**Thabiti Finance Company Limited and another v Abiero**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 19 March 2004

**Case Number:** 251/01

**Before:** Omolo, Tunoi and O’Kubasu JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*Damages – General and special damages – Fraudulent exercise of statutory power of sale – Loss of*

*purchase price – Whether lost purchase price constitutes general damages.*

**Editor’s Summary** The Respondent charged his property to the Appellant as security for a loan given to a third party. The Respondent fell into arrears with loan repayments. The Appellant notified the Respondent of its intention to sell the property by public auction. The auction was put off and the Respondent given permission to sell the suit property by private treaty. The Respondent eventually received a firm offer of KShs 3,5 million which he conveyed to the Appellant. The Appellant had however secretly transferred the property without putting the Respondent on notice. The trial Judge found that the said transfer was fraudulent, and proceeded to award general damages in the sum of KShs 3,5 million. The Appellant appealed, arguing that the Learned Judge erred in a warding general damages of KShs 3,5 million whereas the Respondent was only entitled to special damages.

**Held** – A plaintiff has an obligation to plead and particularise any item of damage which represents out of pocket expenses or loss of earnings incurred prior to the trial and which is capable of substantially exact calculation (*Perestrello Ltd v United Paint Co Ltd* [1969] 1 WLR 570 adopted). Special damages unlike general damages do not follow in the ordinary course of events; they are exceptional in their character and they must be specially pleaded and proved (*Stoms Broks Aktie Balag v Hutchinson* [1905] AC 51 adopted). However, in the current case, the plaintiff did not know what he had actually lost until the date of trial. There was no calculated loss prior to trial (*Njoroge v Kenya Commercial Bank Ltd* [1992] LLR 2357 (CAK) approved; *Sande v Kenya Co-operative Creameries* [1992] LLR 314 (CAK) distinguished). The trial court was therefore right in awarding general damages for fraud equivalent to the monetary value of the suit property.

**Appeal dismissed. Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Njoroge v Kenya Commercial Bank Ltd* [1992] LLR 2357 (CAK) – **APP**

*Sande v Kenya Co-operative Creameries* [1992] LLR 314 (CAK) – **D**

***United Kingdom***

*Perestrello Limited v United Paint Company Limited* [1969] 1 WLR 570 – **A**

*Phillips v Phillips* [1878] QBD 127, 139

*Stoms Broks Aktie Bolag v Hutchinson* [1905] AC 51 J – **A**