



REPUBLIC OF KENYA



**Salson Investment Limited v Tata Africa Holding Limited (Civil Appeal
560 of 2019) [2024] KEHC 6677 (KLR) (Civ) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 560 OF 2019

JN NJAGI, J

MAY 28, 2024

BETWEEN

SALSON INVESTMENT LIMITED APPELLANT

AND

TATA AFRICA HOLDING LIMITED RESPONDENT

*(Being an appeal from the judgment and decree of by Hon. E.A Nyaloti, CM, in Nairobi
Chief Magistrate's Court Civil Suit No. 6305 of 2014 delivered on 29th August 2019)*

JUDGMENT

1. The Appellant herein who was the plaintiff at the lower court bought a vehicle from the respondent at a consideration of Ksh.5,700,000/=. The vehicle developed some mechanical problems and stalled. The appellant brought suit against the respondent seeking the following remedies:
 - a. A declaration that Motor vehicle Registration Number KBZ 88V was unmerchantable and not fit for its purpose;
 - b. Replacement of Motor vehicle Registration Number KBZ 88V with a vehicle of similar specifications but of merchantable quality and in an operable state;
 - c. Expenses occasioned/rendered futile due to breach set out in paragraph 11 of the Plaintiff;
 - d. Specific performance of the agreement dated 28th June 2014 for the delivery of a motor vehicle in merchantable quality and in an operable state;
 - e. Damages for loss of user and and profit as specifically set out in paragraph 12 of the Plaintiff;
 - f. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order.



Or, in alternative;

- a. The sum of Kshs. 5,700,000 being the Purchase Price paid to the defendant for motor vehicle registration number KBZ 883V together with interest at 20% from 3rd August 2014 until payment in full. (Similar rate as the Bank loan);
 - b. General damages for breach of contract and interest thereon at such rate and for such period as this Honourable Court may deem fit;
 - c. Damages for loss of user and profit at the rate of Kshs. 15000 per day from 8th August 2014 until delivery of the new motor vehicle or judgment together with interest thereon;
 - d. Expenses occasioned/rendered futile due to breach set out in paragraph 11 of the Plaint;
 - e. Costs of this suit together with interests thereon at such rate and such period of time as this Honourable Court may deem appropriate.
2. The claim was denied by the respondent/defendant. After a full trial, the trial magistrate found that the vehicle delivered by the respondent did not meet the provisions of section 16 of the *Sale of Goods Act* and consequently entered judgment for the appellant in the sum of Ksh.5,700,000/= being the purchase price the plaintiff had paid for the vehicle. The other claims were dismissed.
3. The appellant was dissatisfied with the trial court's judgment and lodged this appeal. The grounds of appeal are:
- a. That the Learned Magistrate erred in law and in fact by failing to properly review and consider the evidence placed on record by the plaintiff;
 - b. That the Learned Magistrate erred in law and in fact by not taking into account the plaintiff's evidence demonstrating loss of profit thereby failing to award the same;
 - c. That the Learned Magistrate erred in law and in fact by failing to award interest accumulating from the time the cause of action arose until payment in full;
 - d. That the Learned Magistrate erred in law and in fact in applying wrong legal principles in determining the suit.
4. The appellant is seeking that the judgment of the subordinate court delivered on 29/8/2019 be set aside and substituted with an Order allowing the plaintiff's entire claim. In the alternative, the appellant prayed that additional prayers be allowed in terms of loss of profit and interest. It prayed that the appeal be allowed with costs.
5. The appeal was disposed of by way of written submissions.

Appellant's Submissions

6. The appellant ascertained four issues for determination as follows:
- (i) Whether the appellant demonstrated loss of profit
 - (ii) Whether the appellant ought to be awarded interest accumulatively from the time the cause of action arose.



- (iii) Whether the learned magistrate erred in law in applying wrong legal principles in determining the legal suit.
 - (iv) Whether the appellant is entitled to the costs of the appeal.
7. On loss of profit, the appellant submitted that the principal remedy under common law for breach of contract is an award of damages. That a claimant who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed will succeed unless the defendant can discharge the onus of proving that there was no such probability.
 8. It was submitted that in a case where the breach of contract has adversely affected the Plaintiff's business operations, the Courts will have to select the method of measuring the loss which is the most apt in the circumstance to secure that the claimant is compensated for the loss which it has sustained. The considerations can be:
 - (i) either by estimating the effect of the breach on the value of the business,
 - (ii) the effect on its profits,
 - (iii) the resultant management costs, or
 - (iv) the loss of goodwill.
 9. The appellant cited the case of *Chris Ndolo Mutuku v Associated Motors Limited & another* [2020] eKLR, where the Court held that:

“The test for recoverable damages; the damage must flow naturally from the breach of contract; The loss must be a natural consequence of the breach of contract and must have been foreseeable.”
 10. It was submitted that the Appellant had proved that on average the vehicle would be making Ksh. 15,000/= per day when hired out to Njuca Consolidated Company and that the Appellant produced a schedule of daily earnings to be expected upon hiring out the same. The appellant cited the case of *Ndugu Transport Company Limited & another v Daniel Mwangi Waithaka Leteipa* [2018] eKLR where it was held that:

“a claim for loss of user is a special damage claim. Not only must it be specifically proved, in must also have been specifically pleaded in the plaint. It is thus evident that a claim for loss of user which was not only not pleaded but was not specifically proved, cannot stand. To allow it without proof would require that the court takes a figure, as it were from nowhere and use it as a basis for calculating the claim. The court cannot, as occasionally resorted to in a claim for general damages, “do the best it can” and make an award on a claim that was neither pleaded nor proved-see *David Bagaine vs Martin* ^{Bundi (1997) eKLR.}
 11. The appellant submitted that in the instant case the failure to deliver the motor vehicle on time led to a loss of profits that the Appellant could have received if the vehicle was in an operable state. The Appellant incurred losses and damages caused by the virtue of the fact that car was bought by a loan facility and the loan was not services.
 12. It was submitted that the appellant suffered loss and damages for not being able to use the motor vehicle for the intended purpose. Further, that the loss of businesses suffered by the Appellant due to its inability to meet market demands which consequently led to damage of its business reputation,



embarrassment and possible future business failure. It is only fair and just that the Appellant is compensated for such loss.

13. On interest the appellant submitted that the basis for awarding interest from the time the cause of action arose is due to the special damages and loss of profits. Damages and/or monies kept away from the Appellant on account of having been ascertainable at the time of the institution of the suit unless the same was contractually provided.
14. The Appellant submitted that it took out a loan facility to finance the purchase of the suit motor vehicle which it hoped to finance using proceeds from the transport business with the motor vehicle. Since the motor vehicle was faulty and unreliable, it could not be used to generate income. As such the Appellant was not able to service the loan as planned, hence inconveniencing the Appellant. The appellant urged the court to consider the inconvenience caused and award interest from the time the cause of action arose.
15. On whether the trial magistrate applied the wrong principles of law, it was submitted that the Learned Magistrate erred in law and in fact in failing to award the appellant loss of profits, special damages and general damages. More so that the trial Court failed to disclose any reasons for failing to award general damages.
16. It was submitted that it is a settled legal principle that special damages must be both pleaded and proved as stated in *Hahn v Singh* I 985 eKLR. where the Learned judges of Court of Appeal held:

“Special damages must not only be specifically claimed (pleaded} but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
17. It was submitted that the appellant correctly pleaded for the special damages under the heading ‘Particulars of Loss and Damages’ in the Plaint and discharged its burden by proving the same. It was submitted that the appellant proved special damages of Kshs. 46,000/= as towing charges and Ksh. 35,000/= as the cost of hiring a driver from 8th of August, 2014 to 1st September, 2014 at the cost of Ksh. 500 per day.
18. The principles for award of general damages for breach of contract were enunciated in the case of *Francis Namatoi Obongita vs. Cocker Printers and Designers Limited* [I 984] eKLR, where the court quoted with approval, the case of *V.R. Chande and Others vs. E.A. Airways Corporation* (1964) EA78 where Mayer J held:

“The general rule as to quantum of damages to be awarded for breach for breach of contract was stated by Alderson, B in *Hadley Baxendale* (I 854) 9 Ex 341 (156 ER 145 at p. 151I) in the following terms.

None we think a proper rule in such a case as the present in this; where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly[^] and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contracts the probable result of the breach of it.”



19. It was submitted that a claimant must mitigate the loss. The case of *Consolata Anyango Auma v South Nyanza Sugar Company Limited* [2015] eKLR was cited where the Court stated as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a General principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitutio in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No.704 of 2000* [2004]eKLR).”

20. The appellant further relied on the Section 5 I of the *Sale of Goods Act* that provides that:

“The measure of damages is estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.”

21. It further relied on section 53(2) of the *Sale of Goods Act* that provides that:

“The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events from the breach of warranty.”

22. It was submitted that the breach of contract resulted in injury to the appellant’s reputation as it could not meet expectations of its clients and thus lost business especially with Njuca Consolidated Company. That it is only fair that the court awards damages for damaged reputation.

23. The appellant submitted that it had proved its case for special and general damages and urged the court to award the entire claim with costs of the appeal.

24. On costs the appellant submitted that it is a settled principle that costs follow the event. It cited the case of *Party of Independent Candidate of Kenya vs I’lutuIa Kilonzo & 2 others* (2013) eKLR where the Court held that:-

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is a matter in which the trial judge is given discretion.But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”

Respondent’s Submissions

25. The respondent submitted that a claim for loss of user is a special damage claim and in this respect relied on the case of *Kimani v Attorney General* (1969) E.A 503 where it was held that:

A claim for loss of business or otherwise is a claim for loss of income or earnings from the business generated by the use of the car as a taxi is a claim for special damages.

26. The respondent supported the finding of the trial court that the appellant had not proved that they incurred losses as they did not produce any evidence to support their assertion that they had hired out the vehicle.



27. It was submitted that the appellant did not demonstrate what they did to mitigate the loss after returning the vehicle to the respondent for repair and ended up claiming loss for a lengthy period of about 5 years. The respondent cited the case of *Matunda Fruits Bus Services Ltd v Moses Wangila & another* (2018) eKLR where the court stated that:

“A party injured through the negligence of another has a duty to mitigate damages through prudent preventative action...In my view, a claim for loss of user must be for a reasonable period of time which is strictly necessary for the repairs to be made on the damaged vehicle. In most cases, absent exceptional circumstances, such reasonable period should not exceed fifteen days.”

28. It was submitted that the trial court was justified in declining to grant damages for loss of user particularly considering that it is the appellant who refused to collect the vehicle from the respondent after repairs.

29. On interest, it was submitted that any award of interest at commercial rate of 20% on a money decree has to be based on either the existence of an agreement between the parties or trade custom known by the parties, neither of which was not alluded to in this case. The respondent in this regard relied on the case of where the Court of Appeal stated that: *CFC Stanbic Limited v John Maina* (2013) eKLR

Regarding the issue of the commercial rate of interest applicable and the total amount of interest payable could only, in our view, be proved with evidence. From the record, the respondent did not produce any documentary evidence to show the contractual rate of interest applicable. Accordingly, the interest payable would, therefore, be discretionary as provided for by S 26 of the CPA and subject to evidence produced to support the claim. It is a cardinal point of law that special damages must be pleaded and proved.

30. It was submitted that the commercial rate of 20% was not pleaded and that being the case the court should not award what was not pleaded. The respondent cited the case of *David Sironge Ole Tukai v Francis Arap Muge & others* (2014) eKLR for the proposition that a court will not grant a remedy not applied for pleaded.

31. The respondent submitted that the trial court had a wide legal discretion to decide whether or not to award the rate of interest and therefore this court should not interfere with that exercise of discretion.

Analysis and Determination

32. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, appreciate that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand see *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123.

33. I have considered the grounds of appeal, the record of the trial court and judgment and the submissions by the respective counsels for the parties. Though the appellant made submissions on the award of in respect to general damages and special damages the memorandum of appeal indicated that the appeal was only on failure by the trial court to award loss of profit and failure to award accumulated interest from the time of the cause. It is trite law that a court should not award what is not pleaded – see *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR. I will therefore only consider what is pleaded.



Loss of profits

34. The appellant was claiming for loss of profit for failure to use the motor vehicle for the intended purpose from the date it was supposed to be delivered to him till the date of judgment or provision of a new motor vehicle. The trial court found that the respondent was in breach of contract by delivering a faulty motor vehicle. There has been no appeal on that finding and therefore this court should proceed on the basis that there was breach of contract.
35. In *Hyrdo Water Well (K) Limited v Sechere & 2 others* (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR), the court (Mativo J., as he then was) dealt at length on how to identify and compute loss of profits. He stated that lost profits were damages for the loss of net income to a business and they reflected income from lost business activity, less expenses that would have been attributable to that activity.
36. The learned Judge stated that a claimant for lost profits has to quantify the loss by identifying the loss as accurately as circumstances permitted. That the loss is the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss had been identified, the court then had to quantify it in monetary terms. The Judge established a three-tier test for quantifying the loss, of which a claimant for lost profits has to show:
 37. First, that the conduct upon which the claim was based caused the lost profit damages (proximate cause); wherein the plaintiff had to show, by a preponderance of evidence, that the plaintiff's alleged loss was the proximate result of the breach, the so-called "but-for test" (but for the breaching conduct, the plaintiff would have earned profit). A "proximate" cause was a cause that produced a result in a natural and continuous sequence and without which the result would not have occurred.
 38. Second, that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct (foreseeability), which is a determination about whether the parties contemplated that such damages would arise or should have reasonably foreseen that they would arise. The parties' relationship was typically governed by a contract, usually with a specific term and therefore lost profits were available where the parties' contract clearly anticipated them. The language in the contract usually determined whether lost profits were foreseeable.
 39. Thirdly, that the lost profits were capable of proof with a reasonable degree of certainty (reasonable certainty). Generally, the certainty of damages was sufficient if the evidence enabled the court to make a fair and reasonable approximation of damages with relative certainty.
40. The learned Judge continued to say that if the plaintiff was able to demonstrate that lost profits were actually available under the contract, it would typically then have to establish the applicable duration for which lost profits were recoverable. The period for calculating lost profits was the damage period or the loss period. Calculating the loss period was fact-specific. Contract terms, statutory requirements, prior custom and practice, and industry standards could, and typically would, influence the extent of the loss period. The loss period could be relatively short and, in the past, or may be on-going into the future, particularly when a franchisee continued to operate its business while pursuing litigation.
41. I have carefully examined the appellant's claim for lost profits. The appellant claimed damages for loss of user and profit at the rate of Ksh.15,000/= per day from 8th August 2014 until delivery of the new motor vehicle or judgment together with interest. I will now proceed to apply the applicable tests to the present case.



42. From the evidence adduced before the trial court, it was not shown that the contract allowed the loss of profit claimed or whether the claim was foreseeable at the time of contracting and whether the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all the circumstances to have foreseen it.
43. Second, there is no evidence to show that the breach resulted in lost profits because of a special circumstance, a circumstance that must have been known to the defaulting party at the time of the contracting. PW1 testified and stated that the motor vehicle would be used for hiring business however no such hiring agreement was adduced before the trial court to show that the respondent was aware that such a loss was inevitable.
44. Besides that, PW1 said in his evidence that they were being paid Ksh.15,000/= per day per truck. He admitted that he did not file documents to prove that. It is clear that the Ksh.15,000/= was not the profit for a truck per day. A professional was therefore required to work out the profit of a truck per day from the gross pay of Ksh.15,000/=. The appellant did not provide such evidence. Having failed to show the profit of a truck per day, any award on profits would be based on speculation.
45. In view of the foregoing, I find and hold that there was no basis laid out for the claim for loss of profits. It follows that the claim for loss of profits was not proved.

Interest

46. The appellant was claiming interest to the sum of Ksh.5,700,000/= at commercial rate of 20% till payment in full.
47. A court has unfettered discretion under section 26 of the [Civil Procedure Act](#) to award interest. The section provides that:

“26(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”
48. The trial magistrate while awarding the sum of Ksh.5,700,000/= did not give reason for not awarding interest. I have considered the submissions by counsels for parties on interest. I find that interest at commercial rates is not applicable where it is not provided for in the contract – see *CFC Stanbic Limited v John Maina* (supra). There was then no justification to award interest at commercial rates.
49. The trial court had the discretion to award interest on the sum of Ksh.5,700,000/= once it established that the sum was payable to the appellant. I find that the trial court did not exercise its discretion judiciously in failing to award interest on a money decree. I accordingly award interest at court rates of 14% per annum on the awarded sum of Ksh.5,700,000/= from the time of the decree till payment in full.
50. The result of the appeal is as follows:
 - (2) The appellant is awarded interest at court rates on the sum of Ksh.5,700,000/= from the date of judgment till payment in full.
 - (3) The appeal on loss of profits is dismissed.



51. Since the appeal has not fully succeeded, I order each party to bear its own costs to the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MAY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Kioko HB Mumia for Appellant

Mr. Nganga for Respondent

Court Assistant – Amina

30 days Right of Appeal.

