



REPUBLIC OF KENYA



**KENYA LAW**  
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**Norman & 2 others v Naipa Supermarket Limited (Civil Appeal  
E001 of 2022) [2025] KEHC 5280 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CIVIL APPEAL E001 OF 2022  
RN NYAKUNDI, J  
APRIL 29, 2025**

**BETWEEN**

**EKIDOR NORMAN ..... 1<sup>ST</sup> APPELLANT**

**EUNICE ATEYO ..... 2<sup>ND</sup> APPELLANT**

**EKIDOR MOUREEN ..... 3<sup>RD</sup> APPELLANT**

**AND**

**NAIPA SUPERMARKET LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The present appeal arises from the Judgment and Decree of delivered on the 10<sup>th</sup> of March 2022 in Lodwar Civil Suit No. E006 of 2021. The Respondent herein instituted a suit in the trial court against the appellants vide an Amended Amended Amended Plaintiff seeking the following orders;
  - a. A declaration that the Defendants acted illegally in closing down the plaintiff's business without notice.
  - b. A declaration that by closing down the Plaintiffs business without notice, the defendant contributed to the collapse of Naipa Supermarket limited.
  - c. Kshs. 16,679,954/= being the value of the Plaintiffs business and stock as at 8<sup>th</sup> March, 2021 when the Defendant's illegally closed the Plaintiffs shop.
  - d. Kshs. 30,000/= per day being loss of profits from 8th March, 2021 till the date of the judgment.
  - e. An order of permanent injunction restraining the Defendants, their agents, servants, or any other person from closing and denying access to the Plaintiffs business known as Naipa Supermarket operated in the premises situated on Plot Number 340 Lodwar or from interfering with the said business.



- f. That the plaintiff be allowed to continue with the renovations and beautifying the premises situated on plot Number 340 Lodwar, provided he doesn't alter the structure of the building and the cost of the renovation be borne by the Defendants.
  - g. General damages
  - h. Exemplary damages
  - i. Cost of the suit
  - j. Cost of the counterclaim and interest
  - k. Any other relief that the court may deem fit to grant
2. The defendants filed a defence and counterclaim in response to the plaint. In the Counterclaim, they sought the following orders;
- a. A declaration that the Plaintiff has perpetually acted in fundamental breach of the terms of the lease agreement.
  - b. A declaration that the Plaintiff is liable on contracts to pay the Defendants special damages amounting to Kshs. 270,000.
  - c. General damages and exemplary damages
  - d. Interest on (b) and (c) above
  - e. The cost of the suit
  - f. Any other order or relief or relief granted by the Court.

### **Hearing at the trial court**

3. The Plaintiff called three witnesses in support of its case.
- PW1, Anthony Kibet Munene testified that he is a director of the Plaintiff. It was his testimony that the Plaintiff is a limited liability company conducting the business of a supermarket in Lodwar town. It operated on the rental premises on parcel of land known as Plot Number 410 owned by one Martin Ekidor Lotukoi (now deceased). He produced a copy of his national identity card, certificate of incorporation of the Plaintiff, directors' resolution, business permits from Turkana County Government. The witness stated that he entered into a lease agreement with the deceased afore stated in the year 2001 and continued to trade and pay the agreed rent and he produced bank statements detailing payment of rent. Upon the demise of the landlord his family approached him and it was agreed that he continue paying and at the filing of the suit, he was paying Kshs. 45,000 per month. He testified that in March 2021, they carried out an audit of the business and found out that the business was not performing optimally because of a leaking roof, it was not painted and that shelves were in bad shape. It was his testimony that on the 8/3/2021 he was called by one of his managers, Anne Wachira and was informed that the three Defendants had ordered the closure of the Supermarket without any reason. It was his testimony that through the affidavit of one Eunice Ateyo Ekidor the Defendants conceded to having locked the premises. He reported the matter to police station and subsequently filed the instant suit.
4. The witness testified that he does not owe the Defendants any rent as by the closing the premises, and that they took it over when there were no rent arrears. Further, that it is them who are under an



obligation to compensate him in damages for the lost stock through expiry, lost profits and exemplary damages for the illegal closure.

5. PW2 (Anne Wairimu Wachira) testified that the Plaintiff employed her as a manager. On 8/3/2021, she was at her work place supervising work when a lady walked into the supermarket said that she is from the Ekidor family. She ordered all of them out of the premises which she and other workers obeyed and came outside. She then locked the doors. It was her testimony that ever since the said closure of by the Defendants, the supermarket has never been re-opened.
6. PW3 (Alex Wachira) testified that he is an accountant employed by the Plaintiff. He keeps the books and prepared stock records of the business. He produced stock sheets showing that as at the time of closure, the stock in trade was worth Kshs. 11,679,954/=. He testified that the stock records reflected the status of the business between the month of September 2020 and the month of February 2021. Further, that they had a sales manager application installed in their computers and the stock sheets were auto generated and they would also show profit margin for the period. The same revealed that the business during that period would make a profit of between Kshs. 30,000 to Kshs. 35,000 per day. It was his testimony that goods would be sold and replaced immediately through purchases but the invoices for purchases were locked out when the Defendants closed the business.
7. The defendants called three witnesses in support of its case.  
DW1, Eunice Ateyo Ekidor testified that PW1 leased the premises on LR/1491/61 from her late father around the year 2000 and they signed a lease in the year 2001. Further, that the Plaintiff had not signed the lease but PW1 signed. She testified that the plaintiff was known to them as Tony and not Anthony. Upon the demise of her father, the Plaintiff signed another lease with her late brother and yet another again which she and her brother were to sign that the plaintiff not. PW1 did not sign where the rent was increased to Kshs. 45,000. She produced a sheet of account showing that PW1 was paying Kshs. 45,000/= routinely during that period and at times he would send the money using the accounts of Naipa Supermarket. She testified that PW1 was a stubborn tenant who delayed paying rent and would make structural changes on the rental premises without any authority of the landlord. It was her testimony that they never refused to open the premises and that inside the business there were no perishable goods. She produced photographs of a section of the business where the repairs were taking place. Further, that the company was never raided and that PW1 is now in rent arrears from the month of March 2021 to the date of the judgment.
8. DW2 Ekidor Apua testified that on 8/3/2021 she was called by DW1 and asked to go to the Supermarket of PW1. On arrival she found the doors closed save one door and outside was a metal drilling machine and a timber cutting machine and some workmen. She entered inside through the open door and inside she found two men, one climbing up a ladder and another painting. It was her testimony that the people said they were employed to do the work. Further, that there was no selling and that shelves were empty and no perishable goods were stocked. She stated that the Plaintiff did not have authority to carry out any repairs.
9. DW3 (Ekidor Norman) testified that on the 3/9/2021, he was on transit from Kakamega going to Lodwar when he saw people on top of their family premises occupied by the Plaintiff. He called DW2 and then photographed the scene. He interrogated them and they said that they had been called by PW1 and asked to remove the solar panels. He testified that they carried away the solar panels and left tire scene.
10. Upon conclusion in taking evidence, the court visited the premise property and took notes.



11. Upon conclusion of the testimonies, the trial court visited the premises property. The court then considered the evidence tendered, the testimonies of the witnesses and the submissions filed by each of the parties and entered judgment against the defendants as follows;

1. Loss of stock: Kshs. 5,829,997
2. Loss of profits: Kshs. 3,581,329

The court dismissed the counterclaim.

12. Being aggrieved with the judgment and decree, the appellants instituted this appeal vide a memorandum of appeal dated 6<sup>th</sup> April 2022 premised on the following grounds;

1. That the Learned Trial Magistrate erred in facts and law by not considering the Appellants' Pleadings, Evidence and Submissions;
2. That the Learned Trial Magistrate erred in failing to appreciate the contents of the Pleadings filed by either the Appellants and Respondent.
3. That the Learned Trial Magistrate erred in misapprehending the facts and evidence presented by the Respondent.
4. That the learned Magistrate erred in and law by failing to appreciate that the Court had no requisite jurisdiction to hear and entertain the proceedings before it.
5. That the Learned Trial Magistrate erred in law by misapplying the authority in *Narshidas & Company Limited v Nyali Air Conditioning and Refrigeration Services Limited* to hold that the Business Premises Rent Tribunal has no jurisdiction to issue injunctions.
6. That the Learned Trial Magistrate erred in law in using a Tribunal's purported lack of jurisdiction as the only basis to assume jurisdiction and competence to entertain proceedings before it.
7. That the Learned Trial Magistrate erred in law in failing to consider the Respondent's admission/ concession that its relationship with the Appellants was that of a controlled tenancy, to find this alone ousted the court's jurisdiction.
8. That the Learned Trial Magistrate erred in law by failing to appreciate the fact that the Plaintiff lacked the requisite competence *locus standi* to sue the Appellants-Defendants.
9. That the Learned Trial Magistrate erred in failing to appreciate the nature of the Contract in dispute and thus finding that the Plaintiff/ Respondent herein lacked the required legal competence to institute the proceedings.
10. That the Learned Trial Magistrate erred in fact in failing to appreciate the factual admission by the Plaintiff/ Respondent herein that the Plaintiff's business was not performing at the time of the alleged renovation.
11. That the Learned Trial Magistrate erred in fact in failing to appreciate the Plaintiff/ Respondent's factual disposition that it had no reasonable business at the time of the alleged close of its premises.
12. That the Learned Trial magistrate erred in law by failing to appreciate that facts which are alleged and not controverted by the adversary are deemed to have been admitted.



13. That the Learned Trial Magistrate failed to appreciate that the Plaintiff/ Respondent herein had admitted to the factual allegation that it unlawfully leased out the premises to unknown third parties.
14. That the Learned Trial Magistrate erred in law by failing to appreciate that the evidentiary burden of proof lies with the party who alleges.
15. That the Learned Trial Magistrate erred in fact by failing to appreciate that the Plaintiff/ Respondent herein had not pleaded with particularity, or proven the purported value of stock in the suit premises.
16. That the Learned Trial Magistrate erred in fact by failing to appreciate that the Plaintiff/ Respondent herein had not pleaded with particularity, or proven the purported monthly profits made in the suit premises.
17. That the Learned Trial Magistrate erred in law by placing reliance solely on the Plaintiff/ Respondent's own stock reports which were fabricated, as the basis of determining the true value of stock on the premises.
18. That the Learned Trial Magistrate erred in fact and law by unilaterally, and without any basis, apportioning the ration of perishable to non- perishable stock at 50:50 thereby awarding the sum of Kshs 5,829,997.5.
19. That the learned Magistrate erred in fact and law by relying on the biased and unprofessional profit and loss account provided by the Plaintiff-Respondent to enter a finding that the monthly lost profit was Kshs. 1,193,776.50
20. That the learned Magistrate erred in fact and law by giving an award of Kshs. 3,581,329/- being the lost profit for three months, without any reasonable justification.
21. That the learned Magistrate erred in fact and law by failing to consider that the Respondent-Plaintiff took part in closing down his business and locking the premises.
22. That the learned Magistrate erred in fact and law by failing to consider the fact that as the trial continued, the Plaintiff continued to operate the selling of drinks and refreshments in the premise.
23. That the learned Trial Magistrate erred in fact and in law by failing to consider the lack of intrinsic and extrinsic proof of stock and profits through Audited statements, tax returns, income tax invoices and tax payments/ settlements.
24. That the Learned Trial Magistrate erred in law and fact in disallowing the Defendant/ Appellants' Counterclaim.
25. That the Learned Trial Magistrate erred in law by failing to appreciate the threshold for the grant of mandatory injunctions.
26. That the Learned Trial Magistrate erred in fact and in law by granting a mandatory relief to the Plaintiff/ Respondent even in the absence of fulfilment for the conditions for grant of such reliefs.
27. That the Learned Trial Magistrate erred in law by awarding costs to the Plaintiff/ Respondent.



28. That the learned Magistrate erred in fact and law by entering a finding that the Defendants Counterclaim did not have merit for reasons that it sought for rent for the period the suit was in court.
13. The parties were directed to file submissions on the appeal.

### **Appellants' Submissions**

14. Learned counsel for the appellant filed submissions dated 30<sup>th</sup> January 2024. It is the appellant's case that the Respondent asserted that it was a company registered under the Laws of Kenya. It is not in disputed that a Company is a separate legal entity from its owners as was buttressed in *Salomon v Salomon & Co Ltd (1897) A C 22 HL*. Counsel urged that it is clear and not disputed from the Respondent's Claim as well as the subsequent amendments that the Company was incorporated in the year 2005 or thereafter, yet it is alleged that the Plaintiff entered into a lease agreement with the Defendant in die year 2001. He urged that the trial Magistrate did not consider this.
15. It is the appellant's case that the subject of these proceedings were entered into between the Appellants' father and one Anthony Munene. The said Anthony Munene did not assign his rights under the lease and neither was there a sub-lease to warrant the instituting of the suit by the Respondent company. Counsel maintained that the Claim by the Respondent was incompetent for want of a proper party in the proceedings, and as a result, the suit ought to have been dismissed on this account, as was held in *Apex International & Anglo Leasing Finance Ltd vs Kenya Anti-Corruption Commission [2012] eKLR*. Counsel also cited the case of *Santaben Premchand Shah & 2 others v Meya Agri-Traders Limited [2017] eKLR* where the Court dismissed the entire suit with costs on account of the fact that the Plaintiffs therein lacked the locus standi or competence to sustain the proceedings.
16. It is the appellant's case that a lease was entered between Mr Munene and the Defendants. Mr Munene has been paying rent and occupied the suit premises and at no time had the Respondent. The Respondent was bound by its pleadings as was upheld in the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR*.
17. Counsel submitted that the centuries-old case of *Salomon vs. Salomon Company Limited [1895-99] All ER 33* laid that principle to rest. Further, that there is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the company, is the company itself.
18. Counsel urged that the Respondent, Naipa Supermarket Limited, lacked locus standi to file the suit in the Trial Court, and the Trial Magistrate erred in failing to find as much. That there is no Tenancy Agreement with the said entity', neither was there an assignment.
19. Counsel urged that the trial court lacked jurisdiction to entertain the suit and therefore, that the Trial Court erred by assuming jurisdiction in a matter relating to a Controlled Tenancy which should have otherwise been dealt with by the Business Premises Rent Tribunal. The Business Premises Rent Tribunal has jurisdiction to grant injunctions, and has previously granted injunctions which the High Court has confirmed. It was erroneous for the Trial Court to assume jurisdiction solely on the basis that the BPRT may not grant injunctions. Counsel cited the case of *Ola Energy Kenya Limited v Rashid Opondo Otieno t/a Kisumu Breakdown Services Limited [2021] eKLR* in support of this submission. Additionally, he cited the case of *George C. Gichuru v. Senior Private Kioko & Another (2013) eKLR*.



20. The appellant sought to rely on the pronouncement in the widely known case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) where the court held;

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction then would be no basis for a continuation of proceedings pending other evidence.

A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

21. The appellant maintained that the Trial Court was wrong in entertaining the suit despite lack of jurisdiction, an issue that was raised before it. Counsel urged that jurisdiction cannot be conferred on a Court through judicial craft and innovation, including by restructuring the reliefs sought.
22. It is the appellant’s case that during the proceedings, the Trial Magistrate had occasion to visit the suit property to inspect the state of the Stock, the surroundings of the shop in order to properly assess the business of the Respondent’s and veracity of the alleged facts and circumstances in the suit. The inspection and findings from the visit were not factored in the Judgment. Counsel urged that the true picture was, there was no stock, the suit premises had been dilapidated and there was no cause to allow the suit. He cited the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR in support of this submission.
23. Counsel urged that the Respondent did not call evidence to prove financial loss. The Plaintiffs Managing Director when called to the stand, did not testify on this alleged state of affairs. All the Respondent did was to present a Profit and Loss Account prepared by the Respondent’s Accounts’ clerk. This alone was not sufficient to prove the Respondent’s claims in the Plaint. He cited the case of Hangzhou Agrochemicals Industries Limited v Panda Flowers Limited [2021] eKLR in support of this submission. Further, that the Respondent herein did not adduce audited accounts and reports, study reports of such loss claimed. The Trial Court failed to appreciate this, and proceeded to award the Claim whimsically.
24. It is the appellant’s case that special damages must be pleaded and specifically proved as was the position in Athi River Development Authority v Joseph Mbindyo & 3 others [2013] eKLR, where the Court of Appeal held and noted that the Respondent’s claim was in form of special damages, which ought to have been proved specifically. The Trial Court’s reliance on tire Respondent’s profit and loss allegations (which was not proved) was wrong. The Trial Court simply took an average of what the Respondent stated to have made. The Trial Court ignored to assess what, if at all, such profit was made, then the Respondent would have paid Income Tax, and provided proof of such payment or exemption. The appellant urged that the Respondent did not prove the existence of such stock as required by law.
25. Counsel urged that the stock list provided by the Respondent was akin to pieces of paper referred to by the Court of Appeal in the case of Ryce Motors Ltd & another v Elias Muroki [1996] eKLR and the case of National Social Security Fund Board of Trustees v Sifa International Limited [2016] eKLR. The appellant reiterated that the Respondent herein did not prove the claim, and the award that was made to it, this should therefore be set aside.
26. Counsel urged the court to set aside the decision of the trial court.
- There are no submissions on record for the Respondent.



## **Analysis & Determination**

27. The duty of an appellate court was set out in *In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze 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.”

28. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

29. It follows that in determining the present appeal, these principles are to be applied.

The cause of action in the trial court arose from the invasion of the appellants into the respondent’s premises which occasioned it loss and damages. The respondent successfully sought special, general and exemplary damages from the appellants. The premise of the appeal is that the respondent lacked the locus standi to institute the suit in the trial court. Further, that the court lacked jurisdiction to entertain the suit.

30. Therefore, upon considering the memorandum of appeal and the submissions, the following issues arise for determination;

1. Whether the Respondent lacked locus standi to file the suit
2. Whether the trial court lacked jurisdiction to entertain the suit
3. Whether the court should interfere with the award of damages

### **Whether the Respondent lacked locus standi to file the suit**

31. Locus standi means the right to appear before and be heard in a court of law. Without it, even a party with a meritorious case cannot be heard. Locus standi is important to the extent that in its absence, a party has no basis to claim anything before the Court. In the case of *Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000*, as follows:-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and Others -Vs- City Council of Nairobi* [1982] KAR 229, the Court also held that:-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

32. The plaintiff in the trial suit was Naipa Supermarket Limited, a limited liability company which was incorporated on 13<sup>th</sup> November 2005. It was located in premises known as Plot 410 Lodwar, pursuant to a lease agreement entered into by its director, one Antony Kibet Munene. The lease was signed between himself and Martin Ekidor Lotukoi, the landlord. The first tenancy agreement was dated



20/06/2001. There is a second tenancy agreement between the two parties which was entered into on 28<sup>th</sup> March 2004. It follows that these tenancy agreements were between the landlord and the tenant before the company came into existence.

33. Looking at the tenancy agreement, there is no indication that the landlord was entering into a contract with the company. As a matter of fact, at the time, the company did not exist as a legal person. Therefore, it follows that the agreement was between the landlord and a sole tenant. This therefore renders the averment in the plaint, that the plaintiff entered into a lease agreement with the appellants herein. Having entered into the lease in 2004 and the company being incorporated in 2005, it is technically impossible that Antony Kibetu Munene entered into the lease agreement on behalf of the company. I note that the trial magistrate noted that the plaintiff was not a party to the agreement but found that a landlord-tenant relationship existed based on the fact that the appellants continued to receive rent. The circumstances in which a contract might be implied were aptly observed in the case of *The Aramis* (1989) 1 Lloyds Rep 213 as follows: -

“....As the question whether or not any such contract is to implied is one of fact, its answer must depend upon the circumstances of each particular case – and also agree that no such contract should be implied on the facts of an given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist....

.....I do not think it is enough for the party seeking the implication of a contract to obtain ‘it might’ as the answer to these questions for it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is no more than consistent with an intention to contract than with an intention not to contract. It must surely be necessary to identify conduct referable to the contract contended for or at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.’ (emphasis added).

34. In the Court of Appeal in the case of *Ali Abdi Mohamed vs. Kenya Shell & Company Limited* (2017) eKLR stated that: -

“ 11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded....’

35. Given that the respondent company was evidently operating on the premises and paying rent, it is my considered view that the trial court did not err in finding that there existed a relationship between landlord and tenant in the circumstances. It follows that the respondent had locus to institute the suit.

### **Whether the trial court lacked jurisdiction to entertain the suit**

36. The appellants contended that the trial court lacked jurisdiction to entertain the suit as the same should have been dealt with by the Business Premises and Rent Tribunal. This contention was based on the assertion that the dispute in question was a controlled tenancy and therefore outside the jurisdiction of the trial court.



37. The *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* CAP 31 section 2 defines controlled tenancy as:
- a. A tenancy of a shop, hotel or catering establishment-
  - b. Which has not been reduced into writing; or
  - c. Which has been reduced into writing and which-
  - d. Is for a period not exceeding five years; or
  - e. Contains provision for termination, otherwise than for breach of covenant, within five years from the commencement thereof; or
  - f. Relates to premises of a class specified under subsection 2 of this section.
38. Provided that no tenancy to which the Government, the Community or a local authority is a party, whether as landlord or as tenant, shall be a controlled tenancy;

I have perused the record of appeal and the tenancy agreements that were entered into had no provision for termination. It is therefore crystal clear that the tenancy agreement did not meet the requirements to be considered a controlled tenancy. This therefore deals a death knell to the assertion that the trial court lacked jurisdiction.

#### **Whether the court should interfere with the award for damages**

39. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;
- “An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.
40. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini vs A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:
- “The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages”
41. The appellants faulted the award of damages by the trial court. Counsel urged that the trial court erred in awarding damages that were not proved. Further, that the court conducted a visit to the site but the inspections and findings were not factored into the judgement. That the respondent did not call evidence to prove financial loss and that the respondent only presented a profit and loss account which was insufficient proof. The appellants maintained that there was no sufficient proof that there was stock that was lost.
42. The trial court conducted a visit to the premises and made the observation that the premises was not empty. The trial court awarded Kshs. 5,829,997.50 as damages for stock. Stock of goods can be



particularized and can only be ascertained as special damages. It is trite law that special damages must be pleaded and proved specifically. In its prayers, the plaintiff had set out a specific sum for compensation for stock. To prove the value of the stock, the trial court considered the stock sheets submitted that revealed the net worth of the business as at February 2021 as Kshs. 11,659,995/-. Additionally, the court proceeded to apportion 50% of the value of the stock sheets as perishable and this informed its award. Having considered the evidence that was tabled at the trial court, it is my considered view that the trial court was lenient in assuming that 50% of the stock was perishable and consequently the appellants were likely to have a higher award against them. However, I find no reason to interfere with the award for special damages under this limb.

43. The trial court also awarded damages for loss of profits which were also special damages. The plaintiff produced a profit and loss account for between September 2020 and March 2021 which the trial court used to calculate the reasonable amounts the plaintiff lost in a reasonable period being three months. I have considered the reasoning of the trial court in arriving at this decision and it is my view that the court proceeded on the correct principles.
44. The upshot of the foregoing is that the appeal fails in its entirety. The appeal is dismissed with costs to the respondent.
45. It is so ordered.

**DELIVERED, DATED AND SIGNED AT LODWAR ON THIS 29<sup>TH</sup> DAY OF APRIL, 2025**

.....

**R. NYAKUNDI**

**JUDGE**

