Compact Freight Systems Limited v Multiserve Oasis Company Limited & another (Civil Appeal E001 of 2021) [2022] KECA 1300 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1300 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E001 OF 2021

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

DECEMBER 2, 2022

BETWEEN

COMPACT FREIGHT SYSTEMS LIMITED ..... APPELLANT

AND

KENYA PORTS AUTHORITY ..... 1ST RESPONDENT

MULTISERVE OASIS COMPANY LIMITED ..... 2ND RESPONDENT

((An appeal from the judgment of the High Court of Kenya at Mombasa (Commercial Division) (P.J.O. Otieno, J.) delivered on 28th February 2020 in High Court Civil Suit No. 252 of 2010)

JUDGMENT

1. The appellant, Compact Freight Systems Limited, is aggrieved by a judgment of the High Court (PJO Otieno, J) delivered on February 28, 2020 allowing a claim by the 1st respondent, Multiserve Oasis Company Limited, against the appellant for loss of a consignment of 153 bales of imported assorted garments with a value of USD 214,803.00. The court also awarded the 1st respondent USD 4300.00 being cost of accommodation; Kshs 92,560 being the cost of an air ticket to China; and interest and costs.

2. In its suit before the High Court, the 1st respondent (the plaintiff in the trial court) averred that it imported a container containing 212 bales of assorted ready-made garments from the Republic of China aboard motor vessel Kota Nanhai which was discharged at the Port of Mombasa Kilindini on July 26, 2009; that Kenya Ports Authority (KPA), the 2nd respondent, on its own accord nominated and delivered the container to the appellant; that the appellant and KPA failed to safely and securely store and warehouse the container and failed to deliver the same to the 1st respondent; that in breach of its statutory duties, KPA was negligent in discharging its duties by failing to take proper or reasonable care in storing and handling the container and exposed it to theft resulting in the loss or theft of the consignment. The 1st respondent sought judgment against the appellant and KPA jointly and

severally for USD 352,890.98 made up of: value of 212 bales of USD 297,790.98; loss of profit of USD 45,900.00; cost of air ticket of USD 1,200; and cost of hotel accommodation for 1st respondent's representative in China in the amount of USD 8,000.00.

3. In its defence, KPA pleaded that the container left its premises intact and the custody and control of the container was surrendered to the appellant. It denied any negligence or breach of statutory duties.

4. The appellant in its defence also denied the claim. It denied that the 1st respondent is a limited liability company or that it was the importer of the container; that the container contained legitimate goods that could lawfully be imported into Kenya; that the container could only have contained ladies' shoes as opposed to garments as claimed; and it denied the claimed value of USD 352,890.98. The appellant further averred that the 1st respondent "stole the goods directly or was complicit in the alleged loss" and that the 1st respondent organized the loss as part of a scheme to avoid processing the consignment through the normal procedure and paying all duties, taxes and levies.

5. At the hearing, Ahmed Maalim Osman (PW1) described himself as a businessman, a proprietor and director of the 1st respondent involved in clearing and forwarding for the 1st respondent. He stated that on July 28, 2009 he received the Bill of Lading and invoice in respect of the consignment from Bashir Mohamed Nur (PW2) (Bashir);that Bashir requested him not to proceed with clearance so that an error in the description of the goods in shipping documents could be corrected; and that manifest corrector, C11, was effected to reflect the correct description of the goods as assorted garments as opposed to ladies shoes. He stated that later, on 2nd August, he received a call from Bashir with information that a container destined for Container Freight Station (CFS) had been broken into and goods stolen and that the same was at the Port Police Station; that he proceeded to the Port Police Station and based on the information provided by Bashir, he confirmed that the container number corresponded with the number provided by Bashir; that Bashir later travelled to Mombasa and on 3rd August 2009 they proceeded to lodge a complaint with the police.

6. PW1 stated further that he witnessed verification of the container at the police station which had 59 bales of assorted garments. He said that the 1st respondent had suffered loss in the amount of USD 352,890.98. He stated that the goods had been paid for in two instalments of USD 100,000 on May 21, 2009 and USD 197,800 on May 29, 2009 and payment was made through "Hawala system of money transfer"; and that the shipper issued receipts for the payment in settlement of the invoice. He produced a bundle of documents as 1st respondent's exhibit in support of the claim. Under cross examination, he stated that he was aware that KPA authorizes cargo to be stored at Container Freight Stations which are privately owned and located outside the port; and that on enquiry he established that the container in this case was broken into while in transit to the appellant's yard.

7. The Managing Director of the 1st respondent, Bashir Mohamed Nur (Bashir) was next to testify for the 1st respondent. He was PW2 and his evidence was that the 1st respondent deals with importation of ready-made garments from China, Bangkok and the United Arap Emirates for its customers in Kenya; that it has an agent in China, one Mustafa Adil Ahmed, who collects and buys all the garments required and then ships the same in a container to Kenya through the port of Mombasa; that after shipping the goods, he sends all the documents to him by courier.

8. Bashir stated that with respect to the container in question, he received the shipping documents on July 27, 2009 including the Bill of Lading which indicated the contents of the container as 212 cartons of ladies' shoes.The packing list indicated the container contained 212 bales of assorted ready-made garments; that on noticing the error he called the agent in China to rectify the anomaly and also instructed PW1 to halt the clearing process until the error was corrected; that as he was waiting for the Bill of Lading to be corrected, he received information that the container was broken into and goods

stolen; that he travelled to Mombasa and on August 3, 2009, he went to the police station alongside PW1 and witnessed the verification of the container when it was established that only 59 bales of assorted ready-made garments remained and 153 bales of the garments were missing. He stated that the 212 bales of assorted ready- made garments had a value of USD 297,790.98 based on the invoice of July 1, 2009 from the shipper Zheijiang Import and Export Trading Company Limited and that as a result of the theft, the 1st respondent suffered loss of USD 352,890.98 as set out in the plaint which included projected profit.

9. Dahir Farah Mohamed (PW3), a manager with the 1st respondent stated that in April 2009 he travelled to China and went to Zheijiang Import and Export Trading Company Limited and placed an order for the goods; that part of the purchase price was paid on May 21, 2019 and the balance on 2May 9, 2009. Under cross examination he stated that he is based in China as the supplies manager for the 1st respondent, and that after the goods were shipped, he remained in China until December waiting for instructions from the 1st respondent; and that he was present at the point the goods were packed for shipment to Kenya.

10. A witness statement of Stanslaus Angira (DW1) dated July 23, 2021 was admitted in evidence. Cross examination of that witness was dispensed with. DW1 stated that he is a Security Supervisor with KPA; that in January 2010 he was involved in investigations involving loss of 153 bales of fabric and confirmed that the container in question was discharged at the Port on July 26, 2009 and received at the Container Terminal Yard the same day; that it was designated for release to the appellant who had been nominated as the Container Freight Station for the container and on July 29, 2009, the container was loaded on a truck owned by Lulu Ltd which had been contracted by the appellant, and exited the gate of the port on July 30, 2009 destined for the appellant; that the truck after leaving the port apparently diverted from the normal route to the appellant's premises and stayed at Kibarani for about 3 hours during the night before being driven to another location at Makande where it was abandoned; that on January 21, 2010 he was present when a joint survey of the container was undertaken at the Port Police with representatives of various authorities and KPA and it was ascertained that 59 bales of fabric inside the container were intact.

11. Mary Mutisya (DW2), Acting Senior Operations Officer at KPA stationed at Container Terminal Operations, Mombasa explained in her evidence that years past, in a bid to ease congestion at the Port, KPA had licensed private operators like the appellant to handle storage and clearing of cargo from their own premises; that the appellant was licensed as a Container Freight Station under an agreement dated January 1, 2009; that Motor Vessel Mv Kota Nanhai in which the consignment in question was shipped was nominated to the appellant; that the appellant had the obligation to transfer containers aboard that ship from the Port to its licensed Container Freight Station premises; that from the time the containers leave the port bound for the Container Freight Station premises, the responsibility for them rests with the Container Freight Station; and that under the licence agreement, the appellant agreed to indemnify KPA against all proceedings, claims, damages and liabilities incurred arising from damage or loss of containers/cargo handed over to the appellant.

12. Simion Kipsang Chebotin (DW3) a Tally Clerk at KPA stationed at the Container Terminal Yard, Kilindini Port, Mombasa stated that his role involves receiving containers for storage, their shifting and delivery from the Container Terminal; that on July 29, 2019, he recorded the delivery of the container in question which, based on the documents presented to him, was nominated to be taken to the appellant's Container Freight Station where it would be cleared; and that he authorized the loading of the container on to the truck destined for the appellant's premises; that prior to the departure of the truck, he confirmed that it was intact and the seal was secure and had not been tampered with at all.

13. George Mwangi (DW4), the operations manager of the appellant was the sole witness for the appellant. His duties involve coordinating release of cargo from KPA. He stated that the relationship between the appellant and KPA is defined by the licence agreement dated December 1, 2008 and by standard operating procedures for moving of containers; that it is not possible to have a container released without compliance with those procedures; that the transport company, Lulu Ltd, that is indicated to have picked the goods has no relationship with the appellant; that the appellant did not expect the container at its yard and that two days later, somebody from Lalu inquired whether the container had arrived at the appellant's premises and that is when the appellant learnt that the container had left KPA.

14. DW4 stated that KPA is to blame for the loss and that there was no pick-up order or invoice by KPA; that in this case there was no truck list or invoice to show who took possession of the container. He however accepted, under cross examination, that motor vessel Kota Nanhai from which the container in question was discharged had been nominated to appellant and that Isaack Kweyu Makokha, the driver of the truck that carted away the container had a port movement pass that had been issued to him at the behest of the appellant.

15. Based on the evidence, the learned Judge was satisfied that the 1st respondent had, on a balance of probabilities, established that the container was lost while in the custody of the appellant. The Judge found that KPA had nominated the motor vessel carrying the container in question to the appellant; that it was loaded onto a vehicle contracted by the appellant which was driven out of the port by one Isaack Kweyu Makokha with respect to whom the appellant had applied and obtained a port access pass. The Judge concluded:

> " ...from the foregoing and from the admitted evidence of DW1, I find and hold that on the balance of probabilities, the plaintiff has proved that the 2nd defendant is liable for the loss of the container... which was delivered to its custody and control by the first defendant on July 29, 2009'"

16. The Judge further expressed that the 1st respondent had failed to establish that the appellant was an agent of KPA "since under clause 10 of the license agreement it has been expressly stated that the 2nd defendant is an independent contractor." As for relief, the Judge rejected the claim for loss of profits the same not having been proved but awarded USD 214,803.00 as the value of the missing 153 bales of imported assorted garments; USD 4300.00 as cost of accommodation; and Kshs 92,560 being the cost of an air ticket to China and interest and costs.

17. The appellant has challenged the judgment on eleven grounds of appeal as set out in its memorandum of appeal which learned counsel for the appellant Mr Gikandi Ngibuini condensed to two main grounds in his submissions. First, that that liability against the appellant was not established and the court failed to consider that KPA bore the primary responsibility. In that regard it was urged that the evidence presented by the 1st respondent in support of the claim was fraudulent, that there is no logical flow in the alleged transaction for purchase and payment for the goods and the claim was not established to the required standard. Secondly, that the 1st respondent's claim, being one of special damages, was not strictly proved.

18. Urging the appeal before us, Mr Gikandi submitted that based on the licence agreement between KPA and the appellant, the appellant carries out container storage services on behalf of KPA when KPA appoints it to do so; consequently, the appellant is an agent of KPA, and KPA has the primary obligation to compensate the 1st respondent and KPA could only seek indemnity from the appellant under clause 7 of the licence agreement. Further, that based on the 1st respondent's letter dated 5th May 2010 in which the 1st respondent asserted that KPA "is solely liable for the loss of the goods

in the container" and based on an investigation report prepared by KPA's security officer, the 1st respondent was estopped from claiming against the appellant; that the learned Judge failed to analyze and determine the respective roles between the appellant and KPA; that had the court done so, it would have upheld the position that barring cases of fraud, an agent cannot be liable for the acts of the principal. The case of *Standard Chartered Bank Kenya Limited v Pakistan National Shipping Corporation* [2002] UKHL 43 was cited.

19. As to the complaint that the claim for special damages was not proved, Mr Gikandi referred to case of *Charles C Sand v Kenya Co-operative Creameries Limited*, Civil Appeal No 154 of 1992; *Mohamed Ali & others v Sagoo Radiators Limited* [2013] eKLR; and *Hahn v Singh* [2013] eKLR in submitting that it is established that special damages must not only be pleaded but must be strictly proved; that in the present case, the documentary and oral evidence produced relating to the claim of USD 297,790.98 fell short of establishing the 1st respondent's claim to the required standard; that no cogent evidence was tendered of the 1st respondent having made payment to the vendor in China as there was a claim, on the one hand, that payment was made through Hawala money transfer system, while on the other hand, it was claimed to have been paid through the bank by RTGS.

20. Moreover, counsel submitted, it was strange that the invoice for the goods, which should ordinarily precede payment, was issued subsequent to the receipt of funds and there was therefore no logical flow in the alleged transaction between the 1st respondent and the vendor in China. In addition, the 1st respondent did not demonstrate that it had the said amount of USD 297,790.98 it purportedly sent to China. It was submitted that the entire transaction raised serious integrity concerns, namely, that 1st respondent a limited liability company with a separate legal personality, in its attempt to demonstrate that it purchased the goods from China used documents prepared in the name of Multi Serve Oasis; that the goods imported in the container based on the Bill of Lading were "212 cartons of ladies shoes" as opposed to bales of assorted garments that were claimed to have been lost.

21. It was submitted that the trial court did not give any reasons for placing the value of 212 bales of clothes at USD 214,803, and no reasons having been given by the court in that regard, the judgment should be set aside. Reference was made to the English decision in *Flannery v Halifax Estate Agencies Ltd* (2000) 1 WLR 337.

22. Opposing the appeal learned counsel for the 1st respondent Mr Lakicha submitted that the documents it produced before the trial court demonstrated that it purchased and made payments for the goods to the supplier in China and that those documents were never challenged during the trial; that the 1st respondent established that payment was made by electronic transfer of USD 297,800 in two instalments on 21st and May 29, 2009 and that the supplier issued official receipts for the payments; that regarding its legal status, it produced its certificate of incorporation.

23. It was submitted that in light of the provision in clause 7 of the Licence Agreement between KPA and the appellant in which the appellant undertook to indemnify KPA for loss or damage, and in view of KPA having served the appellant with a co-defendant notice, the Judge was right in holding the appellant liable for the loss.

24. As to the contention that the 1st respondent's committed acts of fraud with regard to the importation of the goods, it was submitted that the appellant neither pleaded nor proved fraud; and that the allegations in that regard are an afterthought. It was pointed out that the appellant had made an attempt, through an application to adduce additional evidence, to introduce new evidence to support the claims for fraud but later withdrew that application. The cases of *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR were cited for the proposition that fraud must be specifically pleaded and particulars thereof must be stated on the face

of the pleadings which was not the case here. It was submitted that it was established, and the Judge rightly held, that the appellant is liable for the loss which was specifically proved.

25. Learned counsel Miss Baraza holding brief for Mr Noorani for KPA, the 2nd respondent, submitted that the documents on basis of which the appellant invokes the doctrine of estoppel, namely the letter and preliminary report already mentioned, were not addressed to the appellant; that no representation was made by KPA to the appellant either admitting liability or absolving the appellant from liability. It was submitted that there are pre requisites, which are absent in this case, for the doctrine of estoppel to apply. In that regard, counsel cited the High Court decision in *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR; and this Court's decision in *First Assurance Company Limited v Seascapes Limited* [2008] eKLR.

26. Moreover, it was submitted, the plea of estoppel and allegations of fraud were raised for the first time before this Court and had not been pleaded. The case of *Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR was cited for the argument that parties are bound by their pleadings, while the decision of this Court in *Kinyanjui Kamau v George Kamau* [2015] eKLR was cited for the argument that fraud must be pleaded and strictly proved.

27. As regards the complaint that the Judge erred in failing to hold KPA, as principal, as opposed to its agent, the appellant, liable, it was urged that this matter is not raised in the memorandum of appeal. In any event, it was urged that the trial court correctly found that the appellant was an independent contractor and not an agent of KPA based on the provisions of the Licence Agreement.

28. On special damages, KPA concurred with the appellant that it is trite that special damages must by strictly proved for a party to stand entitled to an award and that the appellant was required to tender evidence clearly accounting for the loss it claimed.

29. We have considered the appeal in accordance with our mandate. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and also *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR. In the latter case, the Court pronounced that the primary role of the Court in a first appeal is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

30. There are essentially two issues in this appeal. The first is whether liability as against the appellant was established. The second is whether the award of special damages in the amount of USD 214,803 had been proved.

31. With regard to liability, the 1st respondent's claim, as already stated was that part of its consignment imported from China containing 212 bales of assorted readymade garments was stolen or lost in the custody of the appellant and the 2nd respondent on account of their negligence in failing to take proper or reasonable care in the storage and handling of the consignment. It averred that it suffered loss in the amount of USD 352,890.98 as a result. The appellant on its part, asserted that the 1st respondent's claim was contrived, that no garments were imported as claimed, that if anything, it was ladies' shoes. The appellant also averred that the 1st respondent orchestrated the heist to avoid to avoid payment of duties, levies and taxes.

32. In accordance with the requirement under section 107 of the *Evidence Act*, it was incumbent upon the 1st respondent, to prove its case on a balance of probability. Section 107 (1) and (2) of the *Evidence Act* provides that:

107(1) "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

(2) "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person"

33. The appellant therefore had the burden to prove that it indeed imported the consignment of assorted garments and that the same were lost due to the negligence of the appellant and KPA. That turned on the credibility of the evidence. Whose version of the story, as between that of the 1st respondent and that of the appellant, was more believable. In *James Muniu Mucheru v National Bank of Kenya Ltd* CA Civil Appeal No 365 of 2017 [2019] eKLR the Court stated that it is indeed:

> "...settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."

34. Lord Denning had years earlier expounded on the standard and degree of proof in civil cases in the case of *Miller v Minister of Pensions* [1947] All ER 372 as follows:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

35. With those principles in mind, the question is whether the learned Judge erred in concluding that the 1st respondent discharged its burden in establishing its claim against the appellant. To support its claim of having imported the consignment, the 1st respondent produced before the trial court, among other documents, Pacific International Lines (PTE) Ltd Bill of Lading No NBMBA 93242227 dated July 5, 2009 relating to 1 by 40 container said to contain "212 CTNs of Lady Shoes"; application to amend "inward report/outward manifest" relating to "change of goods description" to "212 CTNs of assorted garments"; copy of itemized invoice No. 5874 in six folios by Zheijiang Changhan Import & Export Trading Co. Ltd to the 1st respondent dated July 1, 2009 for the amount of $297,790,98; copy of payment receipt dated 2June 7, 2009; invoice dated July 27, 2009 issued to the 1st respondent by PIL (Kenya) Limited, agents of Pacific International Lines for handling and other charges; appellant's owners risk delivery note dated July 29, 2007 relating to container with remarks "loaded intact" and transporter indicated as Lulu; PIL (Kenya) Limited delivery order to appellant dated July 31, 2009.

36. Those documents were produced before the trial court by PW1 in a bundle without objection. Under cross examination, the witness explained that the description of the goods in the Bill of Lading as ladies' shoes was corrected to show it related to assorted garments. With regard to the invoice, the witness stated that it "is commercial invoice. It comes after payment of the purchase price" and that it is different from proforma invoice; that he was at the Police station on August 3, 2009 where the container that was broken into was and some garments were recovered. Bashir (PW2) explained that he is the one who discovered the discrepancy in the description of the goods between the Bill of Lading and the packing list and stated that 59 bales out of 212 bales were recovered.

37. Simion Kipsang Chebotibin (DW3) a tallying clerk with KPA confirmed that the container in question was indeed received by KPA. He demonstrated and accounted for its movement from the time it arrived aboard the ship to the time it was handed over to the transporter for onward delivery to the appellant's premises.

38. The operations manager of the appellant who testified on its behalf, George Mwangi (DW4), explained that it is not possible for a container to be released without compliance with procedures. He went on to state that the company that picked up the container from KPA, namely, Lulu transporters, has no relationship with the appellant. He stated that the owner's delivery note is generated at the loading point by the appellant although the one produced by the 1st respondent did "not reveal the name and signature and time of collection" and that the appellant did not expect the container into its yard but that two days later somebody from Lulu went to the appellant to inquire if the container had arrived at the appellant's premises, and that is when the appellant learnt the container had left KPA.

39. As already indicated, the written witness statement of Stanslaus Angira (DW1) was admitted in evidence without the need to cross examine that witness. In effect, its contents were not challenged.

40. Based on the foregoing, we are satisfied, as the learned trial Judge was, that the container in question was discharged at the port of Mombasa and loaded into a truck driven by a driver authorized by the appellant and destined for the appellant's premises but diverted. As for the contention by the appellant that the claim was fraudulent, the onus was on the it to plead and establish fraud. As this Court stated in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR:

> " ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that:
>
> > "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

41. Earlier in of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi, JA (as he then was) stated that :

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

42. No evidence of fraud was tendered. We think the learned Judge was therefore correct in concluding that the 1st respondent had, on a balance of probabilities, proved that the container was lost while in the custody of the appellant and that the appellant had not displaced that inference.

43. There is then the question whether the trial court rightly held that the appellant was liable, as an independent contractor, and not as an agent of KPA. As already mentioned, counsel for KPA objected that the complaint by the appellant in this regard is not one of the grounds of appeal specified in the memorandum of appeal and cannot therefore be argued. In that regard Rule 107 of the *Court of Appeal Rules, 2022* provides that no party shall, without the leave of the Court, argue that the decision of the

lower court should be reversed or varied except on a ground specified in the memorandum of appeal or a notice of cross-appeal. See *Securicor (Kenya) Limited v EA Drapers Ltd and another* [1987] KLR; *Kenya Revenue Authority v Mohammed Saleh & Company Advocates* [2019] eKLR; *Kibic Star Electro Limited & 2 others v Southern Credit Banking Group*, Civil Appeal No 305 of 2015 [2022] KECA 71 (KLR).

44. In the present case, the complaint raised in ground 8 of the memorandum of appeal is that the Judge erred in failing to determine whether the appellant was found liable directly or assumed liability qua indemnification of KPA in terms of the licence agreement. The issue arising therefrom is therefore whether the Judge made that determination. That matter was expressly addressed by the learned Judge in paragraphs 40 to 46 of the impugned judgment. In paragraph 46, the Judge concluded that the 1st respondent had established, on a balance of probabilities, that the appellant is liable for the loss of the container "which was delivered to its custody and control" by KPA on July 29, 2009. The Judge went to stated that the 1st respondent "has failed to prove" that the appellant "was an agent" of KPA

> "since under since under Clause 10 of the Licence Agreement it has been expressly stated that the [appellant] is an independent contractor"

and further that

> "Clause 7 of the said licence it is stated that the [appellant] shall indemnify...[KPA] against any loss of cargo delivered to it."

In view of that holding, it is therefore not correct as urged by the appellant that the Judge did not determine the basis of the appellant's liability.

45. There being no challenge to the holding by the Judge that the appellant was an independent contractor and not an agent of KPA, the contention that the appellant cannot, as an agent, be liable where KPA is the disclosed principal is not properly taken in arguments without a basis in the memorandum of appeal. That said, it is correct that at common law, where the principal is disclosed, the agent is not to be sued. See decisions of this Court in *Victor Mabachi & another v Nurtun Bates Limited* [2013] eKLR and *Anthony Francis Warehim t/a Wareham & 2 others v Kenya Post Office Savings Bank*, Civil Application Nos NAI 5 & 48 of 2002. In the latter case, the Court expressed:

> "It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.

46. Unlike in that case, however, there was no plea in the 1st respondent's plaint before the lower court in this case that the appellant was joined in the action as an agent of KPA and neither was it established, as the trial Judge found, that the appellant was an agent of KPA. The 1st respondent pursued the appellant and KPA jointly and severally and not on the basis that one was the agent of the other.

47. The last issue is whether the amount awarded was proved. The complaint in the memorandum of appeal is that the trial court "arrived at the figure of $ 214,803 as the value of the lost consignment" without "evidence to that effect" and that the "claim had not been particularly pleaded nor was it specially proved." Authorities abound that special damages must be specifically pleaded and strictly proved. Counsel for the appellants referred us to the case of *Charles C Sande v Kenya Co-Operative*

Creameries Limited, Civil Appeal No 154 of 1992. Much earlier in *Hahn v Singh*, Civil Appeal No 42 Of 1983 [1985] KLR 716, this Court articulated that:

> " 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."

48. See also the decision of this Court in *Daniel Gatihi Gachomo v Kenya Union of Teachers Nyeri Branch* [2013] eKLR; *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR. The learned trial Judge was conscious that it was incumbent upon the 1st respondent to prove its claim. In that regard, the Judge expressed that the 1st respondent's claim:

> " ...is a special damage claim. Therefore, for the [1st respondent] to claim special damages, it must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. It is trite law that special damages must be pleaded and proved."

49. In its plaint, the 1st respondent particularized its loss as $352,890,92 made up of $ 297,790.98 being claimed as the value of the 212 bales stolen; $45,900 being claimed as loss of profit on the bales stolen; $1,200 being cost of air ticket; and $8,000 being hotel accommodation and food for the 1st respondent's representative in China. In partially allowing the claim, the Judge awarded $ 214,803 as the value of 153 bales of garments that went missing. He also awarded $4300 with respect to hotel bill incurred between April 4, 2009 and July 2, 2009 by the 1st respondent's manager who travelled to China to prepare the consignment for shipping; and Kshs 92,560 as the cost of air ticket to China. The claim for loss of profits was rejected. In its memorandum of appeal, as well as in its submissions, the appellant's complaint is with regard to the award $ 214,803. The other awards are not challenged.

50. How then did the learned Judge arrive at the award of $ 214,803? The Judge was satisfied, as we are, that based on commercial invoice No. 5874 that was produced, the 1st respondent had sourced assorted garments and made payment in two instalments for a total of $ 297,790.98. The Judge also correctly found that 59 bales of the 212 bales imported had not been stolen and the 1st respondent should have mitigated its loss by collecting the 59 bales from the port police station where those bales were left. Although the Judge did not explain in the judgment how he arrived at the award that he made, it is evident, again based on the commercial invoice, that the whole consignment of 212 bales had a value of $ 297,790.98 of which 59 bales were recovered at the Police Station. Accordingly, the award of $ 214,803 represents the proportionate value for the 153 bales that were lost. We are therefore satisfied that the award of USD 214,803 was established to the required standard.

51. In conclusion therefore, we have no basis for interfering with the judgment of the High Court. The appeal fails and is dismissed with costs to the respondents.

DATED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR