REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 113 OF 2012

BOSTON WACHIRA KAMANGU.....APPELLANT

VERSUS

TAIFA SOCIETY LTD.....1ST RESPONDENT

RICHARD NJOROGE WACHIRA T/A

GREENBELLS AUCTIONEERS.....2ND RESPONDENT

(Being an appeal from the judgment and decree in Nyeri Chief Magistrates' Court

Civil Case No. 538 of 2010 (Hon. Wambilyanga, J (SRM) dated 5th March, 2012)

JUDGMENT

In a plaint filed in the magistrates' court on 7th December, 2010, the appellant sued the defendants, jointly and severally, for the sum of Kshs 205,312/= and interest thereof; mesne profits of Kshs 348/= per day from the date of filing suit until payment in full; the costs of the suit and interest thereof. The appellant's cause arose from the respondents' action to proclaim, attach and ultimately auction the appellant' property in what the appellant claimed to be a purported recovery of a debt of Kshs 92, 289.60/=. The appellant's case was that he did not owe any money to the 1st respondent under whose instructions the 2nd respondent auctioned his property.

As I understand the appellant's plaint, the 1st respondent proceeded to auction the appellant's property on the basis that he was a member of the 1st respondent and who had defaulted in settlement of credit facilities advanced to him by the 1st respondent. The appellant denied that he was such a member and denied any sort of liability towards the 1st respondent.

In their defence, the respondents not only insisted that the appellant was a member of the 1st respondent but also averred that for this very reason the court in which the suit had been instituted lacked jurisdiction to entertain the dispute which in the respondents' view was a dispute between a co-operative society and one of its members and which could only be properly determined by the Co-operative Tribunal established for that particular purpose under **section 77 of the Co-operatives Act, Cap 490.** They accordingly notified the appellant that they would, at the "very first instance", raise a preliminary objection to the hearing of the suit in the magistrates' court.

The preliminary objection was not taken at the “very first instance” as the respondents threatened; the record shows that the appellant’s suit proceeded to full trial with both contestants testifying and calling their respective witnesses. The respondents only revisited this issue in their submissions at the close of their case; thus rather than the issue of jurisdiction being taken at the “very first instance” as suggested by the respondents it was taken at the very last instance.

But even after taking the evidence of both the appellant and the respondents the learned magistrate still dismissed the appellant’s case not on merit (or lack thereof) but on the basis that the court was not seized of jurisdiction to determine the kind of dispute between the parties; according to the learned magistrate, the appellant was a member of the 1st respondent and in her view the dispute before her was the kind of disputes covered by **section 76** of the **Co-operatives Act** and fall within the jurisdiction of the Co-operative Tribunal. By its very nature, this decision ought to have been taken at the preliminary stage of the proceedings to avoid what in effect was a futile exercise of presiding over proceedings on a dispute the jurisdiction of which, in the learned magistrate’s view, lay elsewhere.

Be that as it may, the appellant was dissatisfied with the decision of the court below and he has questioned it in this appeal. He raised five grounds of appeal in the memorandum filed in court on 18th October, 2012. According to him, the learned magistrate erred in law and in fact in finding that the appellant was a member of the 1st respondent; that the learned magistrate also erred in law and in fact in finding that the court had no jurisdiction to hear and determine the dispute before her; that the learned magistrate erred in law and in fact in finding that there was either a contract or there was privity of contract between the appellant and the 1st respondent; that the judgment was against the weight of the evidence; and finally, that the learned magistrate erred in law and misconstrued the Co-operatives Societies Act and arrived at an erroneous decision.

In his written submissions counsel for the appellant opted to have all these grounds collapsed into the first ground which revolves around the issue of the appellant’s membership with the 1st respondent. According to counsel if the court can resolve the question whether the appellant was a member of the 1st respondent, any other lingering questions embedded in the rest of the grounds would be unravelled.

Owing to the centrality of this issue, both counsel for the appellant and the respondents dwelt substantially in their respective submissions on whether the appellant was a member of the 1st respondent. Nobody can fault their seemingly undivided attention to this issue; after all, it is the determination of this particular issue that influenced the course that the learned magistrate took and dismissed the appellant’s suit. I will, on my part, take cue and interrogate it further at this level with a view to establishing whether the appellant was indeed a member of the 1st respondent and accordingly whether their dispute should have been subjected to the jurisdiction of the Co-operative Tribunal.

Section 76 of the **Co-operatives Societies Act** which the learned magistrate invoked in dismissing the appellant’s suit is anchored in **Part XV** of the **Act** which addresses settlement of disputes; it states as follows:-

PART XV – SETTLEMENT OF DISPUTES

76. Disputes

(1) If any dispute concerning the business of a co-operative society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or

(c) between the society and any other co-operative society,

it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include—

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or

(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;

(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.

In my humble view**, section 76 (1)** ousts the jurisdiction of the of the court or any other tribunal in determination of any dispute between a co-operative society and its member if that dispute fits in any of the categories of disputes prescribed **in section 76(2).** Indeed, under **section 81 (1)** of the **Act**, only the High Court can entertain such a dispute albeit in exercise of its appellate jurisdiction over the decisions of the Co-operative Tribunal; the latter is vested with the original jurisdiction in the prescribed disputes.

If it was to be established that the appellant was, at the material time, a member of the 1st respondent society, his claim would fall under **Section 76 (2) (b)** which deal with members claims against the Society and thus the appropriate forum to determine his dispute would be the Co-operative Tribunal. (See **Adero & Another Versus Ulinzi Sacco Society Ltd (2002) 1KLR 577** at page 579 as per Ringera J as he then was)

The question that then logically follows is, was the appellant such a member" Inorder to answer this question adequately, it is necessary to plough through several of the Act's provisions which shed some light on what constitutes 'membership' of a society as understood in law.

Section 2 of the Act defines a 'member' for purposes of the Act to include "*a person or a co-operative society joining in the application for the registration of a society, and a person or co-operative society admitted to membership after registration in accordance with the by-laws."*

Qualifications for individual membership to a co-operative society are set out in **section 14**; basically one is not qualified for membership unless he has attained the age of eighteen years; his employment, occupation or profession falls within the category or description of those for which the co-operative society is formed; and he is a resident within or occupies land within the society's area of occupation as prescribed by the relevant by-law.

Whenever a question arises as to whether a particular person is a member or not, the answer to this question is not left to speculation; proof of membership may be demonstrated through either of the ways prescribed in **section 40** of the Act; that particular provision states:-

40. Evidence of member's interest in society

(1) Any register or list of members or of shares which is kept by a co-operative society shall be prima facie evidence of any of the following particulars entered therein—

(a) the date on which the name of any person was entered in such register or list, as a member;

(b) the date on which any such person ceased to be a member; and

(c) the number of shares held by any member.

(2) A copy of any entry in a book of a co-operative society regularly kept in the course of its business, shall, if certified in accordance with the rules made under this Act, be prima facie evidence in any proceedings of the existence of such entry, and of the matters, transactions, and accounts, therein recorded.

And on the privileges or rights accorded only to members, **section 17** comes in handy; it provides:-

17. Membership of co-operative society

No member of a co-operative society shall exercise any of the rights a member unless he has made such payment to the society in respect of membership, or has acquired such interest in the society as may be prescribed under this Act or under the by-laws of the society.

The important point to note here is that for one to be a member it is implied that he must have made some membership subscriptions or has acquired some interest in the society either as prescribed under the Act or under the by-laws of the Society in which he is claimed to be a member.

It is necessary at this juncture to focus on and analyse the facts or evidence which underpin the disputed appellant's membership to the 1st respondent society but with a constant rear view on the statutory provisions that I have hitherto flagged out.

Both the appellant and the 1st respondent were in agreement that the appellant was a member of Tetu Coffee Growers Co-operative Society Limited; the appellant testified that he was a member of this society from 1974 until sometimes in the 1990s and that during this period he was advanced a loan of Kshs 20,000/=. The defendants acknowledged this membership in their defence but also added that the loan which the appellant received and which remained outstanding at the material time was advanced by the Nyeri District Co-operative Union Limited through the appellant's society.

The respondents' pleaded further that the 1st respondent succeeded Nyeri District Co-operative Union Limited and in the process acquired all its assets and liabilities; the outstanding loan due from the appellant to the defunct Co-operative Union was one such asset which the 1st respondent had, in its view acquired from its predecessor. As I understand the respondents, the appellant was automatically conscripted into membership of the Co-operative Union the moment he secured a loan from it; and when the 1st respondent acquired the Co-operative Union's assets, the applicant was initiated into the 1st respondent's membership by virtue of his liability to the latter's predecessor.

I pause here to note that the documents which the 1st respondent produced in support of its case appear to be inconsistent with the position it adopted; first, the loan application form shows that the application which the appellant made was directed to Tetu Coffee Growers Co-operative Society Limited and not to

Nyeri District Co-operative Union Limited. Under **section 12** of the **Act** the two were distinct and separate legal entities; that section states as follows:-

12. Co-operative society to be body corporate

Upon registration, every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with, its by-laws.

The appellant owed his allegiance to the Tetu Coffee Growers Co-operative Society Limited and not to Nyeri District Co-operative Union Limited.

The second document that is of interest is a deed titled "Agreement on transfer of Assets between Nyeri District Co-operative Union Limited and Nyeri Farmers Sacco Limited;" Nyeri Farmers Sacco Limited later changed its name to Taifa Co-operative Savings and Credit Society Limited. Altough the respondents pleaded that the appellant became a member of the 1st respondent under this deed, there is nowhere in that deed that expressly states so; in any event, even if it was to be so stated in any of its clauses, that clause would be contrary to Part VIII of the Act which provides for amalgamation or division of co-operative societies. Under **section 29** of that part, a special resolution to amalgamate two or more societies must be made and members must not only be notified of this but they must also be given opportunity to object to such resolution. The Act does not provide for assimilation of co-operative societies in the manner suggested by the respondents.

For all its efforts, there is nothing in the respondent's evidence to demonstrate that the appellant was 1st defendant's member. Going back to **section 14** of the Act, the respondent did not provide any evidence that the appellant's employment, occupation or profession fell within the category or description of those for which the 1st respondent was formed; or that he was a resident within or occupied land within the society's area of occupation as prescribed by the 1st respondent's by-laws.

Again there was no proof of the appellant's interest in the 1st respondent as required under **section 40** of the Act; the 1st respondent did not provide any register or list of members or shares which it kept or ought to have been keeping to show the date on which the name of the appellant was entered in such register or the date he ceased to be a member and the number of shares held by the appellant.

I agree with the counsel for the appellant that the learned magistrate misdirected herself on the facts and the law when she concluded that the appellant was a member of the 1st respondent and therefore the dispute between them could only be resolved by the Co-operative Tribunal. I would allow the appeal to the extent that it was dismissed on a preliminary point.

Under Order 42 rule 24 of the **Civil Procedure Rules**, this Court has the discretion to remand back the case to the subordinate court for its determination on merits since the suit was dismissed on a preliminary point and its decree has been reversed on appeal; this rule provides as follows:-

Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point, and the decree is reversed on appeal, the court to which the appeal is preferred may, if it deems fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence,

if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Since I have held that the subordinate court was seized of jurisdiction to determine the dispute between the contesting parties, it would perfectly be inorder to remand this case to the lower court; however, despite the suit having been dismissed on what should have been a preliminary point, the subordinate court still admitted evidence from the contesting parties as if the case was to be determined on merits. On their part, the parties' respective counsel submitted not only on the issue of the appellant's membership with the 1st respondent but they also submitted on the merits of the appellant's case. Rather than remit this case back to the magistrate's court, this Court is capable of analysing the evidence admitted at the trial and come to its own conclusions in exercise of its appellate jurisdiction. (See **Selle v Associated Motor Boat Co. [1968] EA 123).** For this reason, I am of the humble view that it will not be of any use to refer this case back to the magistrate's court for determination of outstanding issues.

Going back to the evidence at the trial, the 1st defendant admitted having proclaimed, attached and sold the appellant's animals to recover an 'outstanding debt' from the appellant. Counsel for the respondents submitted that the seizure and auctioning of the appellant's property was lawful and had the legal backing of **section 33** of the **Co-operative Societies Act**. That section provides as follows:-

33. Society to have first charge over debts, assets, etc. in certain cases

(1) Subject to any other written law as to priority of debts where a co-operative society has—

(a) supplied to any member or past member any seeds or manure, or any animals, feeding stuff, agricultural or industrial implements or machinery or materials for manufacture or building; or

(b) rendered any services to any member or past member; or

(c) lent money to any member or past member to enable him to buy any such things as aforesaid or to obtain any such services, the society shall have a first charge upon such things or, as the case may be, upon any agricultural produce, animals or articles produced therewith or therefrom or with the aid of such money.

(2) The charge shall subsist for such period as the loan or value of the services rendered by a co-operative society to a member shall remain unpaid.

This section is explicit that the society can only have a first charge on any agricultural produce, animals, or articles of *a member* of the society; the right of the society to have a first charge presupposes that chargor is *a member* of the society. Such rights do not exist against any person who is not a member as understood under the Act. Without belabouring the point, the respondents could not attach and sell the appellant's property as if he was a member of the 1st respondent without any evidence of such membership; a society's right over a chargor's assets or property under this provision of the law was not available to them.

In the absence of any justifiable cause to attach and sell the appellant's property the appellant had a cause of action in tort for damages against the respondents. As noted earlier, he prayed for the sum of **Kshs 205,312** being the value of the livestock and loss of user; he also asked for the mesne profits at the rate of Kshs 348 per day from the date of the suit until payment in full. Finally, the appellant prayed for general damages and costs. The claim for the liquidated damages either as the value of livestock or

ascertained profits would, in my view, constitute special damages and thus the major question at hand is whether the appellant proved on a balance of probability that he was entitled to both general and special damages. The latter damages must be specifically pleaded and proved and therefore in considering whether the appellant was entitled to his claim under this head, I have to consider whether he specifically pleaded and proved the damages under this particular head.

The livestock which the appellant specifically pleaded in his plaint as having been unlawfully auctioned by the respondents was as follows:-

a. One black grade cow

b. One black he-goat

c. One white she-goat

d. One black& white heifer

The composite value which the appellant placed on his livestock in the was Kshs 190,000/=. He calculated the “loss of user” at the rate of Kshs 348/= and came to the figure of 15,312/=. The appellant’s evidence to support these claims went as follows:-

They came to the place after they had sent a letter to me. The property they took I had bought a cow at Thika worth 120,000/-, the calf was worth 40,000/= and the goats were 15,000/= each totalling to 300,000/= since that time I do not benefit from the said cattle that was taken…I used to sell milk from the cow that is 12kg but is (sic) stopped since they took my cow. I used to get Kshs 360 daily that cow could have given birth. I lost all that…I bought the cow at Kshs 120,000. I have the agreement in court drafted in Kikuyu language. I wish to produce it as pexh.2. I have translated version in English produced as pexh.3.

I pause here to note that though the appellant included all the respondents’ exhibits in his record of appeal he did not include any of his exhibits including the alleged sale agreement in that record.

Besides the agreement for the purchase of the “black grade cow” there was no proof of the cost of the rest of the livestock auctioned by the respondents; infact the value of each of the two goats and the heifer was not pleaded and it was only at the hearing that the appellant testified on the respective cost for each of these animals.

When the appellant was cross-examined on the agreement, he admitted that there was inconsistency between the amount stated in words as the purchase price and that stated in figures; while the purchase price was indicated as Kshs 1020/= in figures it was indicated as Kshs 120,000/= in words; he also admitted that the translation of the agreement from Kikuyu language to the English language was incorrect. His explanation was that the variation in figures was an error.

Counsel for the respondents took up this issue in his submissions and urged that in the midst of these inconsistencies and without a proper translation of the document produced as evidence from Kikuyu language to English language there was no proof of the value of the cow.

Though the sale agreement was not included in the record of appeal, I found it in the original trial record; there is indeed a variation in the amount in figures and the amount in words. Despite the fact that the appellant admitted this inconsistency in his evidence, the English translation which was certified as true

and accurate by his counsel does not appear to show any inconsistency and to that extent does not reflect the accuracy of the agreement in the Kikuyu version. I would agree with the counsel for the respondents that the translation was misleading and its probative value as a proof of the price of the cow is in doubt. In my humble view, attaching any of the two inconsistent amounts to the agreement as price of the cow would be nothing more than speculation which this court cannot countenance. In the absence of credible evidence of the price of the cow, it cannot be said with any certainty, or on a balance of probability, at least on the basis of the material before court, that the cow was worth Kshs 120,000/=.

There was also the claim of loss of user which the appellant erroneously referred to as mesne profits in the prayers in the plaint; 'mesne profits' is defined the **Black's Law Dictionary 9th Edition** as "*the profits of an estate received by a tenant in wrongful possession between two dates*" while "loss-of-user" or "loss of use" is mainly associated with the value of a chattel to an owner as a going concern at the time and place of loss so that he might be in a position to purchase a replacement. Loss of user as a claim is the profit for the period until a replacement could be obtained **(See Halsbury's Laws of England Volume 12 on Measurement of Damages in Tort, paragraph 83);** the two are totally distinct concepts and neither can be used in the alternative to the other.

Loss of user is a special damage claim to the extent that any amount due to a claimant under this head is ascertainable and quantifiable and thus must be specifically pleaded and proved.

Order 2 rule 10 of the **Civil Procedure Rules** appears to refer to such claims that must be specifically pleaded or particularised; it says:-

10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a)…

(b)…

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

In **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288** at page 291 the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus:-

"It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."

It is not enough for the claimant, as it were, to pluck figures from the air and pose them as the value of his livestock or the profit which he lost as a result of their non-use, if he will want to regard them as chattels; there must be some substantive proof of the value of the livestock and the loss that arose as a result of his loss of their possession.

Closer to the point is the Court of Appeal's decision in **Civil Appeal No. 25 of 2013 Macharia Waiguru versus Murang'a Municipal Council & Another (2014) eKLR** in which the question of a claim for loss of user was addressed. In its judgment the Court (Visram, Koome and Odek JJ.A) expressed itself on

this issue as follows:-

" On the issue relating to the claim of Kshs. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended plaint indicates that this is a claim for Kshs. 300,000/= and loss of user which is a claim for special damages.

The Court then cited with approval its earlier decision in the case of **Siree –v- Lake Turkana El Molo Lodges (2002) 2EA 521** where it had said:

"This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages"

It was the court's view that damages for loss of user are quantifiable meaning that they can only be pleaded as special damages and failure to plead them as such is fatal to a claimant's claim under this head; in this regard the court relied on its decision in ***Maritim & Another –v- Anjere (1990-1994) EA 312 at 316,*** where it was emphasised:

"In this regard, we can only refer to this court's decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

Having made references to its earlier decisions on the question of special damages and in particular damages for loss of user the Court came to the conclusion that:

"It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given."

Coming back to the appellant's case, I am not persuaded that his claim for special damages either in terms of the value of his livestock or what he thought to be damages for loss of user were proved to required standard. I would dismiss his claim under this head.

As for general damages, counsel for the appellant asked for the amount of **Kshs 100,000/=** as general damages for trespass, illegal attachment and negligence; he relied on the decision in **Hillary David Odongo versus Manager, Juhudi Loan Scheme (2005) eKLR** where the court is said to have awarded the claimant the sum of **Kshs 578,097.80** as damages for illegal attachment.

The respondents counsel on the other hand submitted that an award of Kshs 10,000/= would suffice as general damages and in this regard he relied on the decision in **Anthony Kolani Mwanyale versus Mwaka Omar Ali (2011) eKLR** where an award of Kshs 50,000/= as general damages for trespass was made in the year 2011.

I could not get the decision in **Hillary David Odongo versus Manager, Juhudi Loan Scheme (2005) eKLR (supra)** either in the original trial record or in the record of appeal; however, I found it on the National Council for Law Reporting website. In that case, the court established that the defendant had wrongly detained the plaintiff's sawing machine for 1,477 days; the claimant's daily net income out of

this chattel was established to be Kshs.349/40. The court multiplied the claimant's daily net income with the number of days that the sawing machine had been detained and came to the figure of Kshs 578,097/80 which the claimant was awarded as the net income he lost for that period. Although the award was made under the head of general damages, it was it was in effect an award under the head of special damages for loss of user to the extent that the net income and the amount of loss were ascertainable from the very beginning. The damages were specifically pleaded and proved and in those circumstances I am reluctant to accept that those were anything else other than special damages. In my view, that decision is of little help in determining the general damages due to the appellant.

The **Anthony Kolani Mwanyale versus Mwaka Omar Ali (2011) eKLR** (supra) decision was in respect of trespass to land. In that case the defendant was found to have trespassed on the plaintiff's land on which he constructed a house. The plaintiff asked for Kshs 500,000/= as special damages; the court declined to make this award on the basis that the figure had not been specifically pleaded and proved and that the plaintiff could not just "*pick a figure from the Abacus and cling to it and expect to be awarded such sum"*. The court proceeded to make what appears to me to be a nominal award of Kshs 50,000/= as general damages for trespass.

Again this decision does not appear to be of much help in determining the award for general damages due to the appellant.

In my own research, I came across the Court of Appeal decision in **Civil Appeal No. 94 of 1986, Aroni Sure & 8 Others versus Gesare Nyamaiko** where the court reiterated that wrongful attachment of goods was actionable in tort or trespass and the instigator or the applicant for such an attachment was liable in damages payable to the wronged party.

Just like in this case, the appellants' cattle in the **Aroni Sure & 8 Others versus Gesare Nyamaiko case** (supra) had been unlawfully attached; the Court of Appeal held that the appellants were entitled to succeed and recover damages for unlawful attachment for their cattle. The court did not, however, award them the damages because they had not prayed for them and the court was also in doubt whether such damages could be awarded in objection proceedings rather than in a substantive suit commenced for that purpose.

Such suit, in which the claimant specifically sought for damages as a result of wrongful attachment of his property, was **Civil Appeal No. 108 of 1984, Blassio Simiyu versus Vincent Wanjala Sinino.** In this case, the appellant was not a party to the suit in which the attachment was ordered but his daughter was. Rather than attach the daughter's property, the auctioneers attached her father's property instead. The father sued for damages for the wrongful attachment of his property. After hearing the case the learned magistrate awarded the appellant Kshs 918.50 as special damages and Kshs 10,000/= under the head of general damages. The High Court (Gicheru, J) overturned the decision of the lower court; the appellant appealed against the decision of the High Court to the Court of Appeal which reversed the decision of the superior Court and upheld the magistrate's decision.

In its decision, the Court of Appeal held that the appellant had a cause of action in tort; it held further that to the extent the respondent had misled the court broker to attach the appellant's four head of cattle, he was liable in damages for trespass for wrongful attachment of the appellant's goods. The Court upheld the award of Kshs 10,000/= under the head of general damages. It is not clear from the judgment of the Court when the award was made but it appears to have been sometimes between 1979 and 1980.

In Civil Appeal No. 165 of 1989 Atogo versus Agricultural Finance Corporation the Court of Appeal awarded nominal damages of Kshs 2,000/= for wrongful attachment of what the court described as a

'farm pick-up'.

Considering the foregoing decisions and in particular taking into account that they were made several years ago, and doing the best I can in the circumstances, I would award the appellant the sum of Kshs 100,000/= as general damages. The appellant shall also have costs of the suit plus interest at court rates from the date of judgment in the lower court till payment in full.

Parties will bear their own costs in this appeal since the appeal has only succeeded in part. It is so ordered.

Signed, dated and delivered in open court this 4th day of March, 2016

Ngaah Jairus

JUDGE