



REPUBLIC OF KENYA



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Jinnah v Jhanda & another; Mo Sound Entertainment (Interested Party) (Civil Suit 350 of 2011) [2023] KEHC 21455 (KLR) (Civ) (16 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21455 (KLR)

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

CIVIL

CIVIL SUIT 350 OF 2011

AN ONGERI, J

AUGUST 16, 2023

BETWEEN

NAZIR JINNAH PLAINTIFF

AND

ZAHEER MERLAHI JHANDA 1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA 2ND DEFENDANT

AND

MO SOUND ENTERTAINMENT INTERESTED PARTY

JUDGMENT

1. The initial judgment in this case was delivered on May 29, 2023 and this court directed the parties to file submissions on the issue of quantum of damages.
2. The reason for asking parties to make submissions on the issue of general damages was that the subject motor vehicle was deposited at this court's premises by order of this court and the same has now been waived because of the delay in hearing this case.
3. I rely on the case of *Barclays Bank of Kenya Limited v Mema* (Civil Appeal E011 of 2021) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) where Justice Majanja had the following to say;

“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 *restitution 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). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

4. The *Constitution of Kenya, 2010* espouses every court and tribunal to apply the principles enshrined in Article 159 in the dispensation of justice. The relevant principles for exercising judicial authority are contained in article 159(2) as follows;

- “(a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c)
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.”

5. This court has a duty to do justice between the parties and that is the reason for departing from tradition by asking for submissions on general damages in contract.
6. The said motor vehicle has been destroyed due to exposure to weather vagaries and as it were, it requires to be reinstated to the condition it was when it was recovered if this court has to mete substantive justice.
7. The court made a site visit to the place where the motor vehicle has been lying since 2011 when it was deposited and found its physical condition deplorable and the mechanical condition unknown.
8. If this case was decided timeously that would not have been the situation. I find that the 1st Defendant is to blame for all the troubles for his fraudulent behavior.
9. This court directed that the vehicle be returned to the plaintiff in the judgment dated May 29, 2023.
10. The motor vehicle has now been destroyed due to the delay in hearing this matter. This is a confirmation that delayed justice is denied justice.
11. This court therefore requires to assess the damages payable for reinstating the motor vehicle to its initial state.
12. I have considered the submissions by the parties herein. The plaintiff asked for Kshs 36,000,000 which is excessive.
13. The 1st Defendant submitted that the plaintiff should be awarded the amount pleaded of Kshs 2,300,000 as general damages.



14. The Interested party said it is the interested party that should be paid the value of the motor vehicle together with damages since it bought it in a market overt in June 2012 only for the vehicle to be detained pursuant to a court order.
15. I have considered the authorities relied on by the parties.
16. The duty of this court is to mete substantive justice between the parties as stipulated in Article 159 of the Constitution.
17. Firstly, I apologize for the delay in delivering this final judgment. The reason being this file was mistakenly sent to the mediation Registry and I wish to thank the parties for bringing that fact to the attention of his court when the CAM registry reached out to them.
18. This court did not refer this case to mediation and in my opinion this case is not suitable for mediation because the 1st defendant who is currently a Member of Parliament in Nyaribari Chache lied on oath that he does not even know the plaintiff and further that he may have issued the cheques for his company for something else.
19. The mediation process requires good faith and parties must speak the truth for justice and truth walk together.
20. Secondly, I wish to state I have noted that the parties have already filed a notice of appeal against the judgment of this court and for purposes of clarity, this is the final judgment of this case and whoever wishes to appeal has an automatic right of appeal from the date of this final judgment.
21. Finally, having considered the submissions by the parties, I award general damages of Kshs 1,000,000 for purposes of reinstating the motor vehicle to its initial state.
22. My final orders in this case are therefore as follows;
 - i. That the Plaintiff is entitled to take possession of the motor vehicle at the court premises having proved that he is its rightful owner.
 - ii. That a declaration be and is hereby issued that the said motor vehicle belongs to the Plaintiff and not to the 1st Defendant or the Interested Party.
 - iii. That the said motor vehicle to be released to the plaintiff forthwith.
 - iv. That the Plaintiff is also entitled to the Kshs 25,000 contained in the default clause in the sale agreement dated 11/2/2010 with interest from the date of filing suit until payment in full.
 - v. That the plaintiff is entitled to damages for wear and tear of the motor vehicle and general damages for breach of contract assessed at Kshs 1,000,000.
 - vi. That the 1st defendant to pay the plaintiff the said general damages (Kshs 1,000,000) for purposes of restoring the motor vehicle released to the plaintiff to its initial state.
 - vii. That judgment be and is hereby entered in favor of the plaintiff against the 1st Defendant in the sum of Kshs 1,025,000 plus costs and interest at court rates from the date of this judgment until payment in full.

Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF AUGUST, 2023.



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A. N. ONGERI

JUDGE

