



REPUBLIC OF KENYA



**KENYA LAW**  
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**Itakura v Odera (Civil Appeal E009 of 2022) [2022] KEHC 3120 (KLR)  
(Commercial and Tax) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3120 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E009 OF 2022  
DAS MAJANJA, J  
JUNE 30, 2022**

**BETWEEN**

**YUKA ITAKURA ..... APPELLANT**

**AND**

**ALPHONSE OKUKU OTIENO ODERA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. S. G. Gitonga, RM/Adjudicator dated 14th January 2022 at the Small Claims Court at Nairobi, Case No. E143 of 2021)*

**JUDGMENT**

1. This is an appeal emanating from the judgment of the Small Claims Court. The matter giving rise to the dispute are common ground. According to the Statement of Claim dated 7<sup>th</sup> October 2022, the Appellant, who was the Claimant before the trial court, summarized the claim as relating to a contract in respect of money held and received on or about 8<sup>th</sup> June 2020 to the value of KES. 50,000.00.
2. The Appellant stated that he entered into a tenancy agreement with the Respondent on 8<sup>th</sup> June 2021. On 21<sup>st</sup> July 2021, the Appellant issued notice to the Respondent to terminate the agreement and vacate the premises on 7<sup>th</sup> September 2021. Under the Agreement, the Respondent was required to refund KES. 50,000.00 security deposit within 30 days of termination of the Agreement. In response to the Appellant's notice, the Respondent served the Appellant with a demand letter from Nyongesa, Nafula and Company Advocates demanding KES. 278,000.00 for breach of contract. The Appellant states that contacted, the Advocates disowned the demand letter. On 7<sup>th</sup> September 2021, the Appellant moved out of the premises and demanded the refund.
3. The Appellant states that as a result of the breach of contract and the forged demand letter, it suffered loss and damage which the Respondent refused to settle despite notice of intention to sue.



The Appellant therefore claimed compensatory damages amounting to KES. 50,000.00 and punitive damages for impersonating an advocate and forging a demand letter, interest and costs.

4. Although the Claim was served and the Respondent appeared at the initial appearance before the Ag. Registrar, the Respondent did not file a defence. As a result, the court entered interlocutory judgment on 23<sup>rd</sup> November 2021. The hearing proceeded in the absence of the Respondent and on the basis of the documents filed.
5. In the judgment, the Adjudicator entered default judgment for KES. 50,000.00 being deposit held by the Respondent. The Adjudicator rejected the claim for punitive damages as claimed and called in aid the decision in *Obongo and another v Municipal Council of Kisumu* [1971] EA 91. The court in that case approved the principles upon which the court may award punitive damages in *Rookes v Barnard* [1964] AC 1129 as follows; in cases of oppressive, arbitrary or unconstitutional action by servants of the government, where the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and where exemplary damages are expressly authorized by statute. The Adjudicator did not find any basis to award punitive damages and concluded that, “The claimant in this case did not demonstrate that he had suffered any specific loss as a result of the respondent’s act of forging the demand letter.”
6. It is the aforesaid judgment that has precipitated this appeal. The appeal was argued by oral submissions made by counsel supporting their respective positions.
7. In the Memorandum of Appeal dated 7<sup>th</sup> February 2022, the Appellant raises three issues for consideration. First, that the Adjudicator erred in law in finding that proof of specific loss is required for award of punitive damages. Second, that the Adjudicator erred in finding that there was no basis for awarding punitive damages and last, that the Adjudicator erred in finding that the Respondent’s conduct of forging the demand letter in order to confer a benefit to himself was not punishable in tort.
8. Counsel for the Appellant submits that it prayed for punitive damages under section 84(3) of the *Consumer Protection Act* (“the CPA”) for unfair trade practices by the Respondent and for false, misleading or deceptive representation contrary to section 15 of the CPA. He submits that the allegation that the Respondent forged the Advocates’ letter demanding KES. 278,000.00 for breach of contract and KES 20,000.00 as legal fees were uncontroverted and that the representation that the claimant owed the alleged obligation was false, misleading or deceptive and contrary to section 12(m) of the CPA. Counsel cites the case of *Gladys Karimi Musyimi v Fabari Cars and another* MSA HCCC No. 69 of 2019 [2021] eKLR where the court awarded punitive damages.
9. In response to the appeal, the Respondent filed Grounds of Opposition dated 21<sup>st</sup> June 2022 setting out his reasons for opposing the appeal. It prays that the appeal be dismissed. Counsel for the Respondent submits that the claim for punitive damages cannot stand as the demand notice is part and parcel of the judicial process and cannot be subjected to punitive damages. That to impose punitive damages would amount to violation of the Respondent’s Constitutional freedom of thought, conviction and belief in the understanding of the law and provisions of the tenancy agreement. Counsel contended that the CPA does not apply to tenancy agreements as in the case herein but to lease of goods. The Respondent also contended that the matter has been exhausted as he has settled the decretal sum and has forfeited his right to sue or counterclaim for rent for the remainder of the term.
10. It is the duty of this court, as the first appellate court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand (see *Selle v Associates Motor Boat & Co* [1968] EA 123).



11. The gravamen of the Appellant’s case in this appeal is that the Adjudicator ought to have awarded her punitive damages under section 84 of the CPA which provides as follows:

84.

- (1) If a consumer has a right to commence an action under this Act, the consumer may commence the action in the appropriate Court.
- (2) If a consumer is successful in an action, unless in the circumstances it would be inequitable to do so, the court shall order that the consumer recover—
  - (a) the full payment to which he or she is entitled under this Act; and
  - (b) all goods delivered under a trade-in arrangement or an amount equal to the trade-in allowance.
- (3) In addition to an order under subsection (2), the court may order exemplary or punitive damages or such other relief as the court considers proper.

12. The decision cited by the Adjudicator, *Rookes v Barnard* (Supra) recognizes that the court may award punitive damages where such damages are permitted by statute. Section 84(3) of the CPA permits the court to award punitive damages in addition to other remedies. I agree with the decision in *Gladys Musyimi v Fabari Cars* (Supra) that punitive damages may be awarded in order to deter a defendant from committing a future breach of the same kind that would make him or her a profit that exceeds the compensation paid to the plaintiff.

13. Did the Adjudicator err in refusing declining to award damages under the CPA? I think it is good practice for a party who invokes a specific statutory cause of action or relief to plead the statute. The CPA creates new causes of action and reliefs apart from the general actions based on tort and contract hence it is necessary for a party to be put on notice that the claimant intends to rely on its provisions. In this case, the Adjudicator can hardly be faulted for failing to deal with the submissions on the statute.

14. Turning to the specific claim by the Appellant, the first question the court must determine and which is a threshold issue is whether the Appellant is a consumer entitled to the protection and relief under the CPA and if so, whether the forged demand letter issued to it constitutes a false, misleading or deceptive representation contrary to section 12(m) thereof. Section 2(1) of the CPA defines a consumer as follows:

“consumer” means-

- (a) a person to whom particular goods or services are marketed in the ordinary course of the supplier’s business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business, unless the transaction is exempt from the application of this Act;
- (c) a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods and services; and
- (d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of this Act;



15. At the time material to this suit, the Appellant and Respondent were in a landlord and tenant relationship governed by specific terms of the lease. The Appellant terminated the relationship by notice and expected to vacate the premises on 7<sup>th</sup> September 2021 whereupon she received the impugned demand letter on 2<sup>nd</sup> September 2021. Once the relationship was terminated by notice, did Appellant then become a “consumer” in relation to the Respondent?
16. In my view, the Appellant does not fall within the meaning of a consumer in relation to the issue of a demand letter in the circumstances. A demand letter is not a letter marketing goods and services in the ordinary course of business. Nor is the Appellant a person who has entered into a transaction with a supplier in the ordinary course of the supplier’s business. In relation to the issuer of a demand letter, the Appellant is not a user of particular goods or a recipient or beneficiary of particular services. The inescapable conclusion is that a demand letter in the circumstances does not give rise to a relationship with a consumer hence cannot found a cause of action under the CPA.
17. I also agree with the Respondent that a demand letter is a prelude to legal proceedings. Whether false or not, it does not induce a party to enter in a transaction for goods or services and does not form basis for a suit under the CPA. As I understand, false and misleading representations are intended to induce a party to enter in a contract for goods and or services hence under section 12(1) of the CPA, it is an unfair practice to make false, misleading representations. Subsection 2 thereof proceeds to set out an indicative though not exhaustive list of what constitutes false, misleading or deceptive representations which includes at section 12(m), “A misrepresentation that a transaction involves or does not involve rights, remedies or obligations if the representation is false, misleading or deceptive.” A demand letter in the circumstances of this case does not lead to a transaction contemplated under the section.
18. In the circumstances, I cannot fault the Adjudicator for reaching the conclusion that the Appellant did not prove that she suffered any specific loss as a result of the demand.
19. The Appeal is dismissed but with no order as to costs.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**A. MSHILA**

**JUDGE**

Court Assistant: Mr Michael Onyango.

Mr Karanja instructed by Harry Karanja and Company Advocates for the Appellant.

Mr Okonjo instructed by Mwagambo and Okonjo Advocates for the Respondent.

