



**Jamii Bora Bank Ltd & another v Ndirangu (Civil Appeal E030 of 2021)  
[2023] KEHC 25951 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25951 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E030 OF 2021  
MA ODERO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JAMII BORA BANK LTD ..... 1<sup>ST</sup> APPELLANT**

**ELIUD C WAMBU T/A CHADOR AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SAMUEL WAMBUGU NDIRANGU ..... RESPONDENT**

**JUDGMENT**

1. Before this court for determination is the Memorandum of Appeal dated 14<sup>th</sup> July 2027 by which the appellants Jamii Bora Bank Limited and Eliud C Wambu T/A Chador Auctionees sought for orders That:-

- “(a) This appeal be allowed
- (b) This Honorable court be pleased to set aside the judgment and Decree of the Honorable W. Kagendo Chief Magistrate, delivered on 28<sup>th</sup> June 2021, in Nyeri CMCC 265 of 2017
- (c) The Respondent Further Amended plaint amended on 19<sup>th</sup> June 2021 and filed on 24<sup>th</sup> June 2019 in Nyeri CMCC 265 OF 2017 be dismissed with costs to the Appellants.
- (d) Costs of this appeal be awarded to the Appellants
- (e) Any other or further orders and directions this Honourable court deems just and fit to issue”



2. The Respondent Samuel Wambugu Ndirangu opposed the appeal. The matter was canvassed by way of written submissions. The Appellants filed the written submissions dated 28<sup>th</sup> March 2023 whilst the Respondent did not file any submissions.

## **Background**

3. The respondent herein pursuant to a letter of offer dated 8<sup>th</sup> October 2015 secured an asset finance loan of Kshs.1,370,000/= from the 1<sup>st</sup> Appellant to purchase two motor vehicles Registration numbers KCP 081S and KCD 561R
4. The loan was duly disbursed to the Respondent and the vehicles were jointly registered in the names of the 1<sup>st</sup> Appellant and the Respondent.
5. The Respondent later fell into arrears in servicing the loan which had been advanced to him. As a result the 1<sup>st</sup> Appellant moved to repossess the vehicles for sale by way of auction through the 2<sup>nd</sup> Appellant.
6. The Respondent alleged that the 1<sup>st</sup> appellant had instructed the 2<sup>nd</sup> appellant (the Auctioneer) to attach the two vehicles, without issuing the required statutory notices thereby occasioning loss of business to the Respondent. The Respondent also claimed for special damages being storage fees and fuel hiring charges.
7. On its part the 1<sup>st</sup> Appellant confirmed having advanced to the Respondent a facility of Kshs.1,370,000/= in October 2015. That the Respondent fell into arrears which by July 2019 amounted to Kshs.761,707.72/=
8. The Appellants asserted that in the circumstances their repossession and attachment of the two vehicles was lawful and was done procedurally.
9. The matter was heard and the Honourable trial magistrate delivered her judgment on 28<sup>th</sup> June 2021. In that judgement the court found that the second attachment was unlawful. The court proceeded to award the Respondent general damages of Kshs.200,000/= and directed that each party would bear its own costs.
10. Being aggrieved by the decision of the trial court the appellant filed this Memorandum of appeal dated 14<sup>th</sup> July 2021 in which they raised the following grounds:-
  - a. That the learned trial magistrate erred in fact and in law in finding that the Plaintiff despite pleading damages failed to strictly prove the special damages as required in law and proceeded to award him general damages.
  - b. That the learned trial magistrate erred in law and in fact in awarding the plaintiff general damages of Kshs.200,000/= under prayer D of the when prayer D sought for special damages in the plaintiff's further amended plaint.
  - c. That the learned magistrate erred in law and fact in awarding the Respondent/Plaintiff a relief of general damages when no relief of general damages had been sought or pleaded in the plaintiff's amended plaint.
  - d. That the learned trial court erred in holding that the Plaintiff was punished unfairly and under Prayer D of the Plaint awarded general damages amounting to Kshs.200,000/=
  - e. That the learned magistrate erred in law and fact in failing to hold and find that the Plaintiff failed to strictly prove claim for special damages as required in law.



- f. That the learned magistrate erred in law and fact and seriously misdirected herself in failing to apply the law on special damages to the facts of this case and arrive at the correct conclusions of dismissing the plaintiff's suit”

### **Analysis and Determination**

11. I have carefully considered the Memorandum of Appeal filed in this matter as well as the written submissions on record.
12. It is now settled principle that the duty of the first appellate court is to reconsider the evidence of the trial court, re-evaluate it and make its own conclusions. An appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence of the trial court acts on wrong principles in arriving at its findings.
13. The Court of Appeal in the case of *Selle & Another v Associated Motor Boat Co. Ltd y another* [1968] EA 123 held as follows:-
- “A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also Law JA, *Kneller & Hanxox Ag Jja In Mkube v Nyamuro* [1983] KLR, 403-415, at 403
14. It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they had no basis, or were based on a misapprehension of facts or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. In *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held:-
- “An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution”
15. As pointed out by the trial magistrate in her judgment majority of the issues between the parties were settled amicably. The loan was fully repaid and the motor vehicle and log-books were duly released to the Respondent.
16. The only outstanding issue for determination was whether the attachment of the two vehicles by the Appellants was lawful or not.
17. The trial court found that the second attachment of the vehicles was wrongful as the 1<sup>st</sup> Appellant had wrongly applied the amount of Kshs.153,000/= which had been paid by the Respondent towards costs.
18. The trial court found that the Respondent had failed to prove their claim for special damages but proceeded to award the Respondent an amount of Kshs.200,000/= as general Damages. It is this award that forms the subject matter of this appeal.
19. The Appellants argue that the learned trial magistrate erred in awarding the Respondent General Damages of Kshs.200,000/= when no prayer for General Damages had been made. According to the appellants the court ought to have dismissed the suit in its entirety.



20. I have carefully perused the Further Amended Plaintiff dated 19<sup>th</sup> June 2021 and the prayers sought therein. The Appellants placed reliance on the case of *Caltex Oil (kenya) Limited v Rono* [2016] eKLR in which it was stated that all prayer being sought in a suit ought to be ‘specifically pleaded’ in that case it was held that
- “A prayer for damages must be specifically pleaded and particularized because the claimant has suffered as a result of the wrong that is complained of. There was no justification for a court to award damages for an alternative as couched above”
21. In her judgement the trial magistrate dismissed the prayer for special damages. In awarding General Damages the trial court stated as follows:-
- “(15) Accordingly the court finds that the 2<sup>nd</sup> attachment was wrongful. The plaintiff outlines their special damages but they did not prove the same. They were given time to file the documents and they did not.
- (16) The court however finds that they were punished unfairly and under prayer (D) of the Plaintiff, the general damages amounting to Kshs.200,000/=”
22. It is a fact that in their Further Amended Plaintiff the Respondent made no prayer at all for General Damages. The Respondent only prayed for special damages of Kshs.669,252/= which prayer was dismissed as the special damages were found not to have been proved.
23. Prayer (d) of the plaintiff sought for “Any other or better relief to which the Honourable court will deem fit to grant.”
24. Given that there was no prayer made for general damages and the same were not canvassed at the hearing the trial magistrate erred in making such an award. This is because the Appellants who not being aware that such an award was under consideration, had no opportunity to be heard on the same.
25. It is trite law that parties are bound by their pleadings and courts may only grant orders which have been specifically sought.
26. In *Kenya Commercial Bank Ltd v Sheikh Osman Mohamed* [2010]eKLR it was held:-
- “It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear”[own emphasis]
27. The issue of general damages was not raised in the plaintiff. As such the Appellants were not granted an opportunity to make any representation on that issue. By making such an award the trial magistrate was effectively condemning the Appellants unheard.
28. A claim for general damages is a substantive claim which must be specifically pleaded and proved. It is not one which the court has liberty to grant without submissions/arguments being placed before said court.
29. The court cannot rely on the ‘generic’ prayer of “any other relief” to award general damages. I find that the learned trial magistrate erred in making an award for General Damages where no such prayer had been made.



30. Finally I find merit in this appeal and the same is allowed. This court hereby makes the following orders:-
- i. The judgment and Decree of the Honourable W. Kagendo, Chief Magistrate delivered on 28th June 2021 in Nyeri CMCC No. 265 of 2017 be and is hereby set aside.
  - ii. The Respondents further amended plaint dated 19th June 2021 filed in Nyeri CMCC No. 265 of 2017 is dismissed in its entirety.
  - iii. Each party to meet its own cost.

**DATED IN NYERI THIS 30TH DAY OF NOVEMBER,2023**

.....

**HON. MAUREEN.A ODERO**

**JUDGE**

