**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 251 OF 2001**

**THABITI FINANCE COMPANY LIMITED (IN LIQUIDATION) …..................1ST APPELLANT**

**THE DEPOSIT PROTECTION FUND BOARD ………………….……..….. 2ND APPELLANT**

**AND**

**AUGUSTINE RIWA ABIERO ……………………….........................….…….. RESPONDENT**

**Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mr. Justice Mulwa) dated 27th July, 2001**

**in**

**H.C.C.C. No. 1025 of 2000)**

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**JUDGMENT OF THE COURT**

The facts giving rise to this appeal are largely not in dispute. They are as follows. **Augustine Riwa Obiero**, the respondent (hereinafter called “the plaintiff”), was the registered owner of Land Reference Number 209/6252 situated in Eastleigh, Nairobi, together with buildings and other developments thereon (hereinafter referred to as “the suit property”). On or about 13th September, 1983, the plaintiff acted as a guarantor in respect of financial facilities and banking accommodation granted by the first appellant, **Thabiti Finance Company Limited,** to one Mathews Ouma Mwango and the plaintiff and charged the suit property as security for the loan.

Mwango seriously fell into arrears with the loan repayments and though the plaintiff was able to liquidate the principal sum, the plaintiff was unable to service the accrued interest. Consequently, the first appellant advertised the suit property for sale by public auction. However, a further negotiation between the plaintiff and the first appellant resulted in the rescheduling of the loan repayment scheme. This did not help matters because soon thereafter the plaintiff again defaulted. On 25th January, 1994, the first appellant notified the plaintiff of its intention to sell the suit property by public auction unless the outstanding sum then owed was paid within 14 days from that date. Again, this was not to be because the first appellant acceded to further postponement of the auction sale and allowed the plaintiff to sell the suit property by private treaty. It was the plaintiff’s case that in reliance on the first appellant’s authority and permission the plaintiff involved prospective purchasers and received a firm offer of Shs.3,500,000/= which offer he conveyed to the first appellant.

However, unknown to the plaintiff the first appellant on 20th September, 1994, transferred the suit property to one David Mburu Githere. In his plaint dated 24th January, 1997, the plaintiff averred that the

appellants had knowingly, irregularly and fraudulently transferred the suit property without his sanction or being put on notice. In a reserved judgment the learned Judge held:-

> **"I accordingly find that the evidence before the court proved fraud on the part of the defendants (appellants) and hold that the transfer of the suit property on 20th September, 1994, to the said David Githere was fraudulent".**

Being aggrieved by this decision the appellants have preferred three grounds of appeal which are as follows:

> **1. THAT, the learned judge erred in law in finding that the respondent was entitled to general damages as opposed to special damages.**
>
> **2. THAT, in the alternative, the learned judge erred in law in awarding the respondent general damages in the sum of Kshs 3,500,000/-.**
>
> **3. THAT, the learned judge erred in not specifying the appellant against whom the judgment was entered.**

At the commencement of the appeal, Mr. Ougo for the appellants informed us that he did not wish to challenge the findings by the learned Judge that fraud against the appellants had been proved. All that he (Mr. Ougo) took issue with was the finding by the learned Judge that the plaintiff was entitled to general damages as opposed to special damages. He contended that the damages suffered by the plaintiff were special damages which he neither pleaded nor proved to the degree required by the law and are consequently not awardable. He urged us to follow the decision of this Court in **Sande v. Kenya Co-operative Cremaries Limited (Mombasa) Civil Appeal No. 154 of 1994** and set aside the damages so awarded.

In order to resolve this ground of appeal it is necessary for us to revisit the prayers the plaintiff sought in the plaint. These are:-

**(i) A declaration invalidating and nullifying the purported sale and retransfer of the suit property to himself;**

**(ii) An order directed to the Commissioner of Lands to rectify the register to its status prior to the 20th September, 1994; and,**

**(iii) General damages for fraud.**

The learned Judge declined to award reliefs for invalidation, nullification and rectification of the register. However, he proceeded to assess damages for fraud.

It is manifestly clear from the plaint that the nature of damages which the plaintiff could have incurred are general damages and not special damages as indicated by the prayers enumerated in the plaint. Moreover, as the particulars of the special damages had not been pleaded, special damages could not be awarded. In this regard the learned Judge held:-

> **"In my view special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damage particularly extent thereof would be unknown at the time of trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated as at the time of trial."**

With respect, we are unable to fault the learned Judge. The necessity of pleading "damages" (meaning

injury) or "damages" (meaning the amount claimed to be recoverable), if it arises at all, does so as an example of the general requirement of any statement of claim that it shall "put the defendants on their guard and tell them what they have to meet when the case comes on for trial" **(per Cotton L.J. in Philipps v Philipps (1878) 4 Q. B. D. 127, 139.** This dictum gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out–of pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. See **Perestrello Ltd. V. United Paint Co. Ltd. [1969] 1 W.L.R. 570.**

The difference between special and general damages was explained by Lord Macnagten in **Stoms Broks Aktie Bolag v. Hutchinson (1905) A.C. 51 J.** where he said:

> **"General damages" are such as the law will presume to be the direct natural or probable consequences of the action complained of. "Special damages" on the other hand, are such as the law will infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly".**

Mr. Ougo has placed much reliance in **Sande v. Kenya Co-operative Creameries (Mombasa) Civil Appeal No. 154 of 1992 (unreported)**.

With respect, we think, that this case has no relevance to the matter now before us (We derive much solace in the fact that two of us in this appeal were members that constituted the Bench that made that decision).

At the time of filing its defence the appellant in **Sande's case** knew that it had already suffered a definite loss clearly quantifiable in terms of money. But, in the instant case, the plaintiff did not know what he had actually lost until the date of the trial. All that he could testify on was the value of the suit property that he had lost due to the fraudulent acts of the appellants and the fact that an offer to purchase the suit property for Shs. 3,500,000/= had been received from one Peter Owidi. Clearly, the Sande case is distinguishable and cannot be applied herein.

It is our view, therefore, that the claim the plaintiff sought to prove was one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. The quantification of such damage fell for the court to determine during the trial.

In the circumstances we are unable to say that the learned Judge erred in finding that the plaintiff was entitled to general damages as opposed to special damages.

In **John Wambugu Njoroge vs. KCB Ltd. C.A No. 179 of 1992 (Kisumu)** this Court stated:

> **"…..it means that the appellant is entitled to, in terms of money, to be put in the same position as he was immediately before he was wrongfully deprived of his land and the development being and erected thereon. Since he cannot, now, have the return of his land, this Court can only deal with the matter in terms of money".**

The learned Judge felt bound by this decision and awarded the plaintiff the monetary value of the suit property. Shs. 3,500,000/= constituted the value of the suit property before the plaintiff was deprived of it. In our view, the learned Judge acted correctly. We do not think it is necessary for us to comment on the grounds for affirming the decision of which due notice had been given.

In the result, this appeal is ordered dismissed with costs. As the first appellant committed and perpetrated the fraud against the plaintiff, the first appellant shall pay the costs of the appeal and of the suit in the superior court.

**Dated and delivered at Nairobi this 19th day of March, 2004.**

**R.S.C OMOLO**

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**JUDGE OF APPEAL**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O'KUBASU**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**<u>DEPUTY REGISTRAR</u>**