



**M/S Glory Rent A Car Limited v General Cargo Services Limited (Civil Appeal 94 of 2020) [2023] KEHC 27571 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 27571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 94 OF 2020  
F WANGARI, J  
MARCH 28, 2023**

**BETWEEN**

**M/S GLORY RENT A CAR LIMITED ..... APPELLANT**

**AND**

**GENERAL CARGO SERVICES LIMITED ..... RESPONDENT**

*((Being an appeal of part of the judgment delivered on 17th June 2020, by Hon. P. Muchoki RM in Mombasa CMCC No. 1876 of 2009 in regard to Special Damages for loss of user for 2 weeks amounting to Kshs. 166,000))*

**JUDGMENT**

1. This judgment is on one aspect only, the loss of user for 2, weeks for Kshs 166,000.
2. The Aspect of loss user has been determined and settled in this jurisdiction in [\*Grace Anyoka Mbirdaa v Jubilee Insurance Co. Ltd\*](#) (2021) eKLR, Justice A.N. Onger, stated;

“The Court of Appeal in Civil Appeal No 283 of 1996 David Bagive v Martin Bunde stated that damages which are claimed under loss of user as special damages which must be proved. In the said Court of Appeal decision the court stated;-

Loss of user therefore are special damages that are incurred for a necessary period when the motor vehicle is undergoing repair”



### Duty of the court:

3. This being a first appeal, the hearing of this appeal will be by way of a retrial. As was held in *Selle & another v Associated Motor Boat Co. Ltd* [1968] E.A. 123 at Page 126 by Sir Clement De Lestang V-P,

“...The Principles upon which this court acts in such appeal are well settled. Briefly put they are that this court must reconsider the evidence evaluated it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with evidence in the case generally.”

### Loss of user

4. In Samuel *Wanjohi & another v Michael Ndirangu Karuku* [2005] eKLR, Justice Luka Kimaru, as then he was stated as follows: -

“As was held by the Court of Appeal in, *Coast Bus Services Ltd v Sisco E. Murunga Ndanyi & others* C.A Civil Appeal No 192 of 1992 (Nairobi) (unreported), special damages must be specifically pleaded and during the hearing of the case, specifically proved. In *Eldama Ravine Distributors Ltd & another v Samson Kipruto Chebon* C.A. Civil Appeal No 22 of 1991 (unreported) Cockar J.A (as he was then) held that;

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] K.R 304, after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J. quoted in support the following passage from Bowen L.J’s judgment on pages 532- 533 in *Ratcliffe v Evans* [1892] 2Q.B 524. an English leading case of pleading and proof of damage:

“The Character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularly with which the damage done ought to be stated and proved.

As much as certainty and particularity must be insisted on both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon, less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

5. In *Equity Bank Limited & 2 others v Perpetua Muthoni Nduma* [2019] eKLR, Justice Ngaah Jairus stated as follows: - 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.”

6. The court will not take extravagant expenses as loss of user. In vehicle engaged in business, this court shall portion of losses attributes to the non- user of the motor vehicle during the repair period.
7. The Appellant relied or the authority of *Ndishu & another v Muriungi* (Civil Appeal 3 of 2020) (2022) KEHC (21 January, 2022) (Judgment) where the importance of pleadings was also emphasized. It was stated:

“I will address the argument that the Respondent in his Plaint in the lower court did not plead or particularize his claim for loss of user. In resolving this issue, it is inevitable that we must refer to the Respondent’s Plaint in the lower court”

8. The claim of loss of user in this case was just thrown to the court i.e. loss of user for 2 weeks. It was not particularized. Before a claim is proved specifically, it needs to be particularized. In this case, the claim was just thrown to the court and the court was required to order payment.
9. From the foregoing in the absence of any evidence of the costs incurred by the plaintiff in hiring another motor vehicle, the prayer for loss of user fails.
10. I agree with the appellant that the figures related to the loss of user was just plucked from the air and thrown to the court.
11. Further the Respondent was under duty to mitigate loss. The plaintiff did not tie the loss of user to the period of repairs and how he mitigated loss. In *South Nyanza Sugar Company Ltd v Donald Ochieng Mideny* [2018] eKLR, Justice DS Majanja held;

“Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (see *African Higbland Produce Limited v Kisorio* [1999] LLR 1461 (CAK). Since the appellant did contest the respondent’s claim, it did not show how the respondent could mitigate the loss.”

12. Consequently, I allow the appeal on loss of user and set aside the award for Ksh. 166,000 and substitute it with an order dismissing the entire claim for loss of user.
13. Costs of 65,000 to the Appellant.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**F. WANGARI**

**JUDGE**

In the presence of:

Nasimiyu Advocate for the Appellant



Jengo Advocate for the Respondent

Turuki, Court Assistant

