



**Kipyeko v Kenya Revenue Authority & another (Civil Suit
71 of 2016) [2022] KEHC 10818 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10818 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 71 OF 2016
PJO OTIENO, J
MAY 25, 2022**

BETWEEN

EDWARD KIPYEKO PLAINTIFF

AND

KENYA REVENUE AUTHORITY 1ST DEFENDANT

COMMISSIONER OF CUSTOM SERVICES 2ND DEFENDANT

JUDGMENT

1. In this suit, the plaintiff claims from the defendants, general damages, mesne profits from May, 2013 to date all aggregating to Kshs 125,800,000, unpaid loan of Kshs 4,805,800.81 together with interest accruing thereon as well as interests on damages and costs of the suit
2. The cause is pleaded to be that, there was Mombasa High Court Petition number 36 of 2013 in which it was adjudged and decreed that the respondents release to the plaintiff Motor Vehicle No. KBR XXXX ZC 1556 forthwith and that the question of damages, if any, be argued on a date mutually convenient to the counsel. It was further pleaded that the claim against the defendants is thus for general damages, mesne profits, loan repayment and interest accruing thereof, as a result of the loss of user of his motor vehicle registration No. KBR XXXX - ZC 1556. From the plaint, it is not clear whether the order was complied with by release and whether the arguments on damages were ever offered before the court in that petition. In support of the suit and in compliance with the rules, the plaintiff filed a witness statement and a list of five documents with the copies of such documents. The said documents were, certified bank account statements, transport contracts with its customers, log book for the motor vehicle and the court order issued in the petition. There was also a further list of documents containing a copy of the pleadings and documents filed against the plaintiff in Mombasa Cmcc No 4818 of 2016, Nic Bank Ltd v Edward Kipyego Cherop



3. The claim was resisted by the defendants through the statement of defense dated 23/9/2016 in which the plaintiff's assertions regarding the petition and its outcome were admitted with the only contestation being that there was no order or liberty upon the plaintiff to institute fresh suit but to pursue the claim for damages in the same petition and that this suit is the outcome of misapprehension of the court order by the plaintiff, that the suit lies not and should be dismissed and the matter left for determination in the petition. In support of the said defense the defendant filed five witness statements and a list of some 10 documents being; customs entries, bill of lading, transport agreement between Westin Enterprises Ltd and Hamis Juma to transport some goods out of Kenya, transit bond, demand letter by the defendant, letter by First Assurance Company Ltd, Forensic Documents Examiners Report, Investigations Report by CI Agnes Chekemoi and Seizure Notice.
4. Edward Kipyeko Cherop PW1, testified that he was in the business of transporting goods from Mombasa to countries within East African region and that sometimes in May 2013, his motor vehicle registration No. KBR XXXX-ZC 1556, jointly owned with NIC under asset finance, was detained by the defendants on suspicion of diverting transit goods to the local market. He said that he had borrowed Kshs 2,520,000 from NIC Bank at the interest rates of 13% p.a. which he defaulted to pay hence the bank, in a claim for Kshs 6,200,000 successfully obtained a judgement against him in CMCC No. 4818/2016 culminating in him being sent to civil jail for 5 months. Before the seizure of the motor vehicle, he alleged to have been earning about Kshs 1,500,000 per month.
5. To contest the seizure, he filed Mombasa Petition No. 36 of 2013 pursuant to which the court ordered for the release of his motor vehicle with an additional order that the issue of damages (if any) to be canvassed by the parties. He asserted having undergone extreme losses and trauma from the detention of his motor vehicle, which was his only source of livelihood, and was also evicted from his house in 2014 on account of failure to meet his obligations to the landlord. He urged the court to assess the damages due and to award to him the costs of the suit as well as and interests on damages and costs
6. During cross examination, he reiterated that he owned the motor vehicle jointly with NIC bank but denied ever hiring the motor vehicle to the 1st defendant. He stated that although he transported goods for people, most of the time there would be no written contract and that in mid May 2013, as the motor vehicle was leaving to transport a cargo to Kampala, it was detained by the 1st defendant while parked at a yard in Mombasa. The basis for such detention was that the defendants were carrying out investigations. He however did not have any audited accounts in court to show his income from the use of the motor vehicle.
7. In re-examination, he stated that he did not sue Westin Co. Limited because they were not involved in the seizure and detention of his motor vehicle adding that for transport charges, he would be paid either in cash or bank transfers into his account, whose statements he had exhibited.
8. When questioned by the court, he stated that the petition was determined by Emukule J, who said any claim for damages be negotiated.
9. DW1 Johnstone Bwire Ojiambo, a customs officer with the defendants, adopted his witness statement as his evidence in chief then proceeded to explain that rotation numbers were issued for transit trucks with transit goods so that vehicle leaving the port with transit goods, required road manifest, T810 which showed the details of the goods as imported and transit goods license for the truck. That the plaintiff obtained transit goods license, the goods were released under escort but the officer escorting the goods later reported that he had lost contact with the drivers of the lorry connoting that the goods had been diverted from the transit route and a customs offence had been committed necessitating the seizure of the goods.



10. During cross examination, he stated that without a transit cargo license, a transporter could not load any goods from the port, that for goods under escort, some three documents were mandatory and the transporter in this case was compliant. The goods were found in Changamwe, after the escort had made the report, but away from the transport route. Although the officer escorting the goods had the numbers of the drivers transporting the goods, he was not aware whether the said officer attempted to get into contact with the drivers and finally that plaintiff was never charged with any offence.
11. In re-examination, he stated that the transit goods license was not specific to the goods and that a transporter only comes to know the goods he was carrying from the documents used to have them released from the port. He stressed that the transit route was from the port and the next step was Mariakani and was thus deemed to have diverted once the vehicle went outside the transit route.
12. When questioned by the court, he stated that the transport route as at that time was through gate 1820, through Changamwe round about, Mikindani, Jomvu Miritini to Mariakani. That the goods were released under seal and the transporter relied on the documents.
13. DW2 Joseph Njugi Mwangi, the defendants' assistant manager, adopted his witness statement dated 31/5/2013 as evidence in chief being that he accompanied Mr. Muia from Kenya Revenue Protection Services to Changamwe parking yard, where they found the plaintiff's truck, and 2 others. They explained to the cashier of the municipal yard that the trucks were not supposed to leave the yard without authorization from the 2nd defendant. They subsequently learnt that two (2) trucks had left the yard leaving the plaintiff's truck there. Investigations into the matter revealed that the customs officer Caroline Olela stationed at Mariakani Weighbridge rotated the trucks confirming that they had passed through Mariakani as informed by the escorting officer Stephen Musyoki, while in reality they were parked at the Changamwe municipal yard. Documents from the escorting officer also confirmed that the consignment had passed through Mariakani, but the same consignment was still at the Changamwe municipal parking yard as the rotation was being done. He said that he had no definite transit route but asserted that municipal parking yard was not on the route. The witness then produced, by consent, all the defendant's documents, as a bundle, which were marked as DEH1
14. During cross examination, he stated that at the time of the seizure and detention, the containers were intact, that the vehicle was first detained on 31/5/2013 after it had left the customs yard while at Changamwe parking yard, and it was not on transit route to Uganda. The Changamwe parking yard was after the Changamwe round about towards the. He was unaware that there were two (2) exit routes out of Mombasa then and that he tried finding out from the management of the yard why the vehicle had reached there but the clearing agent was not there to explain. He did not meet the owner of the motor vehicle at any given time. Although he was unaware of the escort cargo, some goods needed to move under escort. For goods under escort, an officer assigned to a group of motor vehicles would ensure the documents arrived at the port of exit. When goods were under escort, the transporter got a copy of the documents to know the description of the goods he was carrying, and the entry document to know the contents of the container. He confirmed that none of the contents in the plaintiff's motor vehicle were offloaded into the local market. He did not have any information that the plaintiff was ever charged with any offence related to the subject containers.
15. In re-examination, he stated that if a transit vehicle moved from the transit route, the Commissioner was notified. A transit route was gazetted by the Commissioner and that in this case there were 4 trucks, which were expected to move together, each carrying 2 containers. The goods in the plaintiff's truck were intact while the other trucks moved to offload the cargo into the local market. They were told the plaintiff's truck had a mechanical problem and hence it could not move. There was a case between



the owner of the consignment and the commissioner, in which the owner claimed the goods did not reach him.

16. When questioned by the court, he stated that transit goods would leave through gate 19 then go through Changamwe round about. He was not aware when the route was gazetted, but he was certain that the municipal parking yard was off the route. The subject goods were not under escort, because by the time the officer who was supposed to escort them was notified, the goods had already left and finally that the goods in the two (2) subject containers should have been at the customer's warehouse Kilindini as at the date of his tender of evidence.

Submissions

17. The plaintiff in his submissions filed on 7/2/2022 contended that at no time did the goods being transported in his lorry become uncustomed because the same were never dumped into the local market then adopted the meaning of uncustomed goods and dutiable goods as defined under section 2 of the *East African Community Customs Management Act*. He submitted that Changamwe municipal parking yard was within the transit route, as it was situated along the Jomvu road, which was one of the roads exiting Mombasa. He submitted that trucks were normally parked at the Changamwe municipal parking yard, and as such, the allegations that the vehicle and its load had deviated from the transit route was not true. The seizure was thus not merited as established by the constitutional court when the lorry was ordered released. As a consequence of the seizure and detention, he submitted that he had suffered extremely trauma and damage because of the unlawful actions of the defendants, and he was entitled to the reliefs sought. He relied on *Emmanuel Hatangimbabazi v Commissioner of Customs & Excise* (2020)eKLR and *John Mbaabu & anor v Kenya Revenue Authority* (2020)eKLR in support of his submissions but without stating what finding(s) in the decisions supported his case. This practice of a counsel citing to court a decision without specifying in what respect he wished the court to rely on such decision seems to gain currency and must be discouraged. Submissions and citation of decided cases is done to help the court with the law applicable but not away to send the court on reading and understanding for itself what counsel may not have read or just never intended to read and guide the court in relating the law to the case at hand. That notwithstanding, I will not visit the undoing upon the litigant but will strive to find the relevance of the two decisions to the case.

The defendants have not yet filed their submissions.

18. for the respondent the submissions took the view that there was sufficient proof that the motor vehicle was ferrying uncustomed goods shown to have been intended for dumping in the local market and was thus lawfully sized and liable to forfeiture under the provisions of sections 185 as read with regulation 104(22), 210, 211 and 213 of *East African Community Customs Management Act* (EACCMA). The fact that the cargo in other vehicles had not been traced and the investigations reports produced were underscored to make an inference that there had been a conspiracy to dump transit goods into the local market and that the plaintiff had not exculpated self from such plans. The decisions in *Republic vs Commissioner of Customs and Excise, Exparte, Abdi Gulet Olu*, (2014) eKLR was cited for the standard of proof to be that of a reasonable belief that a vessel is liable to forfeiture while that of *Cryman Enterprises ltd vs KRA* (2013) was cited for the law on the test of reasonableness and procedural fairness.
19. On the merits of the claim, it is submitted that indeed the plaintiff did file Mombasa pet No. 36 of 2013 in which no prayers for declaration of infringement/violations of rights were made but the court all the same ordered that the question of damages if any be argued by counsel on a future convenient date but the same was not so pursued with the plaintiff opting to file and prosecute the instant suit. It was then argued that no damages lie for award to the plaintiff for having been put to civil jail because



that was never false imprisonment but a consequence of due process of the law in a civil dispute in which the defendant was not a party. To the defendants, damages can only be awarded against them if there is demonstration of malice or negligent conduct but not where there is due execution of the mandate. In addition, it was submitted that there is no constitutional petition in which a declaration of violation of any right to attract the award of general damages hence none is due to the plaintiff.

20. For the specific claim quantified in the sum of Kshs 125,800,000 and expressed to be mesne (*sic*) profits from May 2013 to the date, the defendant submits that there had not been a demonstration on how the same was calculated and the length period of such calculation. It was pointed out that transport contracts produced were variously dated between May 7, 2012 and April 27, 2013 and were as such not interfered with by the seizure hence they present no probative value. The defendant took the position that even though bank statements were produced, there was no corresponding document by way contract to support the deposits yet the law is that mesne profits of loss of user must be ascertainable and quantifiable in terms of the pronouncement by the court in *provincial Insurance Company of East Africa vs Modekai Mwangi Nandwa* and reiterated in *Sande vs KCC* (1992)LLR that the same being special damages must not only be specifically pleaded but also strictly proved. In addition, it was submitted that damages grounded on anticipated deals with third parties are speculative and never attributable to a defendant as held in *Eric Omuodo Ounga vs Kcb* HCC 42 A of 2015 and lastly that the detention here was reasonable and justified.
21. For the of unpaid loan, the position taken was that being a none party to such loaning contract, the chattels mortgage agreement with the bank was not enforceable against it and that to award same would be to allow the plaintiff to draw a benefit out of an unlawful and illegal conduct of ferrying uncustomed goods. The court was urged to dismiss the suit with costs to the defendants.

Issues, analysis of the evidence and determination

22. Even though the parties did agree that the four issues drawn and filed by the defendant on the April 3, 2018, be the agreed issues, my reading of the pleadings filed, the evidence offered and the submissions filed by both sides, determine that, over and above the said four issues, which I have coalesced into one, as the first issue, I have added three additional issues to help achieve a full and final determination of the dispute. The four issue are as follows: -
 - a. Whether the seizure of the plaintiff's motor vehicle by the defendant was grounded on the law and justified?
 - b. Whether as a result of the seizure, the plaintiff has suffered loss in the hands of the defendant?
 - c. If, a) above is answered in the affirmative, what is the nature and quantum of such loss and what is the appropriate remedy?
 - d. What orders should be made as to costs?

Was the seizure of the motor vehicle lawfully done?

23. I have had the benefit of perusing the record in Petition No 36 of 2013 and noted that the substantive prayer in it was the unconditional release of the motor vehicle No KBR XXXX-ZC 1556. When the parties appeared before the court on the 29.7.2015, and the record says after hearing counsel for both parties, it was ordered that the motor vehicle be forthwith released by the defendant to the plaintiff. That order has not been challenged and when I asked the parties whether the same was complied with, both did confirm that the motor vehicle was released early in August 2015. With that order in place and without challenge, I do find that the defendant cannot continue to assert the rightfulness of the



seizure. I so determine because the basis of the petition was that the seizure was wrongful. In ordering the unconditional release the court did find for the plaintiff in the petition. I discern to have been that the seizure was unlawful and therefore no justification to order conditional release. Accordingly, therefore, the question of legality of the seizure is not available and cannot be urged afresh without offending the doctrine of *res judicata* and the need to have court decisions to be binding. This court is therefore bound to maintain and hold that the seizure and detention was unlawful.

24. In fact, the defendant does not contest but admits the pleading by the plaintiff that the prayers in the petition were allowed with only the question of damages, if any, being deferred to a future date. The contest by the defendant by dint of paragraphs 5,6,7,8 and 9 is that there was no liberty to file suit as the matter of damages sought here was due for determination in the petition which was the earlier filed litigation. I understand the defendant to plead *res sub-judice* and therefore I have had the chance to read that file to establish if the matter remains pending. My perusal of this and that other file reveals that the court was moved on the December 8, 2016 to consolidate the two files and an order for consolidation was thus made. However, it would appear that the petition file was never placed together with this file as ordered hence a notice calling for the petitioner to show cause why I could not be dismissed was issued on the August 20, 2018 and the petition was dismissed for want of prosecution on the August 27, 2018.
25. That history is important for the purposes of application of the inhibition upon the court by section 6 of the [Civil Procedure Act](#) because it discloses that the petition is no longer pending and was not pending when evidence was led before the court by the defendant in May 2019.
26. On the basis that there was an order for consolidation followed with the subsequent dismissal, I do find that the defence and challenge to this suit, as a subsequent suit, is unmerited and that the suit is properly before the court.
27. As said before, the order by the court decreeing the unconditional release of the motor vehicle vindicates the plaintiff on the complaint against him by the defendant. That position must be construed to mean that there was no justification upon the defendant to seize and detain the motor vehicle and that such detainer was wrongful and injurious. If wrongful and injurious, then the law must provide a remedy by recompense. It is the finding of the court that the seizure by the defendants was unjustifiable and unlawful and that the plaintiff is therefore entitled to an award of damages if proved to the satisfaction of the court.
28. In pursuing compensation, the plaintiff has sought, general damages, mense profits in the sum of Kshs 125,800,000 and what is called unpaid loan to NIC bank Ltd in the sum of Kshs 4,805,008.81.
29. The claim for unpaid loan leading to the default, legal action and committal to civil jail, appears to be improperly pleaded for no basis has been laid to impose a novation of that claim upon the defendant. I consider the evidence led to be towards proof of the extent of injury the seizure visited upon the plaintiff and not capable of standing alone as a separate head of damages. I do find that there is no basis to order the defendant to pay the obligations owed by the plaintiff to a third party. I will however take into account the fact that as a result of the seizure there was a default with its proved attendant consequences, while addressing the question of general damages.
30. On general damages, even if not specified for what cause of action the same is sought, the pleadings and evidence led point to a claim for trespass to good and arbitrary deprivation of property. As said before, there is no longer a debate on the wrongfulness of the seizure. Based on the concession by both parties that the motor vehicle was detained for a period between May 2013 and August 2015, I consider that to have been an overly long period of detainer during which the vehicle must have been put to dilapidation on account of disuse. I have given due regard to the inconvenience, hardship and



embarrassment the plaintiff suffered on account of the wrongful conduct of the defendant. Even if I was to hesitate to categorize it as extreme, it cannot be regarded as trivial. It is to court a substantial injury which must attract substantial damages. On the basis that it stands adjudged wrongful and that even after the order for release it took the defendant another period of days to effect release and the fact that the detainer incapacitated the plaintiff from utilising the chattel to pay a debt due to his financier and leading his deprivation of liberty, I do assess the damages in the sum of Kshs 5,000,000.

31. For mesne profits claimed in the sum of Kshs 125,800,000, the fact of ownership of the motor vehicle and that it was employed in the business of haulage of goods is not in contestation but common ground. What the court must determine is what was the sums generated from that business on a monthly basis. In his plaint, the plaintiff pleaded a loss of Kshs 350,00 per month but in evidence asserted a monthly lost income of Kshs 1,500,000 per month and exhibited not only contracts for transportation of goods but also bank statement to show that he would bank income from the business. All the documents were produced by consent and no meaningful challenge was mounted in challenging their authenticity. The bank statements produced respect the loan account and the current account.
32. I consider the current accounts, one run on US Dollars and another in Kenyan shillings, to show the income earned from the business. For the period of September 2012 exhibited, there was approximately USD 17, 495 and Kshs 714,000, deposited into the respective accounts. In aggregate the earnings for that month was evidently in the sum of about 2,500,000. That was however some seven months before the seizure after there were three contracts for transport dated January 25, 2013, 10.4.2013 and April 27, 2013 for transport of goods from Mombasa to Kampala at a consideration of Kshs 240,000, and 484,000 respectively. Based on those documents, I do find that the motor vehicle was duly used for hire and reward and it was proved within a balance of probabilities that an average of Kshs 1,500,000 per month was achievable.
33. Had it not been for the pleaded loss of 350,000, the court would have adopted that sum as the monthly loss. The law however stands that the plaintiff is bound by his pleading seeking compensation of the loss of Kshs 350,000 per month. I find the loss of kshs 350,000 per month to be not only modest but also sufficiently proved. The court is therefore satisfied that the plaintiff lost that income for the entire period the motor vehicle was under detention. To compute the specific sum lost, the loss is computed for the entire period between the date of seizure to the date of release. That period aggregates to 26 months. Accordingly, the sum awardable under this heading is (kshs 350,000 X 26 months) Kshs 9,100,000.
34. In the end, judgment is entered for the plaintiff against the defendant as follows; -
 - a. General damages Kshs 5,000,000
 - b. Mesne profits Kshs 9,100,000
35. The plaintiff is further awarded the costs of the suit together with interest on such costs and damages from the date of the suit till payment in full.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, ONLINE, THIS 25TH DAY OF MAY 2022

PATRICK J O OTIENO

JUDGE

In the presence of:

Mr. Orange for the Plaintiff



Mr. Shijenje for the Defendants

Court Assistant: Mwenda

