Musee Mohammed Muse Limited v Zaam Industries Limited; Nzioka & another (Third party) (Civil Case 3B of 2024) [2025] KEHC 12452 (KLR) (4 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12452 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL CASE 3B OF 2024

HM NYAGA, J

SEPTEMBER 4, 2025

BETWEEN

MUSEE MOHAMMED MUSE LIMITED ..... PLAINTIFF

AND

ZAAM INDUSTRIES LIMITED ..... DEFENDANT

AND

PETER WAITA NZIOKA ..... THIRD PARTY

FREDRICK MAINA KIBURI ..... THIRD PARTY

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 7th May,2019 seeking the following reliefs: -

    a. Kshs. 4,917,567/= being pre-accident value of the accident Motor Vehicle, towing and incidental costs for the alternative vehicle and assessors' charges.

    b. Loss of business at the rate of Kshs. 1,170,400/= per month from 30th March,2018 till payment in full.

    c. Interest on (a) and (b) above.

    d. Any other relief this Honourable Court may deem fit to grant.

2. The plaintiff alleged that on or about 30th March,2018, its Motor vehicle Registration No. KAV 004N/ ZC4071 Scania Prime mover was parked off the road along Meru-Nanyuki Road Junction when the defendant's authorized driver/agent/servant /employee so negligently, carelessly and or recklessly drove, managed and/or controlled the Motor Vehicle Registration No. KCP 057W thereby causing it to hit its aforesaid Motor Vehicle causing extensive damage as a result of which it has suffered huge loss

and damage. The particulars of negligence on the part of the defendant were enumerated at paragraph 4(i)-(viii) of the plaint.

3. The plaintiff further alleged that it subjected its aforementioned motor vehicle for assessment for a possible repair but upon assessment it was declared a write off.

4. The Defendant filed a Defence dated 13th August,2019 on 14th August,2019 where it denied the assertions set out in the Plaint specifically denying the fact that an accident did occur involving Motor vehicle Registration No. KAV 004N/ZC4071 and Motor Vehicle Registration No. KCP 057W as alleged. Alternatively, without prejudice the defendant contended that if there was any accident which it still denied, then the same was due to the sole and/or contributory negligence of the plaintiff, its driver/servant/agent and/or authorized user in driving, managing and/or controlling or parking its said motor vehicle and causing it to collide with its Motor Vehicle Registration Number KCP 057W. The particulars of negligence on the part of the Plaintiff were enumerated at paragraph 5(i)-(xi) of the defence.

5. The defendant thus prayed that the plaintiff's suit be dismissed with costs.

6. Even though they were duly served, the 1st and 2nd Interested parties did not enter appearance and the plaintiff sought for an interlocutory judgment to be entered against them vide request for judgement dated 1st November,2022.

7. On 18th February,2025 counsel for both parties recorded the following consent: -

    a. That by consent, Liability be and is hereby entered in the ratio 70:30 in favour of the plaintiff against the defendant.

    b. That the Plaintiff's document as per the list dated 7th May,2019 and supplementary list dated 10th September,2022 are admitted without calling the makers.

    c. That the parties to file submissions on quantum.

    d. That in totality of the proceedings, the court adopts the request for judgement dated 1st November,2024 filed by the defendant against the 3rd parties if satisfied on service.

    e. That costs to abide the outcome of the suit.

8. The above consent was adopted as an order of the court.

Plaintiff's Submissions

9. On loss of Motor Vehicle Registration No. KAV 004/ZC407 whose pre-accident value was assessed at Kshs. 4,645,400/-, the plaintiff referred this court to Dante Technical Agencies' report dated 19th May,2018 which established that spares required before stripping, labor, paint and other miscellaneous would amount to Kshs. 2,050,800/=, that total costs to be incurred would be approximately Kshs. 3,000,000/=, that it was uneconomical to repair the truck and thus declared it a write-off and that the truck was road worthy and in serviceable condition prior to the accident.

10. The Plaintiff argued that it then engaged Scania East Africa who did a quotation for the pre-accident value of the Truck and placed the same at Kshs. 4,645,400/=. In support of this position, this court was referred to the quotation dated 4th May,2018 from Scania East Africa at pages 4-6 of the plaintiff's bundle of documents.

11. On towing and incidental costs and expenses, the plaintiff submitted that at the time of the accident, the plaintiff's truck was transporting a consignment of vegetable oil to Juba, South Sudan. The plaintiff

contended that since the truck was extensively damaged and unable to proceed with the transportation the following expenses were incurred;Hotel/ Accommodation charges of Kshs. 35,027/=. In support thereof, this court was referred to the receipt dated 31st March, 2018.Casuals and Mechanics of Kshs. 10,000/=. The plaintiff submitted that it had to pay mechanics and casual laborers to help in offloading the consignment from the damaged truck and load them onto the hired prime mover and that they paid this amount in cash.Fuel costs for the salvage crew of Kshs. 7,824/=. In support of this, the plaintiff relied on the receipt dated 31st March, 2018.Alternative Transportation of Kshs.119,316/=- The Plaintiff argued that it hired an alternative prime mover, Motor Vehicle Registration Number KCB 659E to transport the consignment to juba and that it paid the said amount for fuel. In support of its submissions, the plaintiff referred the court to the receipt dated 31st March,2018 issued by Lunga Lunga Petroleum at page 34 of its bundle.Towing charges of Kshs. 75,000/=. The plaintiff submitted that it hired Shark Breakdown Service Limited to tow its vehicle back to Nairobi, Industrial area. In support thereof, the plaintiff relied on the receipt dated 2nd April,2018.Costs for quotation by Scania East Africa of Kshs. 10,000/=. The plaintiff submitted that this amount was paid to Scania East Africa for the quote given on the pre-accident value of the plaintiff's truck and referred the court to the receipt issued by Scania and dated 2nd May 2018 at page 29 of the plaintiff's bundle.Costs for assessment of the damaged truck of Kshs. 15,000/=. The plaintiff contended that it hired Dante Technical agencies who assessed the damage caused by the accident and declared the truck a write-off. In support of this position, the plaintiff relied on the receipt dated 19th May,2018 at page 30 of the plaintiff's bundle.

12. Regarding the claim for loss of business specifically the 6 months' contract with the World Food Programme running from 19th March,2018 to 30th September,2018 totaling Kshs. 7,022,400/=, the plaintiff submitted that he was awarded 6 months' contract for loading of Relief Commodities from Moyale (Kenya) to Juba (South Sudan) by the WFP, and that this contract was to run from 19th March,2018 to 30th September,2018.

13. The plaintiff contended that the applicable rate was USD 209 per metric tonne at an exchange rate of approximately 1 USD to Kshs. 100 at the material time. With its truck making two round trips per month and each carrying an average load of 28 metric tonnes, the anticipated payment per trip amounted to Kshs. 585,200, translating to Kshs. 1,170,400 per month.

14. The plaintiff argued that if the accident had not occurred, it would have made two trips per month for the six-month contractual period, each earning Kshs. 1,170,400, resulting in a total projected loss of Kshs. 7,022,400/-. This amount represents the payments that the WFP would have made under the contract. In support of this claim, the plaintiff relies on: (i) a copy of the contract with WFP dated 19th March 2018 (page 53 of the plaintiff's bundle); (ii) a copy of the WFP waybill dated 28th March 2018, indicating the consignment of vegetable oil (27.008 metric tonnes) being transported to Juba at the time of the accident (page 49 of the plaintiff's bundle); and (iii) a copy of the plaintiff's invoice dated 26th April 2018 to WFP for the delivered consignment.

15. With regard to the running contracts with Kobil Uganda LTD which subsequently named Rubis energy Uganda limited from March,2018 to December,2021 Totaling Kshs. 15,120,000/=, the plaintiff submitted that its company was contracted to transport fuel and each listed truck/trailer would make approximately two trips a month and earn approximately USD 1,800 per trip, translating to USD 3,600 or Kshs. 360,000 per month. It argued that the damaged trailer was part of the trucks listed in these contracts and as such, if the accident had not occurred, it would have earned money through the damaged truck under the contracts dated 20th March,2018; 20th March,2019; 20th July,2020 & 1st January,2021.

16. To further bolster their submissions, the Plaintiff referred this court to Sample delivery notes, invoices and bank statements at pages 43-82 of the supplementary list of documents dated 10th September,2022.

17. Based on the foregoing, the plaintiff submitted that it has proved its claim and urged the court to grant the reliefs sought.

Defendant's Submissions

18. On special damages, the defendant submitted that the same be awarded only as strictly pleaded and proved. To buttress its submissions, the defendant relied on Section 107(1) of the *Evidence Act* and the case of Jackson Mwabili v Peterson Mateli [2020] KEHC 2814 (KLR)

19. On loss of business, the defendant submitted that no concrete documentary evidence has been presented to substantiate the same. It argued that mere existence of the contract as evidence of loss fails to take into account the legal effect of frustration, which negates further obligations and by extension the expected benefits or performance under the original terms. The defendant posited that the plaintiff cannot simply point to the contract as dispositive proof of loss without addressing the intervening event that may have legally discharged the contract. To buttress its submissions, the defendant relied on the case of Idi Ayub Shabani v Nairobi City Council, Civil Appeal No 52 of 1984

20. With regard to whether the defendant is entitled to judgement against the third parties for failure to enter appearance, the defendant submitted that it duly served a third-party notice to the third parties and as such liability arising from the Plaintiff's claim should be borne by the third parties jointly and or severally for being solely responsible for causing the said accident giving rise to the instant claim. To buttress their submissions, reliance was placed on the case of Order 1 Rule 17 and the case of Mwangi V Kamanda & 3 Others (Civil Appeal 170, 171 & 172 Of [2020] (Consolidated)) [2024] KEHC 10615 (KLR) (7 August 2024) (Judgment).

Analysis & Determination

21. Upon analyzing the facts, accompanying documents and the submissions by both parties, it is my view that the issues which I am invited to decide are;

    a. Whether the plaintiff proved its claim for material damage on a balance of probability.

    b. Whether liability arising from the Plaintiff's claim should be borne by the third parties jointly and or severally.

22. In determining the above issue, I have to bear in mind that it is trite law that he who alleges must prove. In civil matters, the burden of proof is on he who alleges a fact. Sections 107 and 108 of the *Evidence Act* provide as follows:

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

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

    108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

23. In Miller.v. Minister of Pensions 1947 ALL E.R 372, LORD DENNING puts this standard in the following terms: -

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

24. In James Muniu Mucheru .V. National Bank of Kenya Ltd C.A Civil Appeal No 365 of 2017 [2019 eKLR], the Court stated as follows:

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

25. On the claim for loss of business at Kshs. 1,170,400/- per month from 30th March 2018 until payment in full, I note that the law on whether loss of business or profit constitutes a special or general claim remains unsettled as illustrated by the following authorities;

i. Nyamogo & Nyamogo Advocates –vs- Barclays Bank of Kenya CA 69 of 2005 where the Court of Appeal held that loss of business must be specifically pleaded and proven.

ii. Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR, where the Court of Appeal held that Loss of business is a special damage claim and therefore it must be specifically pleaded and proven.

iii. The Court of Appeal in Civil Appeal No. 283 of 1996, David Bagine versus Martin Bundi, stated as follows: -

> " We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

iv. The same Court in Ryce Motors Limited & Another versus Elias Muroki (1996) eKLR stated as follows: -

> " The learned judge had before him by way of plaintiff's evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act. These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be

specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Kshs.4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety."

v. In Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR, where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

> "(16) The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit-making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases."

vi. The same court, in Wambua v Patel & Another [1986] KLR 336, found that the plaintiff had not kept proper records of what he earned but stated:

> "Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method" .... But a victim does not lose his remedy in damages because the quantification is difficult."

26. In this case, the plaintiff relies on contracts to prove the alleged loss of business. In my view, where the loss is quantifiable and has been satisfactorily demonstrated, an award for loss of business is justified.

27. To this end, I am guided by the court's decision in Heineken East Africa Import Co. Ltd & another v Maxam Ltd (Court of Appeal, 24 May 2024) where the Court of Appeal upheld an award of Kshs 1.79 billion for loss of business profits where the distributor had proved a distributorship agreement and demonstrated quantifiable loss flowing from breach. The court stated that "The loss of business and expected profits could be established based on reasonable estimations..."

28. The plaintiff seeks Kshs. 7,022,400/= as loss of business for a six-month contract with the World Food Programme running from 19th March 2018 to 30th September 2018. The claim is based on a transport rate of USD 209 per metric tonne at an exchange rate of Kshs. 100 per USD. It is contended that the truck would have made two trips per month, each carrying about 28 metric tonnes, earning Kshs. 585,200/= per trip and translating to Kshs. 1,170,400/= per month. I have examined the contract in question and I am satisfied that it was duly issued to the plaintiff and that the contractual rate of USD 209 per metric tonne is not in dispute. However, the contract does not expressly provide that the plaintiff's truck would undertake two trips per month as alleged. The projection advanced is therefore not fully supported by the evidence on record.

29. In the interests of justice, and bearing in mind that a claim for loss of business must be based on reasonable estimation, I find that the reasonable award is half of the claimed amount. I accordingly award the plaintiff Kshs. 3,511,200/= as just and fair compensation.

30. The plaintiff is also claiming Kshs. 15,120,000/= as loss of income from transport contracts with Kobil Uganda Ltd, later Rubis Energy Uganda Ltd, on the basis that the damaged trailer would have earned proceeds through two trips per month between March 2018 and December 2021. I have perused the contract in issue.

31. It is trite that where parties have reduced their agreement into writing, the contract should speak for itself. The contracts clearly provided that payment was to be made upon submission of duly supported invoices and that rates were strictly based on the per cubic metre charges set out in Schedule A. For the periods between 20th March,2018 to 19th March,2019 and 20th March 2019 to 21st March 2020, Schedule A set export fuel transport rates in USD per cubic metre (m^3) as follows: Kisumu/Eldoret – Jinja (27), Kampala (32); Nakuru – Jinja (39), Kampala (45); Nairobi Joint Depot – Jinja (45), Kampala (50); Mombasa – Jinja (60), Kampala (70/85). For the subsequent contracts covering the periods 20th July 2020 to 31st December 2020 and 1st January 2021 to 31st December 2021, Schedule A provided rates in USD per cubic metre (m^3) as follows: Kisumu/Eldoret – Jinja (38), Kampala (40); Nakuru – Jinja (41), Kampala (45); Nairobi Joint Depot – Jinja (45), Kampala (50); Mombasa – Jinja (60), Kampala (70); and Mombasa HFO – Kampala (85). In both sets of contracts, it was further provided that rates for lubricants and LPG were negotiable, and that the transporter was required to fuel its trucks at Kobil Uganda stations.

32. In the face of this clear contractual framework, the plaintiff's submission that each truck would earn USD 1,800 per trip has no contractual basis. The contract did not provide for lump sum trip payments but expressly tied remuneration to the applicable per cubic metre rates and destinations. Accordingly, I find that the plaintiff's projection of fixed earnings per trip is not supported by the contractual framework and the claim of Kshs. 15,120,000/= based on projected earnings cannot therefore stand. In any case, the said contract was not tied to the same truck.

33. In light of the above, I will only award the Plaintiff Kshs. 3,511,200/= as loss of business. The same shall be subject to taxation as provided by law.

34. On the claim for Kshs. 4,917,567/=, being the pre-accident value of the subject motor vehicle, towing charges, incidental costs for the alternative vehicle, and the assessor's fees, I have considered the evidence tendered in support thereof. I have examined the receipts and the specific reports cited in the Plaintiff's submissions and I am satisfied that they substantiate the claim.

35. Without reiterating the Plaintiff's submissions, I find that, on a balance of probabilities, the Plaintiff has proved this head of claim to the requisite legal standard. Accordingly, the prayer is merited and is hereby allowed.

36. On the second issue, the Defendant has urged this court to hold the 3rd party jointly and severally for the liability arising out of the plaintiff's case. I note the defendant joined a Third Party but failed to take out directions for apportionment of liability. It was the duty of the defendant to prove contributory negligence.

37. In case of Calvin Grant V David Pareedon et al Civil Appeal 91 of 1987 Theobalds J enunciated as follows; -

> " Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame

squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth."

38. The defendant did not adduce evidence to support its claim against the third party. In the absence of proof of negligence, no liability could be established and the interlocutory judgment could not mean much without proof of negligence against the third party. It is also noted that the defendant consented to 70% liability against it. The defendant's claim against the third party must therefore fail.

39. In the upshot, the Plaintiff is awarded; Kshs. 3,511,200/= for loss of business, but subject to taxation at the applicable bracket, Kshs. 4,917,567/= being the pre-accident value of the motor vehicle, towing charges, incidental costs for the alternative vehicle and the assessor's fees, making a total of Kshs. 8,428,767/-. The same is subject to the apportionment of liability as greed between the parties leaving a net total of Kshs 5,900,136/-.

40. The plaintiff shall have costs of the suit and interest.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF SEPTEMBER 2025.

H. M. NYAGA

JUDGE.