Manchester Outfitters (Suiting Division) Limited Now called King Woollen Mills Limited & another v Standard Chartered Financial Services Limited & another (Civil Appeal 88 of 2000) [2022] KECA 1401 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1401 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 88 OF 2000

MSA MAKHANDIA, S OLE KANTAI & P NYAMWEYA, JJA

DECEMBER 16, 2022

BETWEEN

MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED NOW CALLED KING WOOLLEN MILLS LIMITED ..... 1ST APPELLANT

GALOT INDUSTRIES LIMITED ..... 2ND APPELLANT

AND

STANDARD CHARTERED FINANCIAL SERVICES LIMITED .... 1ST RESPONDENT

AD GREGORY & CD CAHILL ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (E.M. Githinji, J.) dated 30th July, 1999 in H.C.C.C. No. 5002 of 1990)

JUDGMENT

Judgment of Kantai, JA.

1. The dispute from which this appeal arises has had a long, chequered history. In the course of time documents have been lost or misplaced, others have faded and become illegible, dates are lost; the 7 volumes of Record of Appeal are difficult to follow. The date of filing of the plaint cannot be seen but it is dated 26th September, 1990, which means that the case has been in the judicial system for over 30 years. That plaint was amended twice – the re-re- amended plaint which is not dated runs into 38 paragraphs some divided into "A" up to "H". Many applications and appeals were made; the suit was heard and determined; an appeal to this Court was heard and Judgment delivered by a bench of 3 Judges but that Judgment was later reviewed and set aside. An appeal to the Supreme Court of Kenya on that issue was dismissed. At one time the dispute ended up at the COMESA Court but it was later withdrawn. I can only hope that we can now determine the matter in a way that the parties

find satisfactory unless they are able to find themselves again in the Supreme Court where they have been before.

2. The plaintiffs were King Woolen Mills Limited and Galot Industries Limited (the appellants herein called Manchester Outfitters Suiting Division now called King Woollen Mills Limited and Galot Industries Limited) and the defendants were Standard Chartered Financial Services Limited (1st defendant) and A.D. Gregory and C.D. Cahill (the 2nd defendants – the respondents here). It was stated in the plaint that the 1st respondent had been carrying on the business of financing industries and providing other financial facilities but had not had a banker/customer relationship with the 1st appellant; that the 1st respondent was not a bank within the meaning of The *Banking Act*; that all transactions between the appellants and the 1st respondent up to 1stNovember, 1989 were ultra vires the 1st respondent. It was averred in the plaint that by a loan agreement dated 2nd March, 1982 entered into by Standard Chartered Merchant Bank Limited of the one part, the 1st appellant of the second part and East African Acceptances Limited of the third part the 1st appellant borrowed from the said bank 1,300,000 Deutsche Marks and 1,050,000 Swiss Francs in terms of an agreement to be governed by the laws of England; that the 1st appellant executed a debenture in favour of the said East African Acceptances Limited (later renamed Standard Chartered Financial Services Limited) as guarantor for the said loan; that the 1st respondent had never had a relationship of banker and customer with the appellants; that in 1986 the said loan was terminated and localized into a loan with local currency; that a new agreement which was made by the parties required that a new debenture be created; that in those premises the 1st respondent had no right in law to appoint receivers. Further, that the new debenture to be created was to run pari-passu with a debenture held by Kenya Commercial Bank; the 2nd respondent's (appointed by the 1st respondent as Receiver/Manager of the 1st appellant) were partners in the firm of KPG Peat Marwick, a firm of accountants. The 1st appellant had executed a debenture in favour of the 1st respondent dated 5th April, 1982 as security for the repayment by the 1st appellant of sums payable by the 1st respondent to Standard Chartered Merchant Bank Limited pursuant to the guarantee. Further, that in the debenture the 1st appellant covenanted that it would execute in favour of the 1st respondent a first legal mortgage or charge over two plots of land namely L.R. No. 12867/1 Grant No.I.R. 36265 and L.R. No. 12876/2 Grant No. 36266; a charge was duly executed dated 5th April, 1982 consideration of which was the same as the consideration for the debenture to secure payments falling due but not for any other purpose. An attack was made in the plaint on conduct of advocates who drew those security documents and that became subject of a ruling where the attack was dismissed but in an appeal that followed to this Court proceedings conducted by those advocates were expunged and they (the advocates) were barred from representing the respondents in the case.

3. It was further averred that in 1986 the 1st appellant and the 1st respondent entered into discussions to localize the foreign currency loan; Standard Chartered Merchant Bank was paid by the 1st respondent and a fresh loan was made by the 1st respondent to the 1st appellant in what was called a localized loan through a "Facility Letter" dated 7th October, 1986 where the foreign currency loan was terminated and the 1st respondent advanced to the 1st appellant a loan of Ksh.9,000,000 repayable by half-yearly instalments. That by the said Facility Letter its terms and conditions suspended any previous agreements between the 1st appellant and the 1st respondent and contained the entire agreement between the parties. Further, that prior to the payment-off of the balances due to Standard Chartered Merchant Bank Limited of the said loans the said bank had not called in the guarantee nor had it sought to enforce its terms against the 1st respondent; that in consequence of the said payment the guarantee was discharged and was no longer effective for any purpose and that the debenture was thus discharged. It was also averred in the plaint that security was to be given by the 1st appellant in the

form of a legal charge on plots of land owned by the 1st appellant and an all assets debenture and that the previous securities could not secure the new loan advanced by the 1st respondent to the 1st appellant. Further, that by a letter dated 9th February, 1989 advocates acting for the 1st respondent demanded payment of indebtedness by the 1st appellant as at 31st January, 1989 Ksh,14,272,198.85 with interest; the 1st appellant asked for time to restructure its financial facilities with its bankers (Kenya Commercial Bank); discussions were held between the parties which included the 2nd appellant (the 2nd appellant owned land which it offered to sell to Kenya Commercial Bank to raise capital for various purposes); the sale of land raised Ksh.38,000,000 net; discussions fell through and the 1st respondent by letter dated 5th September, 1990 demanded payment from the 1st appellant of Ksh.19,024,522.05 in default of payment receivers and managers were to be appointed; on the same day 5th September, 1990 the 1st respondent appointed the 2nd respondent to be receivers and managers of all the property and assets of the 1st appellant on the footing of a debenture. It was averred that the 1st respondent was not entitled to appoint receivers and managers in the absence of a new debenture to secure the local loan and declarations were sought in that regard and orders of injunction were prayed for. It was stated in particulars of special damage that the conduct of receivers and mangers while in office and their closing down of the appellants' factory had destroyed the 1st appellant's business which had a turn-over in 1987 of Ksh.42,867,361; in 1988 of Ksh.30,151,827; in 1989 Ksh.21,108,387 and in the first 8 months of 1990 Ksh.6,641,616. In material loss it was stated that the factory contained machinery, finished goods, spare parts, raw materials in the form of dyes chemicals. Particulars of special damages caused to the 2nd appellant were stated as Ksh.11,496,531/30; damages were claimed on "...damage done to the name of Galot and the standing of the Galot group of companies"; damages for impairment of the credit standing of the 2nd appellant; a declaration was sought to the effect that appointment of the 2nd respondent by the 1st respondent as receivers and managers was invalid and/or in breach of contract and was null and void and should be revoked; an injunction be granted to restrain the 2nd respondent or the 1st respondent from interfering with the operation by the 1st appellant of its day to day business; an order for delivering up of possession of all monies and other assets and property of the 1st appellant in the 2nd respondent's possession, power or control, and an account of all monies of the 1st appellant received by them; a declaration that the debenture and all securities given therefor were always unenforceable against the appellants with respect to any rights conferred by the excess security and should be wholly set aside alternatively should be rectified so as to eliminate the terms conferring – the excess security and in any event should be discharged. An order for rectification was also prayed for as were damages and it was further prayed that such enquiry as to the damage sustained by the machinery in the 1st appellant's premises occasioned by the 2nd respondent's acts or omissions as the Court may think just and expedient; costs and interest.

4. The claim was resisted by the respondents in a joint "Defence to Re- Amended Plaint and Counterclaim" where it was denied that the appointment of the 2nd respondents as receivers was wrongful; it was denied that the 1st or 2nd appellant were carrying on business as alleged in the plaint; it was averred that a Guarantee dated 5th April, 1982 was duly signed. It was stated that the primary purpose of the debenture was to stand as security for sums other than those pursuant to the Guarantee which may become due by the 1st appellant to the 1st respondent; it was denied that the security provided by the 1st appellant to the 1st respondent by legal charge was restricted to securing payments falling due under the Guarantee it being stated that it had been agreed in the Debenture that the legal charge was for the purpose of extending the fixed charge created by the Debenture which, together with the floating charge was to secure the payment of all moneys covenanted to be paid.

5. In the counter-claim the 1st respondent claimed that it had in the years 1986 and 1987 made payments on behalf of the 1st appellant called "the arrears" amounting to Ksh.4,644,414; that in 1987 the

1st respondent, pursuant to the Facility Letter dated 7th October, 1986 lent to the 1st appellant sufficient funds to enable payment to Standard Chartered Merchant Bank Limited of the full amount outstanding by the 1st appellant to the said institution and that by the agreement the 1st appellant became indebted to the 1st respondent to a sum of Ksh.13,811,763.65 as at 29th June, 1987; that the 1st appellant made payments in respect of that loan in the sum of Ksh.1,833,337 and interest Ksh.1,741,652.75; that a sum of Ksh.24,908,418 was due from the 1st appellant to the 1st respondent as at 31st January, 1992; that as at 5th September, 1990 the 1st appellant was indebted to the 1st respondent as at 31st January, 1992; that as at 5th September, 1990 the 1st appellant was indebted to the 1st respondent in the sum of Ksh.19,024,522.05 which sum was demanded by a letter of that date 5th September, 1990 which was not paid. In the premises the 1st respondent prayed for judgment against the 1st appellant for Ksh.24,837,999 with interest and a declaration that the debenture dated 5th April, 1982 issued by the 1st respondent to the 1st appellant was a valid and subsisting security for the indebtedness of the 1st appellant to the 1st respondent. The 2nd respondent prayed in the counterclaim for Ksh.2,337,161.75 with interest at 19% per annum compounded and a declaration that the appointment made on 5th September, 1990 of the 2nd respondent as receivers and managers of the 1st appellant was valid and subsisting.

6. The suit was initially heard by Dugdale, J. who took evidence by many witnesses for several days. There was an appeal to this Court challenging the hearing before the Judge and representation of the respondents by a firm of advocates and in a judgment delivered by this Court those proceedings were set aside it being ordered that the suit be heard de novo before another Judge and the respondents be represented by a different law firm. That is how the matter ended up in the hands of Githinji, J. (as he then was. He was later to serve with distinction as a Judge of this Court rising to the position of Acting President Court of Appeal).

7. The proceedings before Githinji, J. took long. In the course of taking evidence of the nine witnesses called by the appellant there were many applications and objections leading to time take for rulings and after five witnesses had been called by the respondents the hearing was adjourned to allow for a court visit to the 1st appellant's factory at Athi River. This took place in the late afternoon of 24th July, 1995 where the Judge, counsel for the parties and witnesses inspected the factory noting amongst other things the state of machinery some of which were noted to be in good condition but others had either been cannibalized or stolen. The machinery was covered in dust and was rusted; some could be rehabilitated at considerable cost. The court visit to the factory was cut short at 6 p.m. because:

> " ... residential flats not visited because it is feared that there are many poisonous snakes...."

All parties left the factory and proceedings resumed two days later on 26th July, 1995 where the Judge took evidence of four more witnesses called by the respondents (this took several days characterized, again, by objections) and the respondents case was closed on 31st July, 1995 when Judgment was reserved to be delivered on notice.

8. Judgment was eventually delivered exactly four years later (30th July, 1999) where the Judge found no merit in the suit which he dismissed and he found in favour of the respondents and allowed the counter-claim.

9. The appellants filed separate Notices of Appeal against the whole decision while the respondents filed "Notices of Grounds for Affirming the Decision" where in 2 grounds it is stated that the debenture dated 5th April,, 1982 to which all the other securities were made subsidiary, by its specific terms covered all future borrowings and liabilities of the 1st appellant whenever and however arising, and,

secondly, that the debenture and the securities were therefore valid security for the sums owing by the 1st appellant in any event.

10. There are 48 grounds of appeal raised in the Memorandum of Appeal which the parties agree in written submissions to be reduced to a determination of the following issues:

    i. Whether the debenture executed by the 1st respondent was valid and enforceable.

    ii. Whether the 1st respondent's appointment of the 2nd respondent as Receiver Manager in respect of the appellants' assets on 5th September, 1990 was proper, regular, lawful and/or valid.

    iii. Whether the appellants are entitled to damages, and if so, the quantum thereof.

    iv. Whether the respondents are entitled to reliefs in the counter-claim.

11. The issues raised in the said agreed grounds are intertwined and they cut across and as is stated by the appellants in their written submissions at paragraph 47:

> " .... We humbly submit that the learned Judge erred in law and fact as set out in fourty eight (48) grounds of Appeal in the Memorandum of Appeal dated 28th April, 2000 (see page 4-6 Vol. 1) which we have classified into three (3) clusters in paragraph 14 hereinabove. The said grounds are all largely combined and argued herein jointly in these submissions with the said clusters in mind, in view of the fact that the same are interwoven in many respects ...."

12. When the appeal came up for hearing before us on a virtual platform on 13th July, 2021 learned counsel Mr. Philip Nyachoti appeared for the appellant while learned Senior Counsel Mr. George Oraro appeared for the 1st respondent. Learned counsel Mr. Paul Chege appeared for the 2nd respondent. All the parties had filed written submissions which they highlighted before us. For the appellant Mr. Nyachoti identified as the central issue in this appeal the debenture issued in 1982 by the appellant to the 1st respondent and the appointment of the 2nd respondent as receiver/manager of the appellant. Counsel submitted that that debenture ceased to be operational when the foreign currency loan was converted to a loan in Kenyan (local) currency. Counsel submitted that the foreign currency loan was terminated in October 1986 and the charge and debenture offered as security for those loans ceased to have any legal effect. According to counsel money advanced by the 1st respondent to the appellant was through a separate distinct arrangement, different from the foreign currency loan arrangement. Counsel further submitted that for the local loan to be secured security documents (charge and debenture) had to be executed and registered as required in law; they not having been stamped or registered they were of no legal effect and were invalid. On the issue of damages counsel for the appellant submitted that damages were specifically pleaded in the re-amended plaint and that various witnesses had testified on behalf of the appellant in that regard. Counsel faulted the trial Judge who had failed to assess damages and prayed that we refer the matter back to the High Court for assessment of damages only but not for re-trial considering the age and history of the case.

13. In opposing the appeal Mr. Oraro submitted that no security had been offered by the appellant for the foreign currency loan but a debenture had been created in favour of the 1st respondent which covenanted to repay a loan or any other money advanced. Counsel referred to provisions of *Companies Act* where a company which creates a debenture is obligated to pay a loan until the loan is discharged. He also referred us to Article 159 of the *Constitution of Kenya, 2010* where justice is to be dispensed without technicalities. On damages it was counsel's submission that the appellant had not led any evidence on which damages could be awarded. On the counter-claims counsel submitted that the trial Judge did not properly deal with the issue. He concluded by submitting that a party should not be enriched unjustly; the appellant had taken a loan which it had not repaid.

14. Mr. Chege for the 2nd appellant associated himself with Mr. Oraro's submissions and submitted that the appointment of the 2nd respondent as receiver/manager was valid. He asked that the appeal be dismissed.

15. In a brief rejoinder Mr. Nyachoti submitted that the 1st respondent had all options in law to recover the debt but could not escape the fact that it had no legal authority to appoint the 2nd respondent as receiver/manager. He referred us to the "Credit Facilities" document at page 319 of the record and the general terms of that document at page 330 of the record in support of his submission that the appointment of the 2nd respondent by the 1st respondent as receiver/manager was unlawful.

16. At the conclusion of hearing the appeal we reserved Judgment to be delivered on 22nd October, 2021. It was then discovered that of the 7 volumes of the record of appeal where there is also a supplementary record of appeal Volume 5 of that record was missing. The Court Registry could not trace its copy; counsel for the parties did not have it and this led to delay in preparing this Judgment where the matter had to be mentioned several times to ascertain whether that volume had been traced. An online version of the record was provided by the High Court Registry but this was not of much help. This Judgment has been prepared as agreed by the parties in the absence of the said Volume 5 of the record of appeal which it is agreed cannot be found or traced. We finally deferred Judgment to be delivered on 9th December, 2022.

17. Enough of that. Let me now come to the crux of the matter.I had earlier set out the issues which have been identified by the parties as the issues in this appeal I accept them as the issues in this appeal.

i. Whether the debenture executed by the 1st respondent was valid and enforceable.

18. It is common ground that the foreign loan issued to the appellant in 1982 comprising 1,300,000 Deutsche Marks and 1,050,000 Swiss Francs was terminated in 1986 when a loan in local currency was issued. It was governed by Credit Facilities document which stated at Clause 11:

> " General
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> a. The Facility Letter and Terms and Conditions supersedes any previous agreement(s) whether written, oral or implied between the Company and the Borrower in relation to the Facility offered hereby and contains the entire agreements of the Company and of the Borrower with respect to the Facility.Any variation of or amendments to this letter may only be made in writing signed by or on behalf of each party hereto."

19. Section 65 of the repealed *Registered Land Act* (this is Section 56 of the new *Land Registration Act*) allowed a proprietor of land to, in a prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or contingent debt or other money. The charge had to be executed, stamped and registered at the Registry of Lands to have legal effect and there was provision at Section 81 of the said Act on how that charge would be discharged upon repayment of the sum secured by the charge.For incorporated entities Section 96 of the repealed *Companies Act* Cap. 486 Laws of Kenya provided in respect of registration of charges:

> 96
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> (1). Subject to the provisions of this Part, every charge created after the fixed date by a company registered in Kenya and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby,

be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced are delivered to or received by the registrar for registration within forty-two days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to the following charges—

a. a charge for the purpose of securing any issue of debentures;

(4) The instrument creating or purporting to create a charge may be sent for registration under this section notwithstanding that further proceedings may be necessary to make the charge valid or effectual.

(7) Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled pari passu is created by a company, it shall for the purposes of this section be sufficient if there are delivered to or received by the registrar within forty-two days after the execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars—

a. the total amount secured by the whole series; and

b. the dates of the resolutions authorizing the issue of the series and the date of the covering deed, if any, by which the security is created or defined; and

c. a general description of the property charged; and

d. the names of the trustees, if any, for the debenture holders, together with the deed containing the charge or a copy thereof verified in the prescribed manner, or, if there is no such deed, one of the debentures of the series:Provided that, where more than one issue is made of debentures in the series, there shall be delivered to the registrar for registration within forty-two days after the date of its issue particulars of the date and amount of each issue, but an omission to do this shall not affect the validity of the debentures issued."

No charge or debenture was stamped or registered in respect of the credit facilities issued in 1986 and the provisions of the *Companies Act* were not followed at all. There were therefore no securities in place to secure the local loan. The trial Judge held in that respect:

> " .... I find that the debenture in its present form was authorized and approved by MOSD and that the Debenture and the legal charge are valid document. I further found that the claim based on invalidity of the debenture and the reliefs sought and based on the invalidity of the debenture are barred by S.4 of the *Limitation of Actions Act* ..."
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> He further held:
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> So, in respect of the 5th issue, I conclude that the localization of the Eurocurrency loan merely rendered the guarantee in operative (sic) but left the debenture and legal charge as valid securities for the localized loan.
>
> Alternatively, the transaction can be viewed from a different perspective. At the time of localization MOSD was in arrears of the Eurocurrency loan to the tune of Kshs.4,524,985.70 (EX A.P. 150 There was no possibility of MOSD honouring the

eurocurrency loan unless the recovery programme was successfully effected. First defendant paid the arrears of shs.4,524,985.70 and eventually the entire Eurocurrency loan to honour its obligations under the guarantee. In that case, the first defendant was entitled to enforce the securities given by MOSD in consideration of the guarantee."

The Judge further found that execution of securities was not intended by the parties and that it would not have been possible to execute securities considering the nature of the transaction.

20. With respect, I cannot agree with those findings or conclusions. There was a clear procedure in 1986 when the local loan was granted for securing the same. It was required that a charge and debenture be created, executed,stamped and be registered in accordance with the provisions of the *Registered Land Act* and the *Companies Act*. The 1st respondent did not follow that procedure. The Credit Facilities document executed by the parties could not replace that procedure required in law. That document stated in clear terms that it superseded all previous agreements in respect of the facility offered and that it contained the entire agreement between the parties. The 1st respondent had no valid or legal instrument on which it could appoint the 2nd respondent as receiver/manager. The appointment of the 2nd respondent to manage the affairs of the appellant was invalid, it was illegal, null and void.

ii. Whether the 1st respondent's appointment of the 2nd respondent as Receiver Manager in respect of the appellants' assets on 5th September, 1990 was proper, regular, lawful and/or valid.

21. I have found that the 1st respondent possessed no legal instrument on which it could have appointed the 2nd respondent as Receiver Manager.

iii. Whether the appellants are entitled to damages, and if so, the quantum thereof.

22. Having found as I have done that the appointment of Receiver Manager was illegal it follows that the appellant is entitled to damages. I had stated at the beginning of this Judgment that the litigation between the parties in this appeal began in 1990, over 32 years ago. Mr. Nyachoti, counsel for the appellant, pointed out that witnesses who testified before the High Court have either died or cannot be found.It is unfortunate that the trial Judge did not assess damages as he was required to do. It was held way back in 1968 by Law, JA in the celebrated case of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 at 131:

> " As to the amount for which judgment should be entered, it is most unfortunate that the learned judge made no finding in this respect. It is always desirable, in a suit for damages, for the trial judges to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. As it is, I can see no alternative other than to remit this case to the High Court of Zanzibar, with a direction to the judge to adjudicate upon the issue of damages, and to enter judgment for the first and second appellants for such sums by way of special and general damages respectively as he shall deem fit."

So we are in the unfortunate position where the trial Judge, who dismissed the suit, failed in his duty to assess damages should the suit have succeeded. Where does that leave us?

23. I have carefully gone through the record and noted the evidence of the many witnesses who gave evidence on behalf of the appellant. The case made by the appellant reached the legal threshold and was proved on a balance of probabilities and the appellant was entitled to Judgment as pleaded in the

re- re-amended plaint. The appellant is entitled to damages. Rule 33 of the *Court of Appeal* Rules 2022 provides as follows on the mandate of the Court on an appeal like this one from the High Court:

33. On any appeal from a decision of a superior court, the Court shall have power, so far as its jurisdiction permits—

a. to confirm, reverse or vary the decision of the superior court;

b. to remit the proceedings to the superior court with such directions as may be appropriate; or

c. to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."

24. In the *Selle* (supra) case it was held that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 witnesses and should make due allowance in this respect. In particular, the 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."

The mandate of the court allows us to render the matter to the High Court for assessment of damages. I think it would not be fair or practical in the circumstances of the case to order a retrial, where as submitted by counsel for the appellant, witnesses who testified many years ago may have died, be frail of body or mind or have relocated from this jurisdiction. This Court in the case of *Aloyce Mareita v Kenya Bus Services (Msa) Limited* [1987] eKLR dealt with a Judgment of the High Court where a claim for wrongful termination of an employee from employment had been dismissed. After considering the evidence afresh this Court held:

> " Having taken into account the plaintiff's evidence and viewing the whole matter in that light we do not think that the decision of the judge can be said to have been reached after a full consideration of the evidence. Accordingly, we allow this appeal, with costs and order that there be assessment of the amount due to him."

25. There was also the case of *Mong'are t/a Gekonga Momanyi Advocates v Standard Limited* [2002] eKLR which involved a road accident case which reached this Court on a second appeal. The suit had been dismissed and the dismissal upheld by the High Court. We thought otherwise and gave the following directions:

> " We must allow this appeal. The learned Judge did not say what damages he would have awarded to the appellant, had he found for him. There is no material before us upon which we ourselves can make the assessment and it is unfortunate that we have to remit the matter to the learned Judge, a process which will involve further delay and attendant additional costs. In the circumstances of this case there is no way we can avoid that course.Accordingly, we allow the appeal, set aside the order of the learned Judge dismissing the appellant's suit with costs and substitute it with an order entering judgment for the appellant as plaintiff

with costs thereof. We remit the case to the trial Judge to assess the damages payable to the appellant. We grant to the appellant the costs of this appeal."

26. *Andrew Mwori Kasaya v Kenya Bus Service* [2016] eKLR was a road accident case which reached this Court on a second appeal. The suit had been dismissed and the dismissal upheld by the High Court. We thought otherwise and gave the following directions:

> " We accordingly set aside that affirmation and substitute it with a finding that on the basis of the record as it was before the two courts below liability was established in favour of the appellant as against the respondent at 100%. In the result, we set aside the findings of the High Court and substitute therefor an order that on the basis of the record before it liability was established in favour of the appellant as against the respondent at 100%. We therefore remit the matter back to the High Court with directions to assess damages payable to the appellant."

27. The High Court had dismissed a petition where the appellant had claimed violation of his constitutional right. The appellant appealed to this Court in *Muchiri Kiuma Maina v Attorney General* [2018] eKLR and this is what we said on the issue of assessment of damages:

> " The appellant's constitutional rights were violated when he was arrested without warrant and detained for about 3 days at the police station and must have suffered humiliation and embarrassment when, firstly, he was bundled into the police motor vehicle without any or any valid reason being given to him. Secondly, he was detained at the police station for about 3 days, and thirdly, he was escorted to his home by heavily armed police officers where a search was conducted and company documents, which he was entitled to keep as the secretary and director of the company, were carted away. The police had no business doing all these and the learned Judge should have found in favour of the appellant. He was entitled to the prayers that he sought in the petition before the learned Judge. The appeal has merit and we hereby allow it. We set aside the orders of the learned Judge and substitute therefore an order allowing the petition. As we have noted earlier, the learned Judge did not assess damages that he would have awarded to the appellant had the petition succeeded. It was his duty to do that. In the absence of such assessment the proper order that we make is to remit the matter to the High Court for assessment of damages."

28. I am persuaded that the matter be referred back to the High Court for assessment of damages only.

iv. Whether the respondents are entitled to the reliefs in the counter- claim.

29. They are not. I have found that there was no instrument that allowed the 1st respondent to exercise any power over the appellant; the 1st respondent had no power to appoint the 2nd respondent as receiver/ manager.I would allow the appeal and make the following orders:

    i. The appeal be and is hereby allowed.

    ii. The Notices of Grounds for Affirming the decision have no merit and are dismissed.

    iii. The matter be remitted to the High Court for assessment of damages only.

    iv. Costs of the appeal and of the court below are awarded to the appellants.

    As Asike-Makhandia & P. Nyamweya, JJ.A. agree, those are the orders of the Court.

Judgment of Asike-Makhandia, JA.

1. I have had the benefit of reading in draft, the judgment of my brother, S. ole Kantai, J.A. with which I entirely agree with and have nothing useful to add.

Judgment of P. Nyamweya JA.

1. I have had the benefit of reading in draft, the judgment of my brother, S. ole Kantai, J.A. I entirely agree with the reasoning and conclusion therein, and I have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR