IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 129 Of 2018

BETWEEN

MIGORI COUNTY GOVERNMENT.....1st APPELLANT

MINISTER FOR TRANSPORT MIGORI COUNTY GOVERNMENT...2nd APPELLANT

AND

JOSIAH ONYANGO OKELLO T/A CARGO SECURED SERVICES.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Migori, (A.C. Mrima J.) delivered on 12th April 2018

in

Migori HCCC No. 1 of 2017)

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JUDGMENT OF THE COURT

1. The respondent is an adult male trading as Cargo Secured Services and he is engaged in transportation business. At all material times to the dispute between the parties, the respondent co-owned with Housing Finance Company a Prime Mover Registration No. KCB 262 X together with a trailer ZE 9242 (both hereinafter referred to as the vehicles). The vehicles had been procured on a loan facility from Housing Finance Company. The respondent used the vehicles in his transportation business. In the business, the respondent would secure and enter into commercial agreements to transport goods and services for and on behalf of clients. One such client was Messrs. Star Brilliant EPZ (K) Limited with whom the respondent signed a service contract dated 1st July 2015 whereby the respondent would earn a sum of Ksh. 1,583,333/= inclusive of VAT at the rate of Ksh. 316,000/= per trip for carriage and transportation of projected five (5) containers per month.

2. On or about 7th September 2015, within Migori County, officers of the appellant County Government impounded the vehicles on allegations that the said vehicles were illegally participating in mineral trade. Upon impoundment of the vehicles, it is alleged officers of the County Government directed the vehicles to be parked at the premises of the 1st appellant. It is further contended that the vehicles were impounded and held at the 1st appellant's premises for a period of 49 days and later released unconditionally with no charges proffered against the respondent.

3. The respondent contends that as a consequence of impoundment of the vehicles, he was not able to utilize the vehicles for his transportation business; he fell into arrears in servicing the loan due to Housing Finance Company. Upon release of the vehicles, the said Housing Finance Company repossessed the same on account of the arears and auctioned them. As a term of the loan facility, the respondent had given a second prime mover registration No. KBK 294C to Housing Finance Company as collateral. This second prime mover was also attached and sold by way of public auction.

4. By way of a plaint dated 13th January 2017, the respondent filed suit against the appellants claiming general and special damages as a result of illegal impoundment of the vehicles. The respondent also claimed general and special damages for loss and termination of commercial transportation contract with Messrs. Star Brilliant EPZ (K) Limited. The respondent further claimed compensation at full value of the vehicles sold at public auction by Housing Finance Company.

5. In the plaint, it was averred that as a result of the illegal impoundment of the vehicles, the respondent's transport business collapsed due to inability to meet the needs of his clients specifically Messrs. Star Brilliant EPZ (K) Limited. That he suffered loss of business and damages.

The respondent particularized the loss and damage suffered as follows:

(a) Loss of business and income at the rate of Ksh. 250,000/= per day from 7th September 2015 until end of October 2015 being 250,000/= X 53 = 13,250,000/=.

(b) Loss of the commercial prime mover registration No. KCB 262 X together with trailer ZE 9242 to the financier at Ksh. 13,000,000/=.

(c) Loss of motor vehicle registration no. KBK 294 C being the collateral in the loan facility due to non-payment of loan at Ksh. 5,500,000/=.

(d) Loss of contract with Messrs. Star Brilliant EPZ (K) Limited for two years being Ksh. 1,583,333/= X 12 X 2 = Ksh. 37,999,992/=.

(e) Loss of contract with four drivers at a monthly salary of Ksh. 40,000/= which is Ksh. 40,000/= X 4 X 12 X 2 = Ksh. 3,840,000/=.

TOTAL = Ksh. 73,589,992/=

6. In the plaint, the respondent prayed for a declaration that the appellants' impoundment of the vehicles was illegal, null and void. The respondent further claimed special damages of Ksh. 73,589,992/= as particularized in the plaint.

7. The appellants filed a statement of defence dated 11th February 2017. They denied *in toto* all the allegations in the plaint. Specifically, the appellants denied impounding the respondent's vehicles as alleged. It was claimed that the appellants' officers found the respondent's vehicle carrying minerals and asked the driver to produce receipts for license fees and mineral royalty payment to the County Government. The 1st appellant's witness testified contending that it was the respondent's driver who had parked the vehicles at its premises.

8. Upon hearing the parties, the trial judge held that the appellants were liable for unlawful impoundment of the vehicles. Damages were awarded for the unlawful impoundment. Judgment was entered in the following terms:

(i) A declaration was issued that the impoundment and detention of vehicles was unlawful, null and void.

(ii) Special damages were awarded at Ksh. 46,226,000/= with interest at court rates from the date of filing suit.

(iii) General damages were awarded at Ksh. 500,000/= with interest at court rates from the date of judgment.

(iv) Costs of the suit to be paid by the appellant.

GROUNDS OF APPEAL

9. Aggrieved by the judgment, the appellants have filed the instant appeal on the following compressed grounds:

(i) The judge erred in finding that it was unfair, unreasonable and without any legal justification for the appellants to demand payment of mineral royalties from the respondent.

(ii) The judge erred in disregarding material facts.

(iii) The judge erred in awarding special and general damages where the same were mere allegations that were not strictly proven.

(iv) The judge erred in awarding as special damages for damage that was not reasonably foreseeable by the appellants. The judge further erred in awarding special damages for injury that was too remote.

(v) The judge erred in awarding special damages of Ksh. 6,900,000/= and Ksh. 4,500,000/= being the alleged forced sale value for the two motor vehicles without considering that proceeds of auction are normally credited to the defaulting customer.

(vi) The judge erred in failing to consider the respondent failed to mitigate his losses.

(vii) The judge erred in awarding damages as unjust enrichment to the respondent.

10. At the hearing of the appeal, learned counsel Mr. R.O. Sagana appeared for the appellants. Learned counsel Julius Juma appeared for the respondent. Both parties filed case digest and list of authorities in the appeal. The appeal was urged through oral submissions.

APPELLANT'S SUBMISSIONS

11. Counsel for the appellant urged the appeal in four broad areas. Firstly, on special damages awarded as a result of termination of transportation contract of Messrs. Star Brilliant EPZ (K) Limited. Secondly, on special damages awarded on account of the public auction of the two motor vehicles. Thirdly, on the general damages awarded and finally on the contested liability of the appellants to the respondent.

12. The appellant submitted that the trial court erred in awarding special damages for termination of the respondent's transportation contract with Messrs. Star Brilliant EPZ (K) Limited. That the judge in awarding the special damages found that the transportation contract was for twenty-four (24) months; that the respondent had serviced the contract for two months leaving a balance of 22 months; that the learned judge erred in awarding special damages for the balance of 22 months under the contract. It was further submitted that the judge erred in taking into account the gross payment that the respondent would have received per month without deducting expenses that would inevitably have been incurred in servicing the transportation contract. The appellant further contended that the judge erred as he did not consider the element of Value Added Tax and other statutory deductions. Further, that there was no evidence tendered to prove the exact amount of profit the respondent would have made per trip had the transportation contract been serviced.

13. On special damages of Ksh. 6,900,000/= and Ksh 4,500,000/= awarded on account of sale by public auction of the two vehicles, the appellants submitted the judge erred in awarding damages equivalent to the forced value of the two vehicles. That the judge failed to take into account that the proceeds of the public auction were credited by Housing Finance Company to the respondent. It was also submitted that the judge erred in awarding special damages for the two vehicles even though the appellant impounded only one vehicle and its trailer. As the appellants' impounded only one vehicle, it was urged the judge erred in awarding special damages on account of the second vehicle that was never impounded by the appellants.

14. On the issue of liability of the appellant, it was submitted the damage and loss suffered by the respondent was too remote and not foreseeable. That the appellant could not foresee that the impounded vehicle was on loan; that it was not foreseeable the respondent had transportation contract; it was also not foreseeable the respondent was in arrears in servicing his loan.

15. In addition, the appellants submitted that the vehicles were impounded only for 49 days and the loss suffered by the respondent if any, was to be measured against the 49 days during which the vehicles were impounded. That the trial judge erred using 53 days as the multiplicant number of days. That Housing Finance Company repossessed the vehicles because the respondent was already in arrears to the tune of over Ksh. 1, 220,635/77 as at 31st October 2015. That the act of impounding the vehicles was not the cause of arrears in servicing of the respondent's loan. That even before the vehicles were impounded, the respondent was already in arrears. It thus follows that the damage and loss of the vehicles by public auction was not caused by impoundment of the vehicle but the respondents own arrears in servicing of his loan; that there was no causal link between the impoundment and default in servicing of the loan; to this extent, the judge erred in finding that the respondent's default in servicing the loan was due to the impoundment.

16. The appellant further submitted that the judge erred in failing to consider the respondent was under duty to mitigate his losses. That during the period of impoundment of the vehicles, the respondent still had possession of two other vehicles that could have been used to service the transportation contract and also to service the loan due to Housing Finance Company. That the transportation contract listed three vehicles that could have been used for carriage of the goods.

17. On general damages of Ksh. 500,000/= awarded to the respondent, counsel submitted the judge erred in law in awarding damages and justifying the same on the grounds that the respondent was distraught, dejected and that his dignity had been affected; that there is no such heading for award of general damages for breach of contract.

18. On the issue of the appellant's liability to the respondent, it was submitted that no liability attaches as the damage suffered were remote, non-foreseeable and there was no causal link with the appellants' act of impoundment of the vehicles. It was further submitted that the appellant was within its mandate and jurisdiction to ask for (and be availed) receipts for payment of license and royalty fees for minerals extracted within the County. That when the receipts were requested for, the respondent's driver could not produce the same and instead opted to park the vehicle at the appellants premises to enable him go and collect the receipts. That the respondent's driver failed to come back with the receipts.

RESPONDENT'S SUBMISSIONS

19. In opposing the appeal, the respondent submitted that the appellants have urged issues and grounds which are not in the memorandum of appeal. For instance, the contention that the judge erred in awarding special damages to Messrs. Star Brilliant EPZ (K) Limited basing calculation on gross revenue instead of net revenue is nowhere mentioned as a ground of appeal. That the issue of awarding special damages for the second motor vehicle is nowhere in the ground of appeal.

20. On the grounds stated in the memorandum, it was submitted that the disputation that the monthly loan repayment to Housing Finance Company was Ksh. 188,000/= was misleading. In their submissions, the appellants faulted the trial judge for awarding special damages using the sum of Ksh. 188,000/= as the monthly loan repayment. It was submitted the appellants' submission is misleading; that the record shows the monthly loan repayment for the prime mover was Ksh. 188,000/= and the monthly payment for the trailer was Ksh. 79,149/=. In total, the respondent's monthly remittance for amortization of the loan was Ksh. 267,149/=.

21. On the issue of liability, it was submitted that by letter dated 14th September 2015, counsel for the respondent sent a demand letter to the appellants demanding immediate release of the impounded vehicles. It was expressly brought to the attention of the appellant that the vehicle were jointly owned with Housing Finance Company. That upon receiving the demand letter to unconditionally release the vehicles, the appellant through its legal adviser replied by letter dated 29th September 2015 stating that they could release the impounded vehicles if the respondent declared the mineral ore in his possession. Counsel for the respondent submitted that this letter from the appellants' legal advisor is an admission that the motor vehicles were in fact impounded.

22. On quantum of damages, counsel submitted that the trial judge did not err; that the judge properly awarded damages for the lost contract

and loss of income with Messrs. Star Brilliant EPZ (K) Limited. On special damages for loss of the two vehicles, it was submitted that once the vehicles were impounded, the respondent was unable to service his loan and as a direct consequence the Housing Finance Company repossessed the vehicles. It was submitted that there is thus a causal link between the impoundment, failure to service the loan, repossession of the vehicles and final sale by public auction. It was urged that the damage and loss suffered by the respondent was thus not remote but foreseeable. The respondent conceded that the judge erred in failing to discount the Housing Finance Company's interest in the vehicles that was sold.

23. On the general damages awarded at Ksh. 500,000/=, it was submitted that an award of damages is at the discretion of the trial court. That the judge did not improperly err in the exercise of his discretion.

24. On mitigation of loss suffered, it was submitted that the duty and burden was on the appellants to prove that the respondent did not mitigate his losses. Counsel submitted that the respondent did everything in his power to mitigate the loss by demanding the immediate release of the impounded vehicle.

25. The appellant in responding to the submissions made urged that mitigation of loss was not undertaken. That the transportation contract stated the contract was to be serviced by any of the three vehicles which the respondent owned; that the appellant only impounded one vehicle; that the invoices tendered in evidence by the respondent did not show any relationship between the impounded vehicle and the transportation contract. That the Bank statements tendered in evidence by the respondent was from Barclays Bank yet the loan was from Housing Finance Company. That the statements on record do not prove the income derived by the respondent from the servicing the transportation contract. That there is no evidence on record that the respondent ever earned the contract sum with Messrs. Star Brilliant EPZ (K) Limited.

ANALYSIS and DETERMINATION

26. We have considered the grounds of appeal, submissions by both counsel and the authorities cited. As this is a first appeal, we are guided by the principles stated in ***Ephantus Mwangi and another – v- Duncan Mwangi*** **(1982-1988) 1 KAR 278,** ***Williamsons Diamonds Ltd – v-Brown*** **(1970) EA 1** and ***Selle – v- Associated Motor Boat Company Limited*** **(1968) EA 123**, that in a first appeal this Court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses and making due allowance for that.

27. Three issues stand out for determination in this appeal. The first is whether the appellants are liable in damages to the respondent from the proven facts in this matter. If the answer is in the affirmative, the second issue is whether the respondent is entitled to any special and general damages as pleaded and the quantum thereof. Lastly, we shall consider and determine if the learned judge properly evaluated the evidence on record and applied the correct principles of law in arriving at his conclusions and determination.

28. The appellants in their defence denied any liability to the respondent. The appellants denied impounding and holding the respondent's vehicles on its premises. In support of its defence, the appellants through a statement recorded by Mr. Christopher Rusana stated that the vehicles were not impounded but that the respondent's driver on being requested to avail evidence of payment of royalties or license fees to the County Government (in compliance with **Section 11 of the Minerals Act)** dumped the vehicles at the appellants' premises and he never returned with the receipts to forthwith collect the vehicles.

29. In rebutting the appellant's assertion, the respondent through the testimony of Mr. Fredrick Wire (the driver of the vehicles) stated that on 6th September 2015, officers of the appellants found his vehicle parked and alleged he was about to engage in illegal business; that they ordered him to driver the truck to the appellants' premises and surrender the key to them; that he called the respondent who was the owner of the vehicles and briefed him what had happened; that the respondent came to Migori and visited the offices of the appellants who refused to release the vehicles; that the respondent told him that he would seek legal advice to get the impounded vehicle released; that on 24th October 2015, the vehicles were released to him by the appellants through its officer a Mr. Oballa.

30. The trial judge in considering the question of the appellants' liability to the respondent correctly posited that the issue is whether the vehicles were as a matter of fact impounded by the appellants. The learned judge in finding the appellants liable, expressed himself as follows:

> *43. I believe Exhibit 2 settles the question as to whether the motor vehicle was impounded. The letter certainly stated that the motor vehicle was to be released by the defendants upon the plaintiff declaring the mineral ore in his possession. Exhibit 2 was the defendant's letter in response to the plaintiff's formal demand on the release of the motor vehicle. It was written by the legal advisor to the County Governor on behalf of the defendants…..*
>
> *48…. I hence find and hold that the defendants impounded the motor vehicle as alleged by the plaintiff…..*

31. In this appeal, the appellants denied liability to the respondent submitting that it was entitled in law to demand proof of payment of license fee and royalty pursuant to **Section 12 (5) of the Mining Act.**

32. We have examined the record of appeal more particularly the letter dated 29th September 2015 written by the appellant to the respondent's advocate in relation to release of the vehicles. The letter is signed by I. Kwanga, Legal Advisor to the Migori County Government. In salient excerpts the letter states:

> *Your client…. was caught by our enforcement officers transporting mineral ore from Nyatike, within the jurisdiction of Migori County without the mineral trading license contrary to Chapter 306 of the Mining Act… and the County Legislation which prohibit transporting of mineral ore without a valid license.*

Your client was not only found transporting mineral ore from Migori County to Nairobi but also found to be prospecting and mining without paying the requisite royalties to County Government as by law required….

In view of the foregoing, your client is advised to declare the mineral ore in his possession and show proof of licensing and thereafter pay what is due to the County Government before the motor vehicle and the mineral ore can be released. (Emphasis supplied)

33. In this appeal, the appellants submitted that they did not impound the respondent's vehicles. In our view, the letter dated 29th September 2015 is an unambiguous statement that the vehicles were in possession of the appellants and that they could not be released unless certain conditions were fulfilled. Based on the contents of the aforestated letter and the testimony of Fredrick Wire (the driver of the vehicle) we are satisfied that the learned judge did not err in finding that the appellants had impounded the respondent's vehicles.

34. The next issue is whether the impoundment was lawful. The appellants submitted that the impoundment was lawful. The respondent contends the impoundment was unlawful. The appellant as per the letter dated 29th September 2015 assert that the respondent was engaged in prospecting and mining without paying the requisite royalties to County Government as by law required.

35. We have examined the evidence on record, the appellants did not tender evidence to prove the respondent was engaged in prospecting and mining. On the issue of transportation of mineral ore, on record there is a receipt for payment of cess of Ksh. 4,000/= received on account of motor vehicle KCB 262X. The evidence on record aptly shows that when the vehicles were impounded, they were not carrying any mineral ore. According to the respondent's driver, the vehicle was impounded before he had loaded any mineral ore.

36. Upon our evaluation of the evidence on record, we are satisfied that the respondent was not found in possession of any mineral ore. Accordingly, we find that the judge did not err when he made a finding that in the circumstances of this case, it was premature for the appellant to call upon the respondent to produce proof of payment of royalty when the respondent was not in actual possession of any mineral.

37. On our part, we are satisfied that whereas the appellant has legal authority to request for proof of payment of cess, the fact that the respondent was not in actual possession of any mineral ore deprives the appellants any justification to request for proof of payment of cess or royalties.

38. We also take into account that there is no evidence on record that the respondent was engaged in mineral prospecting and was not found in actual possession of any mineral ore. Consequently, we are satisfied the appellants wrongfully and without any justifiable cause impounded the vehicles. We find that the appellants liable to the respondent for damage and loss occasioned by the unlawful impoundment of the prime mover and its trailer.

39. Having determined the issue of liability, we now consider the quantum of damages due to the respondent. There can be no wrong without a remedy. In its plaint, the respondent prayed for special and general damages. The special damages were itemized and particularized. The learned judge awarded as special damages a total of Ksh. 46,226,000/= with interest at court rates from the date of filing suit. It is our duty appraise the evidence on record and applicable law to determine if the judge erred in awarding the general and special damages.

40. At the risk of repetition, the trial judge awarded special damages under the following item heads:

a) Loss of business and income at the rate of Ksh. 250,000/= per day from 7th September 2015 until end of October 2015 being 250,000/= X 53 = 13,250,000/=.

b) Loss of the commercial prime mover registration No. KCB 262 X together with trailer ZE 9242 to the financier total Ksh. 13,000,000/=.

c) Loss of motor vehicle registration No. KBK 294 C being the collateral in the loan facility due to non-payment of loan total Ksh. 5,500,000/=.

d) Loss of contract with Messrs. Star Brilliant EPZ (K) Limited for two years being Ksh. 1,583,333/= X 12 X 2 = Ksh. 37,999,992/=.

e) Loss of contract with four drivers at a monthly salary of Ksh. 40,000/= which is Ksh. 40,000/= X 4 X 12 X 2 = Ksh. 3,840,000/=.

TOTAL = Ksh. 73,589,992/=

41. We shall consider the legality of the damages awarded by the trial court under each of the item heads as given by the court. The test for recovery of damages is that of remoteness, as laid down in the decision of **Hadley –v - Baxendale (1854) 9 Exch. 341.** It was stated:

(i) *the damages must flow naturally from the breach of contract;*

or

(ii) *the damages, although difficult to predict in the ordinary case, must be reasonably foreseeable.*

42. For injury or loss to form the basis for recovery of damage for breach of contract, the loss must be such as can be traced solely to the

breach, be capable of exact computation, must have arisen according to the usual course of things, and be such as parties contemplated as the probable result of such breach.

43. In the instant matter, the respondent made claim for loss and termination of service transportation contract with Messrs. Star Brilliant (EPZ) K. In addressing issues relating to the breach of a service contract, the material item of damage is usually the loss of "anticipated profits". Vague, speculative, or uncertain damages are not recoverable. However, lost future profits are recoverable if there is a causal link and it arises and flow from the breach of contract. Special damages are secondary or derivative losses resulting from special circumstances particular to that contract or to the parties.

44. In the instant matter, the respondent claimed for special damages against the appellants. The availability of special damages is conditioned upon whether the special circumstances were known, or should have been known, by the defendant at the time of contract. (See **Pankaj Transport PVT Limited - v- SDV Transami Kenya Limited [2017] eKLR at paragraphs 14 and 15).** With the foregoing principles in mind, we now consider the legal propriety of the quantum of damages awarded by the trial court under various item heads.

Special damages awarded as loss of contract with four drivers

45. The trial judge declined to make an award of Ksh. 3,840,000/= as special damages for loss of contract with four drivers. The respondent in his claim alleged that he had employed four drivers at the rate of Ksh. 40,000/= per month per driver. That as a result of the appellant's illegal conduct of impounding the vehicles, he was forced to terminate the services of four drivers. That the four drivers were being paid a total of Ksh. 160,000/= as their monthly salary. The respondent sought compensation for loss of salary for the drivers for the balance of the transportation contract period. In declining to award special damages for loss of drivers' salaries, the learned judge expressed that there was no proof that the respondent employed four drivers. In any event, the learned judge observed that this was a matter for the Employment and Labour Relations Court and he had no jurisdiction as a High Court judge.

46. We have analyzed the evidence on record and we are satisfied the respondent did not lead any evidence to prove the claim for damages for loss of contract with the four drivers. We are also satisfied that the learned judge did not have jurisdiction to determine employment and labour related disputes. Further, on our part, the respondent did not demonstrate he suffered any loss as a result of terminating the contract of the four drivers. It was not demonstrated that the respondent spent monies towards paying the drivers their salaries. We do not see how the respondent suffered loss by his inability to pay the drivers. The persons most affected were the drivers and there is no evidence that they ever complained. Under this item head, we find the trial judge did not err in declining to award any special damages for loss of contract with the four drivers.

Damages for contract with Star Brilliant EPZ (K) Limited

47. This Court in **Richard Okuku Oloo – v- South Nyanza Sugar Co. Ltd [2013] eKLR** tacitly stated that.

> *"…. a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."*

48. In the instant matter, the trial judge awarded the respondent the sum of Ksh. 34,826,000/= for loss of contract with Star Brilliant EPZ (K) Limited. In making the special damages award, the learned judge expressed himself as follows:

> *According to the contract (Exhibit 3) the plaintiff was to transport 5 containers from Naivasha to Mombasa every month at the rate of Ksh. 316,000/= per container. That translated to Ksh. 1,583,000/= monthly. The period of contract was 2 years from 1st July 2015. The entire contract sum was to be Ksh. 37,992,000/=. Agreeing with the counsel for the defendants, I find that the contract had run for two months before the motor vehicle was impounded hence the plaintiff is only entitled to what he would have earned in the remainder of the contract period which is 22 months. That is Ksh. 34,826,000/= which amount I find well pleaded and proved.*

49. We have considered the sum of Ksh. 34,826,000/= and it is our duty to determine whether the trial court followed the appropriate legal principles in awarding the sum as special damages for loss of contract with Messrs. Star Brilliant EPZ (K) Limited.

50. We re-affirm that damages for breach of contract are subject to the principles of remoteness, causation and mitigation. In this matter, there was no contract between the appellants and Star Brilliant EPZ (K) Limited. There is no privity of contract between the appellant and Messrs Star Brilliant EPZ (K) Limited. Consequently, any award of special damages as against the appellant for the termination of contract between the respondent and Messrs Star Brilliant EPZ (K) Limited must be based on sound legal principles.

51. The trial judge in awarding damages for the contract loss and termination of the contract did not cite any judicial principles to support the award. The judge did not indicate upon what legal principle he was awarding the balance of twenty (22) months' period of service when there was no privity of contract between the appellant and Brilliant Star (EPZ) K Limited.

52. Again, the learned judge computed the damages awarded on the basis that the respondent was to transport five (5) containers from Naivasha to Mombasa every month at the rate of Ksh. 316,000/= per month. There is no evidence on record that during the two months of July and August 2015 prior to the impoundment of the vehicles that indeed the respondent transported five (5) containers from Naivasha to Mombasa. There is also no evidence on record that the respondent was paid Ksh. 316,000/= per month during the two months when the contract of transportation service was in force. The respondent led evidence to show he was paid Ksh. 250,000/=. There is no proof this sum was consistently paid during the two months. In any event, it is not clear what the sum was being paid for and how many containers as well as how many prime movers were involved. To this extent, we find the respondent did not lead evidence to prove his ability to raise and generate the revenue of Ksh. 316,000/=per month from the transportation service contract with Star Brilliant (EPZ) K Limited. There is no evidence on record with particularity to show that the respondent was ever paid the sum of Ksh. 316,000/= per month. Further, we find the trial court erred in using the sum of Ksh. 316,000/= as the base figure for computing the award of special damages. The sum is a gross sum

including operating expenses and Value Added Tax (VAT). The judge erred in computing the special damages awardable under this item head without taking into account the operating expenses and taxes due to the Government. There is no evidence on record to prove what was the net profit that the respondent would have made per month when the transportation contract was serviced. We thus find the respondent did not prove special damages (with particularity) as a result of the termination of the transportation contract with Star Brilliant (EPZ) Limited.

53. For purposes of liability under the item head loss of contract, we consider the issue of remoteness of damage. Was the impoundment of the motor vehicle the cause of termination of the contract of service for transportation with Brilliant Star (EPZ) Limited? The transportation service contract was terminated by letter from Messrs. Star Brilliant (EPZ) K Limited dated 9th October 2015.The evidence on record shows that the respondent had three vehicles to be used to service the transport contract. The appellant impounded only one prime mover and a trailer. There is no evidence on record to show that the other two vehicles were not available to service the transportation contract. We are not satisfied that the collapse of the respondent's business was solely due to the impoundment of the vehicles by the appellants. There is no causal link between collapse of the business and the act of impoundment.

54. Further, the learned judge awarded damages for the balance of twenty-two (22) months due under the transportation contract. It is not in dispute the contract was never serviced. It is not in dispute that the judge used gross revenue instead of net revenue. The judge did not state upon which legal principle he was awarding damages for the balance of the 22 months using a gross revenue sum when there is no privity of contract between the respondent and Star Brilliant (EPZ) Limited. There is no evidence on record that the respondent ever earned the sum of Ksh. 1,583,000/= monthly from the contract during the two months that the contract was in force. It follows there was no factual basis for the judge to use the alleged monthly sum of Ksh. 1,583,000/= as the basis for computing special damages for loss of the service transportation contract. The judge erred in simply assuming that because the sum of Ksh. 1,583,000/= was mentioned in the service contract, the same was due and payable. For the various reasons stated above, we hereby set aside in entirety the special damages of Ksh. 34,826,000/= awarded by the trial court for loss of contract with Star Brilliant (EPZ) K Limited.

Loss of business and income

55. The trial judge awarded the respondent the sum of Ksh. 13,250,000/= for loss of business and income at the rate of Ksh. 250,000/= per day from 7th September 2015 until end of October 2015 being 250,000/= X 53 = 13,250,000/=. We note that this sum is lifted lock, stock and barrel from the demand letters dated 28th and 29th September 2016 from the respondent's counsel to the appellant's County Secretary.

56. Comparatively, in **Union of India and another -v- Hari Mohan Ghosh, AIR 1990 Gauhati 14**, it was laid down that the loss of profit is loss or damages which naturally arose in the usual course of things from the breach.

57. In the instant matter, the respondent neither indicated nor proved the amount of net income or net profit he would have earned in a single contract month. The evidence shows he received the sum of Ksh. 250,000/= towards servicing the transportation contract. This was a gross monthly payment. There is no evidence on record to show that the sum of Ksh. 250,000/= was earned per day. There is no evidence that during the two months in which the contract was in existence, Ms. Star Brilliant (EPZ) Limited paid the respondent the sum of Ksh. 250,000/= daily. The contract simply stated the respondent would be paid a sum of Ksh. 316,000/= per month for transporting five (5) containers. Further, the appellant impounded the respondent's vehicle for 49 days and not 53 days yet the trial judge used 53 days in computing special damages. Once again, we observe that the 53 days is derived from the respondent's demand letters dated 28th and 29th September 2015. The evidence clearly proved the vehicles were impounded for 49 days. It follows that the trial judge erred and had no factual basis to use 53 days for computing the damages awardable when in actual fact the vehicles had been impounded for 49 days. In arriving at this finding, we are guided by dicta of this Court in in **African Highland Produce Ltd -v- John Kisono CA 264/99 [2001] eKLR** where it was stated *inter alia* that:

> *"the trial judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff was only entitled to loss of user for 21 days which period was necessary to effect in full all repairs on his BMW car."*

58. In addition, we find that there is no evidence that the respondent was earning the sum of Ksh. 250,000/= per day under the contract with Ms. Star Brilliant (EPZ) Limited. Accordingly, we set aside the entire sum of Ksh. 13,250,000/= awarded by the trial court for loss of business and income. We substitute in its place an award of Ksh. 408,330/= calculated as being Ksh. 250,000/= divided by 30 days multiply by 49 days to get the sum of Ksh. 408,330/=. In our considered view, and with great reluctance, we find the lost income from the impoundment of the vehicles is at most Ksh. 408,330/=. We accordingly award the sum of Ksh. 408,330/= as lost income.

Loss of the commercial prime mover registration No. KCB 262 X together with trailer ZE 9242 and loss of motor vehicle Registration No. KBK 294 C

59. The learned judge awarded special damages of Ksh. 11,400,000/= for loss of vehicles and the loss of motor vehicle registration No. KBK 284C. The award was computed as Ksh. 6,900,000/= for loss of vehicles and Ksh. 4,500,000/= for loss of vehicle registration no. KBK 284C. The award was made on account of public auction of the two vehicles by Housing Finance Company. Is the award of Ksh. 11,400,000/= as special damages justifiable in law given the facts of the case?

60. The vehicles were co-owned by the respondent and the Housing Finance Company. The Finance company had advanced a loan facility to the respondent towards the purchase of the vehicles. The security for the loan facility was the vehicles. In addition, the respondent provided another vehicle registration No. KBK 294X as collateral. The respondent was required to make a monthly repayment for the loan facility at the rate of Ksh. 188,000/= for the prime mover and Ksh. 79,149/= for the trailer. The total monthly repayment by the respondent to the finance company was thus Ksh. 267,149/=. During the two months that the prime mover and its trailer was impounded, the respondent was expected to have serviced his loan and paid a total of Ksh. 534,298/= being Ksh. 267,149/= X 2 = 534,298/=.

61. The legal question is whether the appellant is liable to the respondent for the loss of the vehicles which were sold by public auction by

Housing Finance Company. The trial judge held that the appellant was liable to the respondent. For this reason, the judge awarded special damages of Ksh. 6,900,000/= being the forced sale value of the vehicles. In addition, the judge awarded Ksh. 4,500,000/= being the forced sale value for motor vehicle registration no. KBK 285C.

62. In awarding the special damages of Ksh. 11,400,000/=, the learned judge expressed as follows:

> *93. There is no doubt that because of the impoundment of the motor vehicle the plaintiff defaulted in the loan repayment and the financier exercised its legal rights over the motor vehicle and the other vehicle which had been used as a collateral. The plaintiff was hence deprived of the ownership of the two vehicles and claimed Ksh. 13,000,000/= for the motor vehicle and Ksh. 5,500,000/= as the value of the other vehicle.*
>
> *The defendant submitted that the value of the motor vehicles to be awarded should be the ones proved by the valuation reports since the plaintiff had instead pleaded for higher values. I agree with that submission. The valuation report for the motor vehicle gave a market value as Ksh. 7,300,000/= and a forced sale value of Ksh. 6,900,000/=. I will adopt the forced sale value in this case since the motor vehicle was sold in an auction. Likewise, I will settle for Ksh. 4,500,000/= for the other vehicle which amount is given as the forced sale value in the valuation report…..*

63. The question in our mind is whether the learned judge erred in law in awarding special damages of Ksh. 11,400,000/= for the two vehicles and the trailer. The answer is in the affirmative - the judge erred in law for the several reasons.

64. Peremptorily, the judge did not take into account that the respondent's interest in the motor vehicles was not 100%. The financier, Housing Finance Company had a superior and overriding proprietary and possessory rights over the vehicles. The respondent's claims over the motor vehicles is that he was entitled to possession thereof when the same were impounded. In **Bloxam – v- Hubbard (1804) 5 East 407** it was held that if a claimant relies upon a right to possession of a chattel, he can recover only according to the amount of his interest. Any damages recovered above the value of his interest is held on account of the other person's interest in the property. (See **The Winkfield (1902) P. 42).**

65. What was the respondent's interest in the motor vehicles? Was he entitled to possession of the vehicles? Did the respondent suffer loss of the vehicles through public auction? Is the appellant responsible for the loss of the vehicles through the sale by public auction?

66. By letter dated 29th October 2015, Housing Finance Company, the financier and co-owner of the vehicles wrote a letter to the respondent demanding payment of arrears of Ksh. 1,220,635/77. From this letter, it is manifestly clear that as at the date of impoundment of the vehicles by the appellant, the respondent was already in arrears for his loan repayment. It is therefore manifestly clear that the cause of default and arrears in servicing the respondent's loan with Housing Finance Company was not the impoundment of the vehicle. The respondent was already in arrears in his monthly amortization of the loan facility. He had other vehicles in his use and possession that could have serviced the transportation contract. On balance of probabilities, there is no causal link between the impoundment of the vehicles by the appellants and the failure of the respondent to pay his monthly installments and the repossession of the vehicles by the Financier and the ultimate sale of the vehicles by public action. Upon our re-evaluation of the evidence, we find that the trial judge erred in arriving at the conclusion that because of the impoundment of the motor vehicles, the respondent defaulted in his loan repayment and this led the financier to exercise its legal rights and repossess the motor vehicles leading to collapse of the respondent's business. We find there is no causal link between the impoundment and repossession of the vehicles by the Finance Company.

67. In this matter, there was privity of contract founded on the loan agreement between the respondent and the Finance Company. The Finance Company repossessed the vehicles due to arrears on monthly amortization of the borrowed sum. The respondent was in arrears. A party cannot rely on "self-induced frustration" due to his own conduct to allege that a breach of contract by the other party or a third party has occurred. (See **Maritime National Fish Limited – v- Ocean Trawlers Limited [1935] AC 524).** A party whose own breach of contract brings about termination of a contract cannot plead that a third party is liable for the breach and ensuing loss or damage. (See generally **Denmark Production Limited – v- Boscobel Productions Limited [1969] 1 QB 699; The Hannah Blumenthal [1983] 1 All ER 34; Norris –v- Southampton C. C. (1982) 1 C.R. 177).**

68. We earlier posited the question what loss did the respondent suffer as a result of sale by public auction of the two vehicles. The respondent did not 100% own the vehicles. The vehicles were co-owned. His interest in the vehicles was subject to the overriding proprietary and possessory interest of the Finance Company. The proceeds of sale of the vehicles must have been credited to the respondent's loan account. By awarding the respondent the full value of the two vehicles, the trial judge erred in law. The judge erred and ended up making the appellants "buy" and redeem the two vehicles and the trailer for the respondent. The respondent did not suffer a loss of 100% for what he did not own. This is unjust enrichment.

69. In his submissions before us, the respondent conceded that the learned judge erred and should have discounted the Housing Finance Company's interest in the motor vehicles. There is no evidence on record to indicate the extent or percentage of the Finance Company's interest in the vehicles. However, the interest of any financier of a property is equivalent to any outstanding unpaid installments, the principal sum and interest thereon. Further, a financier who has security over a chattel or property has an overriding and superseding interest therein. This being the case, when the Housing Finance Company exercised its possessory and security rights over the two vehicles, the respondent's possessory rights in the vehicles was extinguished and his proprietary rights superseded. The respondent's interest in the vehicles, if any, was transferred into his rights vis-à-vis the Finance Company.

70. As against the appellant, we find the respondent suffered no loss in the sale by public auction of the two vehicles. We say so when we take into account the superseding interest of the Housing Finance Company over the vehicles and which interest included the Housing Finance Company's right to the unpaid installments, the principal sum and interest thereon not to mention legal and administrative expenses. In addition, we find that the cause of default in loan repayment was not the appellant's action of impounding the vehicles. The respondent was already in default of his loan amortization as at the date of impoundment. We find that there is no causal link between the repossession of the vehicles by the Finance Company and the impoundment of the vehicles. For this reason, we set aside the entire sum of Ksh.

11,400,000/= awarded by the trial judge as special damages for the loss of the two vehicles and the trailer.

General Damages

71. The trial judge awarded the respondent the sum of Ksh. 500,000/= as general damages. In awarding the amount, the judge himself expressed thus:

> *The plaintiff prayed for general damages…He decried the loss of his business integrity which he had built over the years and that he could not be trusted any more. That, the net effect of the defendant's actions rendered him financially unstable.*
>
> *The plaintiff's status after the events complained of in this suit were not challenged by the defendants during cross-examination. I watched the plaintiff testify before me and he appeared a very dejected man. There is no doubt he was hard-hit by the way the events unfolded after the impoundment and detention of the motor vehicle. No doubt his dignity was greatly impugned.*
>
> *As I have already stated, this is a perfect case for consideration of an award of general damages for the unlawful actions of the officers of the defendant in the impoundment and detention of the motor vehicle. The plaintiff prayed for an award of Ksh. 1,000,000/= under this head. I am persuaded that an award of Ksh. 500,000/= serves as adequate damages and I hereby award the plaintiff.*

72. We have considered whether the trial court erred in awarding Ksh. 500,000/= as general damages. In **Butt v. Khan** [1981] KLR 349, it was expressed that:

> *"An appellate court will not disturb an award of damages unless it is so 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."*

73. In the instant case, the trial court justified the award of general damages by stating that the respondent suffered loss of status and dignity; that he was a dejected man and he had lost business integrity. With due respect, these item heads are relevant to computation and award of general damages in a defamation suit. The respondent's claim was not founded on defamation. Notwithstanding, the trial judge correctly held that an award for general damages is due to the respondent for the unlawful actions of the officers of the appellant in the impoundment and detention of the vehicles. We likewise are of the view that an award of general damages is due to the respondent. The appellants' officers conduct was high-handed, reprehensible, capricious and borders on abuse of power. This is a case where we would have awarded exemplary damages if the same were pleaded and prayed for. Despite impounding the vehicles, the appellants stone facedly denied the same. Such conduct is detestable and unbecoming of public officers. We therefore find that the general damages awarded by the trial court did not sufficiently take into account the unlawful conduct of the appellants officers and the stone face denial of impoundment of the vehicles. Nevertheless, there is no cross appeal on the award for general damages. Accordingly, in the absence of a cross-appeal, we affirm and uphold the sum of Ksh. 500,000/= awarded as general damages by the trial court.

74. From our re-evaluation of the evidence on record and the applicable law, we affirm and uphold the appellant's liability to the respondent for general damages. However, we come to a determination that the trial judge erred in law in awarding the quantum of special damages as itemized in the court's judgment. We hereby set aside in entirety the quantum of special damages as awarded by the trial court. We substitute the same with award of damages as follows:

(a) General damages ----- Ksh. 500,000/=.

(b) Special damages for loss of the commercial prime mover registration No. KCB 262 X together with trailer ZE 9242 and loss of motor vehicle Registration No. KBK 294 C ------- Nil award.

(c) Special damages for loss of contract with Ms. Star Brilliant EPZ (K) Limited ------ Nil award.

(d) Damages for lost income ----- Ksh. 408,330/=.

(e) Special damages for loss of contract with the four drivers ---- Nil award.

75. In the final analysis, this appeal has merit on quantum and no merit on liability. It is hereby partially allowed. The judgment of the trial court be and is hereby varied as follows. We affirm liability of the appellants to the respondent. We set aside in entirety the special damages of Ksh. 46,226,000/= as awarded by the trial court. We substitute in its place an award of damages for lost income in the sum of Ksh. 408,330/=. We affirm the general damages of Ksh. 500,000/= awarded by the trial court. The total sum of damages awarded in favour of the respondent is thus **Ksh. 908,330/= only** (Ksh. 500,000/= plus Ksh. 408,330/=).

76. Each party shall bear its/his own costs in this appeal.

Dated and delivered at Kisumu this 31st day of July, 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR