dated 25<sup>th</sup> May 1990, the 1<sup>st</sup> respondent sued the appellant and the 2<sup>nd</sup> respondent in the High Court of Kenya at Nairobi in HCCC No. 2577 of 1990 seeking to recover: KShs. 16,700,000 being the value of the property in issue; in the alternative, KShs. 7,284,760 comprised of the value of the wasteland (KShs. 4,000,000), the cost of carting away the debris (KShs. 1,887,360) and the cost of filling the excavation pits with red soil (KShs. 1,397,400); mesne profits at the rate of KShs. 50,000 per month from the date of filing the suit until determination of the suit; general damages; an injunction to restrain the appellant and the 2<sup>nd</sup> respondent from continuing to commit any of the above-mentioned wrongful acts; interest at court rates; and any other relief that the court deemed just to grant.
6. In its defence dated 18<sup>th</sup> July 1990, the appellant denied liability for the acts complained of and averred that it had engaged the 2<sup>nd</sup> respondent as an independent contractor under a building contract; that, as an independent contractor, the 2<sup>nd</sup> respondent was directly responsible and liable to third parties for any loss, damage, claim or injury arising out of or in the course of the said works; and that the appellant had not at any time managed, controlled or directed the 2<sup>nd</sup> respondent in the manner in which the construction works were to be carried out.
7. The 2<sup>nd</sup> respondent filed its defence dated 29<sup>th</sup> June 1990 in which it denied having trespassed onto the 1<sup>st</sup> respondent's property. It averred that it was not liable for any damage alleged by the 1<sup>st</sup> respondent.
8. By a Notice of Motion dated 25<sup>th</sup> July 1990, the 1<sup>st</sup> respondent sought judgment against the 2<sup>nd</sup> respondent on admission vide its letters dated 3<sup>rd</sup> and 7<sup>th</sup> February 1990. The 2<sup>nd</sup> respondent's letter of 3<sup>rd</sup> February 1990 addressed to the appellant read in part:

"We used Mr. Ndegwa's plot by mistake. We are ready to restore the plot.

We need our crusher run which was laid there. As agreed, we shall remove the crusher run.

As agreed with you also, we shall remove the temporary fence to enable us to remove the crusher run and restore the fence after the removal.

We are waiting for Mr. Ndegwa to indicate to us how he wishes the restoration to be carried out."

9. In its letter dated 7<sup>th</sup> February 1990 addressed to the 1<sup>st</sup> respondent and copied to the 2<sup>nd</sup> respondent, the appellant confirmed the 2<sup>nd</sup> respondent's admission of liability and undertaking to restore the property in its original condition.
10. Upon hearing the 1<sup>st</sup> respondent's Motion, the court (G. P. Mbiti, J.) delivered its ruling on 13<sup>th</sup> May 1991 in which it entered interlocutory judgment against the 2<sup>nd</sup> respondent on admission and directed



that the matter proceeds to determination or assessment of damages on evidence on the nature of the damage occasioned by the trespass.

11. The matter proceeded for assessment and determination of damages before Nyamweya, J. (as she then was) on 20<sup>th</sup> March 2012. In her judgment dated 1<sup>st</sup> August 2013, the learned Judge held that the appellant was vicariously liable for the acts of the 2<sup>nd</sup> respondent. In her view, the 2<sup>nd</sup> respondent was not an independent contractor, but a servant of the appellant to the extent that the appellant retained a measure of control and authority over the 2<sup>nd</sup> respondent's activities. The basis of the trial court's holding in that regard was because the appellant had engaged a firm of architects and a clerk of works. Accordingly, the learned Judge awarded the 1<sup>st</sup> respondent as against the appellant and the 2<sup>nd</sup> respondent, jointly and severally: special damages on account of the cost of reinstatement in the sum of KShs. 3,284,760 with interest at court rates from the date of filing the suit until payment in full; mesne profits/loss of profits at KShs. 50,000 per month with interest at court rates from the date of filing suit until payment in full; and general damages for trespass in the sum of KShs. 100,000. The learned Judge also ordered that the 1<sup>st</sup> respondent's costs of the suit be borne by the appellant and the 2<sup>nd</sup> respondent.
12. Aggrieved by the decision of Nyamweya, J., the appellant moved to this Court on appeal on a whopping 18 grounds set out on its Memorandum of Appeal dated 16<sup>th</sup> June 2020, which are rendered in narrative and argumentatively against the grain of rule 88(1) of the *Court of Appeal Rules*, which requires a Memorandum of Appeal to "concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against...."
13. In summary, the appellant faults the learned Judge for, *inter alia*: not objectively considering the whole agreement between the appellant and the second respondent; concluding that the appellant was vicariously liable for the torts of the 2<sup>nd</sup> respondent; failing to adjudicate on the facts of admission of the 2<sup>nd</sup> respondent; awarding the 1<sup>st</sup> respondent special damages for the cost of reinstatement of the land in the sum of KShs. 3,284,760; awarding the 1<sup>st</sup> respondent loss of profits as special damages in the sum of KShs. 50,000 per month not pleaded in the plaint; failing to cap the period of time during which the 1<sup>st</sup> respondent could recover for mesne profits; for awarding general damages without any legal basis; making an award that bestowed unjust enrichment on the 1<sup>st</sup> respondent; misapprehending the facts presented by the 1<sup>st</sup> respondent and for taking into account considerations of which she ought not to have taken into account; failing to appreciate the law on award of interest; misdirecting herself in law on the standard and burden of proof; and for substituting and amending her judgment without giving the appellant an opportunity to be heard in that regard. The appellant prayed that the appeal be allowed with costs.
14. Learned counsel for the appellant, M/s. Wekesa & Simiyu Advocates, filed written submissions and list of 27 authorities both dated 22<sup>nd</sup> February 2021 in support of the appeal. In opposition to the appeal, learned counsel for the 1<sup>st</sup> respondent, Ms. Njeri Kariuki, also filed written submissions, list of 17 authorities and case digest dated 26<sup>th</sup> March 2021, all of which we have considered.
15. When the appeal came for hearing on the "GoTo Meeting" virtual platform, Mr. Wekesa represented the appellant and made oral highlights of their submissions, urging us to allow the appeal as prayed. On their part, leading counsel Mr. Njoroge Regeru appeared with Miss. Mutheru, representing the 1<sup>st</sup> respondent. Mr. Regeru made oral highlights of their submissions and urged us to dismiss the appeal with costs to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent, though duly served with the hearing notice, was unrepresented and no submissions were filed on its behalf.



16. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial and draw our own conclusions. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, take into account that fact.
17. This approach was adopted in the persuasive decision of our predecessor court in *Dinkerrai Ramkrishan Pandya vs. R* [1957] EA p.336. In that case, the Court cited with approval the case of *Figgis vs. R* 19 KLR p.32, which had also adopted the principle in *The Glannibanta (2) (1876)* 1 PD p.283 where the Court had this to say at p.287:

“ ... the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were ... material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.”
18. We also take to mind the decision in *Highway Developers Limited vs. West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle vs. Associated Motor Boat Co.* [1968] EA p.123, which was also a case in point. In *Selle's* case (*ibid*), this Court held:

“ ... 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 demeanor of a witness is inconsistent with the evidence in the case generally.”
19. Having carefully examined the record of appeal, the grounds on which it is founded, the written and oral submissions of learned counsel for the appellant and for the 1<sup>st</sup> respondent, all relevant legal principles and authorities cited in the rival submissions made to us, we are of the considered view that the appeal stands or falls on our findings on the following four main issues of law and fact, and in respect of which learned counsel for the appellant and for the 1<sup>st</sup> respondent filed comprehensive written submissions as aforesaid, namely: Whether the 2<sup>nd</sup> respondent was an independent contractor or a servant of the appellant in the nature of a master-and-servant relationship; whether the appellant was vicariously liable for the acts of the 2<sup>nd</sup> respondent; whether, in any event, the 1<sup>st</sup> respondent was entitled to the sums awarded in the impugned judgment and, if the answer is in the affirmative, who as between the appellant and the 2<sup>nd</sup> respondent is liable to the 1<sup>st</sup> respondent; and what orders ought we to make in determination of the appeal, including orders as to costs.
20. On the 1<sup>st</sup> issue as to whether the 2<sup>nd</sup> respondent was an independent contractor or a servant of the appellant in the nature of a master-and-servant relationship, it is imperative that a clear distinction be drawn between an independent contractor and an employee as defined in the *Employment Act*; and as between a contract of service and a contract for service.
21. Learned counsel for the 1<sup>st</sup> respondent submitted that the appellant retained a fairly large degree of control over the 2<sup>nd</sup> respondent; that the nature of the relationship between the appellant and the 2<sup>nd</sup> respondent revealed a pattern of payment of wages after performance of the contracted duties; that there was mutuality of obligations; and that the appellant was the ultimate bearer of the economic risk. Counsel cited the Industrial Court decision in *Christine Adot Lopeyio vs. Wycliffe Mwatibi Pere* [2013]



eKLR, which set the test for determining the difference between an employee and an independent contractor in the following words:

“In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprises ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.
- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.”

22. Learned counsel for the appellant submitted that “... the learned Judge erred in fact and in law in the manner in which she interpreted the agreement between the appellant and the 2<sup>nd</sup> respondent by only analysing three clauses ... without reviewing or reconciling the remaining twenty clauses that militated against the three clauses and the supposed directions vested in the appellant and pointed to the 2<sup>nd</sup> respondent being an independent contractor.” Counsel cited the case of *National Coal Board vs. Williamneill and Son* [1985] QB p.300 at p.319 where the court underscored the need “... to look at the terms of a contract as a whole and not to focus on the meaning of a particular word.”

23. In addition, counsel took issue with the trial court’s interpretation of clauses 8, 9 and 10 of the Building Contract as implying that the 2<sup>nd</sup> respondent was the appellant’s employee as opposed to an independent contractor.

24. On the authority of Christine Adot Lopeyio (*supra*), learned counsel for the 1<sup>st</sup> respondent reiterated that

“The appellant retained a fairly large degree of control over the 2<sup>nd</sup> respondent. Further, the nature of the relationship between the appellant and the 2<sup>nd</sup> respondent reveals a pattern of payment of wages after performance of contractual duties, which in turn highlights mutuality of obligations. The foregoing analysis of the control test, the economic test and the mutuality of obligations test, reveals a relationship between the appellant and the 2<sup>nd</sup> respondent that is inextricably linked to that of an employer-employee or master-servant relationship.”



25. Addressing herself to the provisions of clauses 8, 9 and 10 of the Building Contract, the learned Judge concluded that the 2<sup>nd</sup> respondent was a servant of the appellant. In her judgment, the learned Judge stated:

“It is therefore the finding of this court that the 2<sup>nd</sup> Defendant was not an independent contractor but a servant of the 1<sup>st</sup> Defendant, to the extent that the 1<sup>st</sup> Defendant still retained a measure of control and authority over the 2<sup>nd</sup> Defendant’s activities as shown in the foregoing.”

26. Turning to the Building Contract, clauses 8, 9 and 10, which must be read with reference to the nature of the works as identified in clause 1, read as follows:

“1. For the consideration hereinafter mentioned the Contractor will upon and subject to the Conditions annexed hereto carry out and complete the Works shown upon the Contract Drawings and described by or referred to in the Contract Bills and in the said Conditions.

8. The Contractor shall constantly keep upon the Works a competent foreman-in-charge and any instructions given to him by the Architect shall be deemed to have been issued to the Contractor. The foreman-in-charge shall be literate in English.

9. The Architect and his representatives shall at all reasonable times have access to the workshops or other places of the Contractor where work is being prepared for the Contract, and when work is to be so prepared in Workshops or other places of a sub- contractor (whether or not a nominated sub- contractor as defined in the sub-contract so far as possible a secure a similar right of access to those workshops or places for the Architect and his representatives and shall do all things reasonably necessary to make such right effective.

8. The Employer shall be entitled to appoint a clerk of works, whose primary duty shall be to act as inspector on behalf of the Employer under the direction of the Architect, and the Contractor shall afford every reasonable facility for the performance of that duty.”

27. In our considered view, clause 1 is clear as to the nature of the works for which the 2<sup>nd</sup> respondent was contracted to undertake, to wit, the construction and development of a housing project for a “consideration” that cannot reasonably be interpreted to mean a “wage” or “salary” ordinarily payable by an employer in master-and-servant relationships. To our mind, the one-off engagement bound the contractor under an obligation to “carry out and complete the works shown upon the contract drawings and described by or referred to in the contract bills and in the said conditions.”

28. Clause 8 obligated the 2<sup>nd</sup> respondent to ensure that the works were properly supervised by a competent foreman under its own employment for purposes of perfect performance to the appellant’s satisfaction. Reference to “instructions given to him by the architect” (nominated by the appellant) cannot of itself impute control by the appellant. To our mind, the instructions given by the architects was intended to ensure that the appellant got what it bargained for. Moreover, the architectural drawings had to be adhered to, standards that could only be assured by close supervision and direction of the architects. To this end, clause 9 obligated the 2<sup>nd</sup> respondent to grant reasonable access to the architects.



29. The fact that the architects were nominated by the appellant did not of itself constitute them the appellant's servants by whom the appellant would be said to have exercised control over the 2<sup>nd</sup> respondent. Far from it, the architects were yet another firm of independent contractors engaged to consult and provide professional services.
30. Likewise, the appointment by the appellant of a clerk of works to "act as an inspector on behalf of the employer under the direction of the architects" pursuant to clause 10 of the Building Contract is common trade usage in the construction industry. The clerk of works was tasked with the duty of inspecting the works on the appellant's behalf to ensure compliance with the building standards anticipated in "... the contract drawings and described by or referred to in the contract bills ...." Indeed, that is what clause 1 made provision for, and no stretch of imagination would suggest that the four clauses aforesaid constituted the 2<sup>nd</sup> respondent a servant of the appellant within the meaning of the Employment Act, which governs master-and-servant relationships.
31. The elaborate decision in the South African case of *Stein vs. Rising Title Productions* (2002) 23 ILJ 2017 also drew a clear distinction between an employee and an independent contractor in the following words:

"The main distinction between an employee (servant) and an independent contractor appears to lie in the fact that the former undertakes to render personal services to the employer, while the latter undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result. .... Although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the 'dominant impression' of the relationship is that of a contract of employment... The application of the dominant impression test thus requires a topological approach, according to which the right of control is not an indispensable requirement of the contract of service, but one of a number of indicia, the combination of which may be decisive. Other indicia which have been identified in the South African case law are: the nature of the work; the existence or non-existence of a right of supervision on the part of the employer; the manner of payment (eg, whether the employee is paid a fixed rate or commission); the relative dependence or freedom of action of the employee in the performance of his or her duties; the employers power of dismissal; whether the employee is precluded from working for another, whether the employee is required to devote a particular amount of time to his or her work; whether the employee is obliged to perform his or her duties personally; the ownership of the working facilities and whether the employee provides his or her own tools and equipment; the place of work; the length of time of the employment; the intention of the parties, etc."

32. In accord with the test in the forgoing South African case, Mbaru, J. correctly observed in *Christine Adot Lopeyo (supra)*:

"In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise 'employment' as against what constitutes 'service' in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.



- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.
- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.”

- 33. Applying the control test posited in *Christine Adot Lopeyio (ibid)*, we find nothing to suggest that the appellant exercised such control over the 2<sup>nd</sup> respondent with reference to the manner of performance of the contracted works so as to constitute it a servant of the appellant, and such control cannot be imputed from its engagement of other independent professionals (the architects and clerk of works) to guarantee quality delivery on the contracted works. In our considered view, the 2<sup>nd</sup> respondent was generally not subject to the control or the instructions of the appellant as to the manner in which it was obligated to perform the contracted works.
- 34. We say so conscious of the fact that there will be contracts of service where the master cannot control the manner in which the work is done, but they nonetheless remain contracts of service (see *Everret Aviation Limited vs. KRA* [2013] eKLR).
- 35. For the avoidance of doubt, control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. However, the right need not be unrestricted (see Mackenna, J. in *Ready Mixed Concrete (South East) Ltd. vs. Minister of Pensions and National Insurance* [1968] 2 QB p.497). In our considered view, the dominant impression” was that the 2<sup>nd</sup> respondent was not an employee or servant of the appellant, but an independent contractor
- 36. As respects the “integration test,” we find nothing to suggest that the 2<sup>nd</sup> respondent was subject to the rules and procedures of the appellant. As an independent contractor, the 2<sup>nd</sup> respondent was at all times in command of its own workforce, tools and equipment, and was not under the appellant’s management or control in the manner of performance of its part in the Building Contract. The appellant had nothing to do with the source of the material which the 2<sup>nd</sup> respondent was to use in carrying out the building contract or wherever the 2<sup>nd</sup> respondent was going to dump any debris.
- 37. As to the” economic test,” we find nothing to doubt that the 2<sup>nd</sup> respondent was in business on its own account with liberty to undertake other building contracts. Neither are we persuaded that the appellant took “the ultimate risk of loss or chance of profit” on account of the 2<sup>nd</sup> respondent’s construction business.



38. Finally, we also find that the “mutuality of obligation” test does not apply to the relationship between the appellant and the 2<sup>nd</sup> respondent so as to constitute it a servant of the appellant. Indeed, we find nothing to suggest that the two made any commitment to maintain an “employment relationship” over a period of time. The express terms of the Building Contract by which they were bound were clearly indicative of a relationship between an employer and an independent contractor. Indeed, theirs was a contract for service to undertake a specified building project for an agreed consideration, and which ended on completion. Put differently, the 2<sup>nd</sup> respondent did not undertake to render personal services to the appellant, but to perform a specified piece of work, and to produce a certain specified result for the employer, namely, development and construction of a housing project. Moreover, the appellant was not in the business of housing construction in respect of which it could be said to have employed the 2<sup>nd</sup> respondent as its servant. Moreover, the houses in question were designed for the appellant’s senior staff.
39. In addition to the foregoing, we take to mind the fact that the terms of payment and degree of control by the employer in the manner of performance, among other considerations, are determinant of the nature of the engagement of labour by an employer – whether it amounts to a contract of service or a contract for service.
40. To illustrate, the Supreme Court of Nigeria in *Shena Security Co. Ltd vs. Afropak (Nig.) Ltd & 2 Others* [2008] 18 NWLR laid down the following factor that should guide courts in determining which kind of contract the parties entered into. In this regard, the Court had this to say:
- “If payments are made by way of “wages” or “salaries” this is indicative that the contract is one of service. If it is a contract for service, the independent contractor gets his payment by way of “fees”. In like manner, where payment is by way of commission only or on the completion of the job, that indicates that the contract is for service.”
41. The provisions of clause 2 of the Building Contract is instructive. That clause reads:
- “2. The Employer will pay to the Contractor the sum of Kshs. 154,032,026.50 (hereinafter referred to as ‘the Contract Sum’) or such other sum as shall become payable hereunder at the times and in the manner specified in the said Conditions.”
42. Our examination of the record as put to us does not disclose what learned counsel for the 1<sup>st</sup> respondent describes as “a pattern of payment of wages after performance of contractual duties” so as to constitute the 2<sup>nd</sup> respondent a servant of the appellant. With due respect to counsel, the control test, the economic test, the integration test and the mutuality of obligations test do not by any means suggest that the relationship between the appellant and the 2<sup>nd</sup> respondent was that of a master and servant. So much for judicial decisions on this issue.
43. Turning to statute law, section 2 of the *Employment Act*, 2007 sheds light on the distinction between an employee and an independent contractor, and defines an employee thus:
- “employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;”
44. On the other hand, a “contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract



of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.

45. Section 3(1) of the Act provides that “this Act shall apply to all employees employed by any employer under a contract of service.” It follows, therefore, that the 2<sup>nd</sup> respondent does not fit the definition of an employee within the meaning of sections 2 and 3 of the Act, but of an independent contractor rewarded by the appellant for the construction works on expressly agreed terms under the Building Contract.
46. The *Black's Law Dictionary* (9<sup>th</sup> Edition) defines a “contract for service” “under which independent contractors are engaged” as “A contract for a job undertaken by an independent contractor, as opposed to an employee”. It is –

“... one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it .... It does not matter whether the work is done for pay or gratuitously.”

47. Viewed in light of the afore-cited authorities, the evidence on record leads to the inescapable conclusion that the 2<sup>nd</sup> respondent was an independent contractor, and not an employee of the appellant. Guided by, and in accord with, the afore-cited judicial decisions and statute law, we reach this conclusion on account of the following facts: that the 2<sup>nd</sup> respondent was a body corporate, and an employer in its own right complete with its own workforce under its command and control; that the appellant engaged the 2<sup>nd</sup> respondent under a Building Contract for a specified housing project; that the 2<sup>nd</sup> respondent employed its own skills, workforce, tools and equipment to undertake the housing project for an agreed contract price; that the appellant had no control over the day-to-day operations and management of the 2<sup>nd</sup> respondent; that the 2<sup>nd</sup> respondent was in business on its own account, and not on account of the appellant’s business; that the 2<sup>nd</sup> respondent was not subject to the appellant’s supervision or control in the manner of performance and execution of the Building Contract; that the 2<sup>nd</sup> respondent’s contractual obligation was confined to the contracted works and delivery of the end product, to wit, the housing project; and that the 2<sup>nd</sup> respondent was at all material times at liberty to engage in and undertake other works on separate contracts with third parties.
48. That relationship explains the provisions of clause 2 of the Building Contract, which obligates the appellant to pay to the 2<sup>nd</sup> respondent the agreed “Contract Sum” of KShs. 154,032,026.50 against the requisite completion certificates. Simply put, the 2<sup>nd</sup> respondent was an independent contractor, and not an employee of the appellant within the meaning of the *Employment Act*, which governs master-and-servant relationships. That settles the 1<sup>st</sup> issue before us.
49. As to the 2<sup>nd</sup> issue, the general rule is that an employer is not vicariously liable for the acts of an independent contractor. As held by the Court of Appeal in *Board of Governors St. Mary’s School vs. Boli Festus Andrew Sio* [2020] eKLR -
- “... the general rule is that an employer who has employed an independent contractor to undertake services or work on his behalf is not responsible for any tort committed by the contract or in the course of his work. The employer is also not liable for the tortious act committed by the contractor’s employees ....”
50. In the above cited case, the respondent, a staff member of the appellant school, along with other teachers and pupils of the appellant, had travelled in a bus hired by the appellant on a trip to Mombasa. An accident occurred during the trip and the respondent sustained injuries. The Court of Appeal



considered the issue of whether the learned Judge properly concluded that the appellant was vicariously liable for the acts of the owner or driver of the hired motor vehicle and held that:

“The judge reviewed various cases, including the case of *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA 123 ...

De Lestang, VP, in *obiter dictum* (stated):

“A person employing another is not liable for that other’s collateral negligence unless the relation of master and servant existed between them at the material time; the existence of the right of control is usually a decisive factor in deciding whether the relationship of master and servant exists.”

51. What *Selle and Another (supra)* is saying is that a principal will be responsible for the acts of a servant where the servant is carrying out a task on behalf of the principal. That is not the same when the task involves employment of an independent contractor. This issue is well articulated in [Charlesworth on Negligence](#) 4<sup>th</sup> Edition, page...?.. (Sweet and Maxwell). On the subject of “independent contractors” the learned author declares that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. He says:

“Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable.”

52. In [Grace Karimi, suing as legal Representative of the estate of Silas Kobia Francis vs. Marcello Buntai](#) [2016] eKLR, Gikonyo, J. correctly observed:

“... In the law on negligence, a master is vicariously liable for any tort committed by his servant while in the course of his employment. But for vicarious liability to arise the following two things must co- exist:

1. There must be a relationship of master and servant between the Respondent and the person who committed the wrong complained of; and
2. The servant committed the wrong in the course of his employment.

But it should be understood that the servant herein for purposes of vicarious liability must be distinguished from an independent contractor. The independent contractor is engaged under a contract and for a particular assignment under the contract. Unlike in the ordinary master and servant relationship, the employer of independent contractor has no control over the independent contractor in respect of the manner in which he does his work. Their relationship is governed by the terms of the contract.”

53. In view of the foregoing, we reach the conclusion that the appellant was not by any means vicariously liable for the 2<sup>nd</sup> respondent’s acts of trespass and damage occasioned to the 1<sup>st</sup> respondent’s property. Accordingly, it is the 2<sup>nd</sup> respondent alone that must bear liability for the acts complained of, and that settles the 2<sup>nd</sup> issue before us.
54. We now turn to the 3<sup>rd</sup> issue as to whether, in any event, the 1st respondent was entitled to the sums awarded in the impugned judgment and, if the answer is in the affirmative, who as between the



- appellant and the 2<sup>nd</sup> respondent is liable to the 1<sup>st</sup> respondent. As to whether the sums awarded by the trial court on the respective heads were merited, the appellant's case is that they were not and that, if they were, they would be borne by the 2<sup>nd</sup> respondent.
55. Having found that the appellant was not liable for the acts of the 2<sup>nd</sup> respondent, and that the 2<sup>nd</sup> respondent was alone liable to the 1<sup>st</sup> respondent, we could justifiably have stopped there and let the matter take its course in the enforcement of the decree, and more so in light of the fact that the impugned judgment was entered on admission by the 2<sup>nd</sup> respondent, which did not cross-appeal or contest the appeal. That said, we nonetheless consider it prudent to clarify the law on the respective awards to the 1<sup>st</sup> respondent of general and special damages.
56. As respects the award of general damages for trespass in the sum of KShs. 100,000, the appellant contends that the award on this head was not on any legal basis. On the other hand, the 1<sup>st</sup> respondent considers an award under this head to be well deserved and, to that extent, we agree with the 1<sup>st</sup> respondent, save for the issue of quantum to which we will shortly return.
57. In principle, general damages are a type of compensatory damages, which are granted by a court in a lawsuit to redress loss or damage resulting from another person's wrongdoing. If the plaintiff can prove that the defendant's actions directly led to the loss or damage, the defendant will be ordered to pay damages. The court must then decide how much should be paid in compensation. We need not overemphasize the fact that the quantum of damages on his head depends on many variables on which we need not pronounce ourselves in extenso. Suffice it to observe that quantification or assessment of general damages is subject to the court's discretion, and is not specific or provable. The victim's suffering may be interpreted in different ways depending on the parties and their own interests in the case. In exercise of its discretion, the trial court may consider, among other things, the nature and factual details of the tort or negligence, and recklessness of the party who caused the loss or damage; the loss of enjoyment caused by the injury; and the stress and worry over the particular loss or damage complained of.
58. It is not in contention that the 2<sup>nd</sup> respondent's conduct resulted in extensive loss and damage on the 1<sup>st</sup> respondent's property, which was undoubtedly a source of grave concern and distress. In our considered view, the sum of KShs. 100,000 awarded to the 1<sup>st</sup> respondent in general damages is so inordinately low as to represent an entirely erroneous estimate, considering the extent of the damage inflicted on the suit property, the reckless conduct of the 2<sup>nd</sup> respondent, the Loss of enjoyment caused by the injury, and the stress and worry on the part of the 1<sup>st</sup> respondent over the particular loss or damage complained of.
59. In reaching this conclusion, we are mindful of the decision of the Court of Appeal for East Africa in Butt vs. Khan (1977) 1 KAR, where the Court held:
- “An appellate court will not disturb an award of 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....”
60. In Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs. A.M. Lubia & Olive Lubia (1982-88) 1 KAR 727 at page 730, Kneller, J.A. stated:
- “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 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* [1967] E.A. 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited Vs Kalovoto* [1970] E.A. 414, 418, 419. This court follows the same principles.”

61. We also take to mind this Court’s holding in *Ken Odondi and 2 Others vs. James Okoth Omburah T/A Okoth Omburah and Company Advocates* [2013] eKLR where the Court had this to say:

“We agree that this Court will not ordinarily interfere with the findings of a trial judge on an award of damages merely because this Court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge.”

62. In view of the foregoing, we do not hesitate to disturb and set aside the learned Judge’s award to the 1<sup>st</sup> respondent of KShs. 100,000 on account of general damages and hereby award the 1<sup>st</sup> respondent as against the 2<sup>nd</sup> respondent a sum of KShs. 5,000,000 together with interest thereon at the rate of 14% per annum from the date of the impugned judgment, to wit, 1<sup>st</sup> August 2013 until payment in full.

63. As to the special damages awarded by the trial court in the sum of KShs. 3,284,760 with interest at court rates from the date of filing suit until payment in full on account of the estimated cost of restoring the suit property to its original state, learned counsel for the appellant submitted that:

“The 1<sup>st</sup> respondent pleaded exact costs, i.e., KShs. 1,887,360 and KShs. 1,397,400. The only evidence tendered by the 1<sup>st</sup> respondent’s witness was an unsigned quantity surveyor’s report that bespeaks of estimated costs of KShs. 1,887,360 and KShs. 1,397,400. He tendered no evidence of the exact costs pleaded. No receipts of the exact costs pleaded, for the carting/removal of debris and filling of excavation pits were tendered in evidence.”

64. In response, counsel for the 1<sup>st</sup> respondent contended that “the appellant’s submission in respect of the damage occasioned to the 1<sup>st</sup> respondent’s property absolved the 1<sup>st</sup> respondent from the requirement to specifically prove the special damages prior to their award by the trial court.”

65. We are not persuaded by the position taken by counsel for the 1<sup>st</sup> respondent against the grain of the immutable principle that special damages must not only be specifically pleaded, but strictly proved. Neither do we agree with the words of the learned Judge in awarding the sums in issue. According to her:

“The Plaintiff produced as Exhibit 4 a Quantity Surveyor’s Report and valuation report on the areas of, and damage occasioned by the excavations and dumping on the suit property by the 2nd Defendant. The valuation report which was dated 10th May 1990 showed a diminution of value of the suit property of Kshs 4,000,000/=, while the Quantity Surveyors Report estimated the costs of removing the debris from the land to be Kshs 1,887,360/= and the estimated costs of filling the pits and other excavated areas to be Kshs 1,397, 400/=....

The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land not both. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm. The test that guides the court in deciding which of the two measures of damages to employ is the reasonableness of the said reinstatement in light of the extra costs that may be incurred by the Defendant in this regard. In the present case the diminution in value and the cost of replacement are



approximately the same, and this court hereby awards the Plaintiff special damages for the cost reinstatement of Kshs 3,284,760/= with interest at court rates from the date of filing of this suit until payment in full.”

66. Of the conclusion reached by the learned Judge, we have this to say with all due respect: that special damages are consequential to, and are intended to compensate the injured party for, loss or damage arising from the conduct of the party at fault; that such damages need not only be pleaded, but strictly proved as having been incurred by the claimant as a direct expense on account of the loss or injury complained of; that special damages are distinct from general damages, and that the two cannot be equated or otherwise awarded as alternative compensation. Each must be separately pleaded. In our considered view, once pleaded, special damages must be strictly proved. They cannot be awarded without strict proof on the grounds that general damages could have been awarded in a similar amount.
67. The general and immutable principle that special damages must be strictly proved was affirmed by this Court in *Hahn vs. Singh* [1985] KLR 716 at pP. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi, JJA, and Chesoni, Ag. J.A. – held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
68. The cost of removing debris (1,887,360) and cost of filling excavation pits (KShs. 1,397,400), is in the nature of special damages, which must be pleaded and strictly proved. Though pleaded, we find no evidence or proof that the sums claimed were actually incurred in consequence of the damage on the suit property. All that the 1<sup>st</sup> respondent did was to present to the trial court an unsigned report prepared by a firm of quantity surveyors sometime in April 1990, and containing the estimated costs of removing the debris, filling the excavation pits and bunkers and the diminished value of the land. It is noteworthy that the unsigned report styled “Quantity Surveyor’s Report” did not disclose the maker, and was merely produced at the hearing before the trial court by the 1<sup>st</sup> respondent’s son, Robin Muriuki Ndegwa, who was his only witness. But for the unsigned report, we find no evidence on the record as put to us of the actual expenses incurred on that account.
69. In *Douglas Kalafa Ombeva vs. David Ngama* [2013] eKLR, this Court held that:
- “... it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically.”
70. In view of the foregoing, we form the considered view that the special damages awarded by the trial court in the sum of KShs. 3,284,760 with interest at court rates from the date of filing the suit until payment in full on account of the estimated cost of restoring the suit property to its original state was premature and unmerited in so far as there was no evidence that such moneys had actually been expended. Accordingly, we agree with the appellant that this award cannot stand and, consequently, the same is hereby set aside.
71. Turning to the award by the trial court of “mesne profits/loss of profits” at KShs. 50,000 per month with interest at court rates from the date of filing suit until payment in full, we take note that this award is also challenged in the appeal before us and hasten to observe that “mesne profits” are not synonymous to “loss of profits”. The two are distinct terms deserving of separate consideration as we hereby purpose to.



72. In their submissions, learned counsel for the appellant faults the trial court for making an award on this head without proof of actual loss suffered. Counsel questions the existence of unspecified evidence alluded to by the Learned Judge. According to learned counsel, such evidence, other than the allegations made orally by the only witness, did not exist.

73. On their part, counsel for the 1<sup>st</sup> respondent had this to say in response:

“54. The extent of damage of land and the resultant rendering of the rest of the Suit Property is a relevant premise upon which the Trial Judge awarded mesne profits to the 1st Respondent in due exercise of her discretion. Absent any other grounds advanced by the Appellant, it is the submission of the 1st Respondent that the award and quantum of mesne profits was, indeed, merited and that this Court should find that the Trial Judge duly exercised her discretion, taking into account the relevant factors, in awarding the same.”

74. The impugned award by the learned Judge of “mesne profits/loss of profits” was couched in the following words:

“The Plaintiff did not bring any proof of the basis for the mesne profits of Kshs 50,000/= per month, but brought evidence to show that the land was in a state that was unusable, and it therefore could not provide any sort of profits. Consequential damages in terms of loss of profits are recoverable as special damages.”

75. On this head of claim, we cite with approval the decision of the High Court Mativo, J., (as he then was), in *Rajan Shah T/A Rajan S. Shah and Partners vs. Vipin P. Shah* [2016] eKLR where the learned Judge had this to say:

“The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of other’s property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.”

76. In the same vein, the Court of Appeal in *Christine Nyanchama Oanda vs. Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR held that:

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black’s Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case of Peter Mwangi Mbuthia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:



“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

77. In the case of *Inverugie Investment v Hackett* (Lord Lloyds [1995]3 ALL ER 842, it was held thus:
- “Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass” since both mean one and the same thing...”
78. Finally, having allowed a sum of KShs. 5,000,000 general damages to compensate the 1<sup>st</sup> respondent for trespass, the claim for mesne profits would not avail and, in any event, this was not a proper case for an award of mesne profits.
79. In addition to the foregoing, the appellant faults the learned Judge for awarding the 1<sup>st</sup> respondent “loss of profits” that were not pleaded in his plaint. We hasten to observe that, even if they were pleaded, lost profits are in the nature of special damages, which must be specifically pleaded and strictly proved.
80. Lost profits may be defined as economic damage caused by a disruption in business operations. The damage can be the result of a variety of factors, some of which include patent infringement, breach of contract, liability caused by an accident, negligent acts or physical damage to business property or equipment. The key words here are “economic damage” caused by “disruption of business operations” resulting from negligent acts or trespass as was the case here. The question that arises here is whether there was, on the suit property, evidence of business operations that was disrupted by the 2<sup>nd</sup> respondent’s conduct resulting in economic loss for which the 1<sup>st</sup> respondent was entitled to compensation.
81. Learned counsel for the appellant viewed the matter differently. They only fault the trial court for finding “that consequential damages in terms of loss of profits are recoverable as special damages” According to learned counsel, “the question that must be answered is where is the evidence of the said special damages.”. They submit, as we hereby find, that no such evidence was tendered, and that the claim on that head ought to have been dismissed. Counsel further submits that the learned Judge erred in “amending the 1<sup>st</sup> respondent’s pleaded claim in mesne profits to one of loss of profits”.
82. In answer to the question raised by counsel for the appellant on the issue of lost profits awarded in the impugned judgment, learned counsel for the 1<sup>st</sup> respondent had this to say in their submissions:
- “54. The extent of damage of land and the resultant rendering of the rest of the Suit Property is a relevant premise upon which the Trial Judge awarded mesne profits to the 1st Respondent in due exercise of her discretion. Absent any other grounds advanced by the Appellant, it is the submission of the 1st Respondent that the award and quantum of mesne profits was, indeed, merited and that this Court should find that the Trial Judge duly exercised her discretion, taking into account the relevant factors, in awarding the same.”
83. A glimpse at the counsel’s submissions electing to address the issue of mesne profits, on which we have separately pronounced ourselves above, does not answer the decisive question posed by counsel for the appellant. It is common ground that lost profits are in the nature of special damages which, if not specifically pleaded and strictly proved, are not recoverable. In any event, mesne profits and lost profits are dissimilar, and one cannot mean the other.



84. We take to mind that, as a general rule, in an adversarial system of justice a court has no jurisdiction to award relief not sought by a claimant or defendant in proceedings before it. This Court in *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others* [2014] eKLR quoted Stevens & Sons Ltd, *Current Legal Problems*, Volume 13, Issue 1, 1960, Page 174 thus:

“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....”

85. Having carefully examined the record as put to us, we find nothing to suggest that “lost profits” were pleaded in the 1<sup>st</sup> respondent’s plaint dated 25<sup>th</sup> May 1990, and neither was any evidence adduced at the trial in support of his claim under that head. Moreover, a claim for “mesne profits” cannot be equated with a claim for “loss of profits”. In view of the foregoing, we reach the inescapable conclusion that the learned Judge erred in awarding the 1<sup>st</sup> respondent KShs. 50,000 per month with interest at court rates from the date of filing the suit until payment in full” in the absence of specific proof of the existence on the suit property of business operations disrupted by the 2<sup>nd</sup> respondent’s conduct resulting in economic loss.

86. Finally, we turn to the issue of costs in the trial court, which the 1<sup>st</sup> respondent had not specifically prayed for in his plaint. Neither had the appellant sought to recover costs in its defence. However, the question as to who should bear the costs in the proceedings before the trial court fell to be determined on account of the 2<sup>nd</sup> respondent’s prayer that the 1<sup>st</sup> respondent’s claim against it be dismissed with costs. It is on that basis that the learned Judge proceeded to pronounce herself on the issue of costs, and properly so in exercise of the court’s unfettered discretion enshrined in statute law.

87. The 2<sup>nd</sup> respondent having sought to recover costs in the proceedings, it was incumbent upon the trial court to exercise its unfettered discretion on the authority of section 27 of the *Civil Procedure Act* (Cap. 21) and pronounce itself on the issue as to who, among the parties, was liable to bear the costs of the suit. In doing so, the trial court was also bound to be guided by the general principle that costs follow the event as expressly stipulated in the proviso to section 27 of the Act, and which has been the subject of numerous judicial decisions a few of which we hereby cite with approval.

88. In the House of Lords decision in *Reid, Hewitt and Co. vs. Joseph Air* 1918 Cal 717 and *Myres vs. Defries* (1880) 5 Ex D 180, the court had this to say:

“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.”



89. Likewise, the High Court at Machakos in *Party of Independent Candidate of Kenya & another vs. Mutula Kilonzo & 2 others* (2013) eKLR, which cited with approval the words of Murray, C. J. in *Levben Products vs. Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 thus:

“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 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.”

90. Section 27 of the *Civil Procedure Act*, Cap. 21 reads:

“27. Costs

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

91. Addressing the issue of costs, *Halsbury's Laws of England* (4th Edition) (Re-issue), [2010], Vol. 1. para 16 states:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

92. In the same vein, the learned author, the Hon. Justice (Retired) Kuloba in his *Judicial Hints on Civil Procedure* 2nd edition, Law Africa EA Publishing Ltd Nairobi 2011) had this to say at p.94:

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”



93. In view of the foregoing, we can understand why the learned Judge had good reason to exercise her unfettered discretion to make an award on costs. However, in view of our finding that the appellant was not vicariously liable for the acts of the 2<sup>nd</sup> respondent, the learned Judge ought to have found, ordered and directed that the 1<sup>st</sup> respondent's costs of the suit be borne by the 2<sup>nd</sup> respondent.
94. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned judgment and the decree of the trial court, the written and oral submissions of the learned counsel for the appellant and counsel for the 1<sup>st</sup> respondent, and the authorities cited in the rival submissions of the parties, we hereby find that the appeal partially succeeds to the extent of our finding that:
- a. The 2<sup>nd</sup> respondent was at all material times an independent contractor, and not an employee or servant of the appellant;
  - b. The appellant was by no means vicariously liable for the acts of the 2<sup>nd</sup> respondent;
  - c. The second respondent was alone liable to the 1<sup>st</sup> respondent for the loss and damage suffered in consequence of the 2<sup>nd</sup> respondent's trespass onto the suit property and, accordingly, we hereby order and direct that –
    - i. The 2<sup>nd</sup> respondent do pay to the 1<sup>st</sup> respondent a sum of KShs. 5,000,000 general damages together with interest thereon at the rate of 14% per annum with effect from 1<sup>st</sup> August 2013 until payment in full;
    - ii. The 2<sup>nd</sup> respondent do pay to the appellant and the 1<sup>st</sup> respondent costs of this appeal and of the proceedings in the trial court together with interest thereon at the rate of 14% per annum from the date hereof until payment in full; and
  - d. Subject to our foregoing orders and directions in (a), (b) and (c) above, the judgment and decree of the High Court of Kenya at Nairobi (P. Nyamweya, J.) dated 1<sup>st</sup> August 2013 be and is hereby set aside.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2023.**

**D. K. MUSINGA, (P)**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

