



REPUBLIC OF KENYA



**Odhiambo v Real People Kenya Ltd & 2 others (Civil Suit 10 of 2017)  
[2022] KEHC 13286 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13286 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL SUIT 10 OF 2017  
AN ONGERI, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**MARTIN M. ODHIAMBO ..... PLAINTIFF**

**AND**

**BENJAMIN KIPRONO LANGAT ..... 1<sup>ST</sup> DEFENDANT**

**REAL PEOPLE KENYA LTD ..... 2<sup>ND</sup> DEFENDANT**

**INDOMITABLE AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case Martin M Odhiambo( hereafter referred to as the plaintiff) sued the three defendants Real People Kenya Limited, Indomitable Auctioneer And Benjamin Kiprono Langat (hereafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively, seeking the following remedies.
  - i. A refund of kshs 3,756,152.86 being payment already made to the 1<sup>st</sup> defendant as per section 80(1)(a) of the [Consumer Protection Act](#) 2012
  - ii. Special damages of ksh 5000/= per day from the date of attachment of the plaintiffs motor vehicle
  - iii. Hospital fees and medication of kshs 350,000
  - iv. Exemplary and punitive Damages under section 84(1),(2) and (3) of the [Consumer Protection Act](#) 2012.
  - v. Costs of the suit and interest.
2. The plaintiff stated as follows in the amended plaint.



- i. The 1<sup>st</sup> defendant financed the purchase of motor vehicle K \* in October 2015 at kshs 2, 580, 000 making a total of kshs 4,837, 140 which included interests, registration fee and credit life insurance;
- ii. That this was a chattel mortgage transaction as per the chattel mortgage instrument signed by the plaintiff and the 1<sup>st</sup> defendant;
- iii. That the 1<sup>st</sup> defendant did not register the chattel mortgage in accordance with section 6 and 13 of the *Chattel Transfer Act*, Cap 28;
- iv. That the 1<sup>st</sup> defendant had charged the plaintiff kshs 45, 150 on September 25, 2015 for security registration before even the loan was disbursed;
- v. That the repayment was being done by cheques banked into the 1<sup>st</sup> defendants bank account at standard chartered bank;
- vi. That all the cheques were paid into the 1<sup>st</sup> defendants account without fail and without any cheque bouncing at all;
- vii. That it was an express and implied condition that the 1<sup>st</sup> defendant was to take out a credit life insurance for the plaintiff;
- viii. That the plaintiff was paying kshs 2970 for the credit life policy insurance which the 1<sup>st</sup> defendant did not take up for the plaintiff;
- ix. That the credit life policy insurance was to cover the plaintiff for death, funeral expenses, permanent disability, credit health and fire and burglary;
- x. That the 1<sup>st</sup> defendant has not availed to the plaintiff all the documents as relates to the loan facility signed between the parties such as the loan agreement, credit life policy document, guarantors guarantees and indemnity and chattel mortgage instrument;
- xi. That he has been paying kshs 135,000 per month and at times making payments of kshs 150,000 without fail;
- xii. That sometime in November 2017, the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to repossess the said motor vehicle K\*\*\*\*\* to recover the balance of kshs 1, 523, 127 vide a letter dated November 30, 2017, knowing very well that the projected date of last installment was to be in October, 2018, without giving the plaintiff any notice at all;
- xiii. The 2<sup>nd</sup> defendant vide proclamation of attachment dated the December 5<sup>th</sup>, 2017, attached the said asset K\*\*\*\*S on the January 24<sup>th</sup>, 2018, claiming kshs 1, 523, 127;
- xiv. That at the time of attachment, the balance as per their statement was kshs 1, 128, 042/01;
- xv. That on the January 29<sup>th</sup>, 2018, the asset was released unconditionally under certificate of release no 125 by the 2<sup>nd</sup> defendant;
- xvi. That the said attachment was not legal as it was done without a court order, as the chattel mortgage instrument was not registered as per section 6 and 13 of the *pdf Chattel Transfer Act*;
- xvii. That all this time, he was critically ill, which resulted in him suffering a stroke and was admitted at Kericho Nursing Home ltd for some time;
- xviii. Despite the 1<sup>st</sup> defendant being aware of his sickness, the 2<sup>nd</sup> defendant again attached the asset K\*\*\*\*S without proclamation of attachment as required by *Auctioneer Rules* 1997;



- xix. That the 2<sup>nd</sup> defendant repossessed the motor vehicle K\*\*\*\*\*S on the 28/4/2018 without a proclamation as per rule 12 (1) (b) of auctioneer rules, 1997, without a court order as the chattel mortgage instrument was not registered in accordance with the chattel transfer act;
- xx. That the chattel mortgage in respect of the motor vehicle K\*\*S is **fraudulent, null and void for want of registration in accordance with section 6 and 13 of the pdf Chattel Transfer Act; and the 2<sup>nd</sup> defendant could not repossess the motor vehicle K\*\*S** without a court order ;
- xxi. That the 1<sup>st</sup> defendant terminated the loan agreement by instructing the 2<sup>nd</sup> defendant to repossess the motor vehicle while the loan balance was kshs 1,080, 987.14 and with still eight months to the end of the repayment period;
- xxii. That the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to repossess the said vehicle after payment of kshs 3, 756, 152.86, which was more than two-thirds of the payment obligation of kshs 4, 837,140, contrary to section 20 (1) of the Consumer Protection Act;
- xxiii. That the 1<sup>st</sup> defendant could not instruct the 2<sup>nd</sup> defendant to repossess the said vehicle without a court order after a payment obligation of more than two-thirds in accordance with section 20 of the consumer protection act;
- xxiv. That any contract that contravenes a statute is illegal and void ab initio and is therefore not enforceable;
- xxv. That the 1st and 2nd defendants colluded to sell the asset to the 3rd defendant without following the correct procedure as required by law;
- xxvi. That the notification of movable property dated the April 28, 2018, is not as per auctioneer rules 1997 and the auctioneer act 1996, as it does not give the dates of the auction, amount claimed and auctioneer charges;
- xxvii. That the 3<sup>rd</sup> defendant was not at the auction on the May 24, 2018 and did not bid for the motor vehicle;
- xxviii. That the 2<sup>nd</sup> defendant auction of May 24, 2018 is null and void as it was done before the expiry of seven days after the first newspaper advertisement contrary to section 12 (1) (f) of the Auctioneer Rules, 1997;
- xxix. That the motor vehicle K\*\*\*\*\*S was sold at an under value without proper valuation done by the 2<sup>nd</sup> defendant with the knowledge of the 1<sup>st</sup> defendant
- xxx. The particulars of collusion and fraud are as follows:
- a. No valid letter of instruction;
  - b. No valid proclamation as per rule 12 (1) (b) of the auctioneer rules, 1997;
  - c. Notification of moveable property dated April 28, 2018 does not indicate amount claimed and auctioneers charges, thus does not comply with Auctioneer Rules 1997;
  - d. No reserve price as per the condition for sale;
  - e. Advertisement was made on the May 17, 2018 and the auction on May 24, 2018, which is earlier than seven days after the first newspaper advertisement as per rule 12 (1) (f) of the Auctioneer Rules 1997;



- f. The 3<sup>rd</sup> defendant was not at the auction and did not pay the amount of kshs 1,000,000 at the fall of the hammer as per the condition of sale as advertised by the 2<sup>nd</sup> defendant;
  - g. At the time of attachment, the balance of the loan obligation was kshs 1, 080, 987/14 as per the 1<sup>st</sup> defendant statement;
  - h. The asset was returned to the yard unsold on the May 24, 2018.
- xxxi. The plaintiff avers that the 1<sup>st</sup> defendants actions has made the plaintiff suffer loss and damages as follows:
- a. Hospital fees and medication to date- kshs 350,000;
  - b. Loss of income of kshs 5000 per day from the date of attachment of motor vehicle K\*\*\*\*S on April 28, 2018 to date;
  - c. Amount paid to the 1<sup>st</sup> defendant of kshs 3, 756, 152.86 Value of the motor vehicle K\*\*\*\*S;
  - d. Exemplary and punitive damages under section 84 (1), (2) and (3) of the [consumer protection act](#), 2012.
3. The defendants filed their amended defences as follows:-
- i. The 1<sup>st</sup> defendant stated that the plaintiff approached the bank for a loan facility, which request the bank acceded to and a sum of kshs 2, 580,000 was advanced to the plaintiff for the purchase of motor vehicle K\*\*\*\*S;
  - ii. That the plaintiff, having been advanced the funds, was required to make regular monthly installments of at least a sum of kshs 134, 365 per month, failure to which would constitute an act of default on the part of the plaintiff as per the terms and conditions agreed upon by the parties in the facility agreements willfully executed by the parties;
  - iii. That the plaintiff failed to make regular repayments of the facility amount, thus allowing the account to fall in default;
  - iv. That the credit life insurance policy was for the benefit of the 1<sup>st</sup> defendant and was to cover the risks of the 1<sup>st</sup> defendant on terms set out in the facility agreement;
  - v. That it has operated the account of the plaintiff strictly in line with the requirements of operating such accounts and availed all documents related to the loan to the plaintiff;
  - vi. That the plaintiff has not been making monthly loan repayments without fail as alleged;
  - vii. That all the necessary documents relating to the facility of the plaintiff were availed to the plaintiff, and that the documents relating to the insurance were not a contract between the 1<sup>st</sup> defendant and plaintiff, and could not be supplied to the plaintiff;
  - viii. That the plaintiff breached the terms of agreement of the parties as a result of which the account went into arrears, which gave the 1<sup>st</sup> defendant the right to repossess and sell the vehicle to recover the sums due;
  - ix. That the 1<sup>st</sup> defendant was not aware of the alleged sickness of the plaintiff, and the plaintiff was duly served with the proclamation of attachment by the 2<sup>nd</sup> defendant contrary to his averments;



- x. That the proclamation and notification of sale duly complied with the law;
  - xi. That the plaintiff's sickness was not an event covered under the policy as it did not comply with the terms thereof, including the fact that the plaintiff had already defaulted before the alleged sickness, and further, that the sickness was not the cause of the default so as to invoke the cover to offset the liabilities of the plaintiff;
  - xii. That the repossession of motor vehicle registration K\*\*\*\*S was lawfully carried out in accordance with the signed facility agreement, which were willfully executed by the plaintiff hence the plaintiff is not entitled to compensation of damages as claimed;
  - xiii. That the 3<sup>rd</sup> defendant duly attended the auction and bid for the vehicle before emerging the successful buyer;
  - xiv. That the vehicle was not sold before the expiry of the 7 days and that the vehicle was auctioned as per the law;
  - xv. That a valid letter of instruction was issued pursuant to which the 2<sup>nd</sup> defendant undertook the proclamation and attachment;
  - xvi. That a valuation of the vehicle was done before sale, and further that the attachment was done on the basis of the terms of the agreement, in order to recover monies due from the plaintiff as a result of default, and that all the conditions pertaining to the auction were complied with;
4. The 2<sup>nd</sup> defendant stated as follows:
- i. That instructions were given by the 1<sup>st</sup> defendant to repossess motor vehicle K\*\*\*\*S, but that he was not aware of the agreement terms as between plaintiff and 1<sup>st</sup> defendant on the repayment terms or notice;
  - ii. That the proclamation and attachment were executed professionally and legally;
  - iii. That the 2<sup>nd</sup> defendant did not collude with 1<sup>st</sup> defendant to fraudulently sell the motor vehicle K\*\*\*\*S;
  - iv. That all conditions for the auction and sale of the motor vehicle were fully complied with
5. The 3<sup>rd</sup> defendant in his statement of defence stated that he participated at the auction and was declared the highest bidder, and further, that he paid the money to the auctioneers at the fall of the hammer.
6. The parties filed witness statements as follows;
- j. The plaintiff in his statement stated that the 1<sup>st</sup> defendant advanced to him a loan facility of kshs 2, 580, 000 on the 28/9/2015, which amounted to a total of kshs 4, 837, 140 that included interest, registration fees and credit life insurance; and the repayment was to be by installments of kshs 134, 365 vide cheques banked into the 1<sup>st</sup> defendants bank account at standard chartered.
  - ii. The plaintiff stated that the 1<sup>st</sup> defendant did not register the chattel mortgage in accordance with section 6 and 13 of the *Chattel Transfer Act*, which is mandatory and further that the 1<sup>st</sup> defendant had charged the plaintiff kshs 45,150 on September 25, 2015 for security registration before even the loan was dispersed.



- iii. The plaintiff stated that he had been making payments of kshs 135,000 monthly without fail and that all the cheques were paid into the 1<sup>st</sup> defendants account without any cheques bouncing at all.
  - iv. The plaintiff stated that on the November 30, 2017, the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to repossess the motor vehicle K\*\*\*\*S while the balance of the loan was kshs 1, 523, 127 without giving any notice and the 2<sup>nd</sup> defendant proclaimed the motor vehicle on the December 5, 2017. Further, it was stated that the 2<sup>nd</sup> defendant repossessed the vehicle on January 24, 2018 despite payments being made, and the balance on the loan facility being kshs 1, 128,042.01.
  - v. The plaintiff stated that the 1<sup>st</sup> defendant was to take a credit life policy insurance that was to pay for some installments for the plaintiff in case of sickness and payment of hospital bills.
  - vi. It was stated that the 2<sup>nd</sup> defendant repossessed the vehicle on the April 28, 2018 without a valid proclamation and without a court order as the chattel mortgage was not registered in accordance with the Chattel Mortgage Act;
  - vii. The plaintiff stated that the purported public auction of the vehicle on the May 28, 2018 was null and void and that the 3<sup>rd</sup> defendant was not at the auction on May 24, 2018 but was sold the vehicle on the May 26, 2018, when he made payments, contrary to the *Auctioneers Act*, Auctioneers Rules and the conditions of sale that state that payments must be done at the fall of the hammer.
  - viii. The plaintiff stated that the 2<sup>nd</sup> defendant repossessed the vehicle, without a court order, after payments of kshs 3, 756, 152.86, which was more than two-thirds of the payment obligation of kshs 4, 837, 140, contrary to section 20 of the *consumer protection act*.
7. The 1<sup>st</sup> defendant in his witness statement stated as follows:
- i. That the plaintiff obtained a facility from the defendant of kshs 2, 580, 000 for a term of 36 months, which facility was for the purchase of a vehicle registration number K\*\*\*\*S.
  - ii. That the plaintiff defaulted in the repayment of the facility, and would at times issue cheques that would be returned unpaid, and would also make some payments past the specified date of the 8<sup>th</sup> of every month, which led the account to accumulate arrears over time;
  - iii. The defendant stated that they sent the plaintiff several demand letters, calling for the payment of arrears but the plaintiff did not comply with the said letters resulting in the 1<sup>st</sup> defendant initiating the process repossessing and selling of the vehicle.
  - iv. The 1<sup>st</sup> defendant stated that the 2<sup>nd</sup> defendant was instructed to repossess and sell the attached unit, and it was on the basis of this instructions that the 2<sup>nd</sup> defendant repossessed the vehicle, which was then valued in order to determine the value for sale.
  - v. It was stated that the vehicle was then advertised for public auction, which was held on the May 24<sup>th</sup>, 2018, and the 3<sup>rd</sup> defendant was declared the highest bidder, and the auctioneer prepared an auction report indicating the offers received;
  - vi. The 1<sup>st</sup> defendant stated that the insurance was a contract between the 1<sup>st</sup> defendant and the insurer, insuring the 1<sup>st</sup> defendant from certain specific risks that may accrue, which included sickness of a critical nature, which would lead to hospitalization for a period of more than 2 weeks hence affecting the ability of the customer to repay the facility.



- vii. It was stated that the plaintiff availed medical documents that showed he was admitted for a period of six days and further, at the time of the said admission, the plaintiff was already in default.
  - viii. The 1<sup>st</sup> defendant stated that the default was not as a result of incapacity arising from sickness and the insurance could not under the circumstances take over liability arising from willful default, and further that the plaintiff has not demonstrated how his admission in April, 2018, is related to acts of issuing cheques that bounced and delayed payments occurring way before the sickness.
  - ix. The 1<sup>st</sup> defendant stated that the vehicle was sold and the proceeds applied towards settling part of the facility but the same did not clear the loan amount.
8. The 2<sup>nd</sup> defendant in his witness statement stated as follows:
- i. That on the November 30, 2017 he received instructions from the 1<sup>st</sup> defendant to repossess and sell motor vehicle registration K\*\*\*\*S, and on the December 5, 2017 he proceeded to proclaim the said vehicle, and served the plaintiff with the proclamation notice.
  - ii. That after the lapse of the seven days' notice of proclamation, the 2<sup>nd</sup> defendant took possession of the vehicle and served the plaintiff with the notification of sale, which notification the plaintiff refused to sign.
  - iii. That on the January 29, 2018 the 2<sup>nd</sup> defendant received an email from the 1<sup>st</sup> defendant instructing him to release the vehicle to the plaintiff on a running attachment on the release letter, and the plaintiff did not object to the running attachment condition as he signed the release letter.
  - iv. That on the February 27, 2018 the 2<sup>nd</sup> defendant received an email from the 1<sup>st</sup> defendant to impound the vehicle since the plaintiff had failed to honor their agreement, and the said vehicle was repossessed on the April 28, 2018.
  - v. That the motor vehicle was advertised in the daily nation newspaper of May 17, 2018 for auction to be carried out on May 25, 2018, and the 3<sup>rd</sup> defendant was the highest bidder at kshs 1,000,000.
9. The 3<sup>rd</sup> defendant filed his witness statement as follows:
- i. That upon perusing and reading the daily nation newspaper of the May 17, 2018, the 3<sup>rd</sup> defendant saw a sale by public advertisement published by the 2<sup>nd</sup> defendant, selling motor vehicle registration K\*\*\*\*S on the May 24, 2018.
  - ii. That on the May 24, 2018 the public auction was conducted outside Kericho law courts, and several people attended the auction.
  - iii. That during the auction, there were two interested bidders, however he emerged the highest bidder and purchased the vehicle at a sum of kshs 1, 000, 000, which sum was paid at the Equity Bank, Kericho branch.
  - iv. That upon payment of the said sum, the vehicle was released to him by the 1<sup>st</sup> defendant and ownership transferred to him.
10. The parties filed written submissions as follows



- i. The plaintiff submitted that the chattel mortgage in respect of motor vehicle registration K\*\*\*\*S is fraudulent, null and void for want of registration in accordance with the Chattel Transfer Act, and the repossession of the motor vehicle by the 2<sup>nd</sup> defendant without a court order was illegal, unlawful and amounts to trespass.
  - ii. The plaintiff submitted that the 2<sup>nd</sup> defendant reposed the vehicle K\*\*\*\*S on the April 28, 2018 without a proclamation as is required by rule 12 (1) (b) of the auctioneer rules, 1997, and without a court order, as the chattel mortgage instrument was not registered in accordance with the Chattel Transfer Act.
  - iii. The plaintiff also submitted that the 2<sup>nd</sup> defendant colluded with the 1<sup>st</sup> defendant to sell the vehicle fraudulently, and not as per the [Auctioneers Act](#), 1996, [Auctioneer Rules](#), 1997 and the conditions of sale as advertised by the defendant that payment is at the fall of the hammer, which were mandatory provisions.
  - iv. The plaintiff also submitted that the 3<sup>rd</sup> defendant was not at the auction on the May 24, 2018 and did not bid for the said vehicle, and that is why the 3<sup>rd</sup> defendant was not able to pay for the vehicle on the day of the auction as required by the [Auctioneers Act](#), 1996, [Auctioneer Rules](#) 1997, and as per the advertisement of the 2<sup>nd</sup> defendant that payment is at the fall of the hammer.
  - v. The plaintiff submitted that the auction on the May 24, 2018 was null and void, for it was done before the expiry of seven days after the first newspaper advertisement, which was on the May 17, 2018.
  - vi. The plaintiff submitted that the 1<sup>st</sup> defendant instructed the 2<sup>nd</sup> defendant to repossess the vehicle after payment of kshs 3, 756, 152.86, which was more than two-thirds of the payment obligation of kshs 4, 837, 140, contrary to section 20(1) of the [Consumer Protection Act](#), which requires leave to be sought from the High Court where the consumer has paid two-thirds of the payment obligation.
  - vii. It was the plaintiff's submission that the actions of the 1<sup>st</sup> defendant amounted to a cancellation of the agreement between the plaintiff and the 1<sup>st</sup> defendant under section 76 (3) of the [Consumer Protection Act](#), and the 1<sup>st</sup> defendant should therefore refund all the amounts paid by the plaintiff for kshs 3, 756, 152.86; and further that the plaintiff is entitled to exemplary and punitive damages as provided under section 84(3) of the [Consumer Protection Act](#).
11. The 1<sup>st</sup> defendant submitted as follows:-
- i. That the Chattel Transfer Act does not require all instruments of the nature of a chattel instrument to be registered, and that an interpretation of section 4 of the Chattel Transfer Act shows that registration of the chattel instrument is a requirement that is intended to protect the lender from third party claims;
  - ii. It was the 1<sup>st</sup> defendant's submission that instances where chattel instruments would be deemed to be void are listed under section 13 of the [Chattel Transfer Act](#), which none of the parties fall under.
  - iii. The 1<sup>st</sup> defendant submitted that the plaintiff did not pay two-thirds of the loan amount before repossession as alleged, as the plaintiff started defaulting on repayment in January, 2015 after he failed to repay the 3<sup>rd</sup> installment of the loan; and further according to the loan agreement, once there was a single default in installment payment, then the bank would charge default



interest. It therefore follows that due to the default interest charged, the loan amount due could not remain kshs 4, 837, 140;

- iv. The 1<sup>st</sup> defendant submitted that it issued all the requisite notices to the plaintiff, who failed to honor the said notices, before it issued instructions to the 2<sup>nd</sup> defendant to repossess the vehicle, and that they were acting within the law while repossessing and selling the vehicle;
  - v. It was also submitted by the 1<sup>st</sup> defendant that if the plaintiff felt aggrieved by the actions of the 1<sup>st</sup> defendant of attaching and selling the security, he did not state if he moved to court to stop the sale if the 1<sup>st</sup> defendant was acting in breach of the law.
12. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant jointly submitted as follows:-
- i. That whereas the plaintiff claims hospital fees of kshs 350,000, loss of income at kshs 5,000 per day and the value of Motor vehicle, no valuation report has been produced in court to prove what the value of the motor vehicle was, and no receipts were produced in court to show that the plaintiff paid kshs 350,000 as hospital bill and also to prove the kshs 5,000 loss of user per day, as it is trite law that special damages must be specifically pleaded and proved;
  - ii. It was the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' submission that the plaintiff was under an obligation to pay the money advanced to him to buy a chattel, and for the 1<sup>st</sup> defendant to be able to recover the amount, it had to instruct the 2<sup>nd</sup> defendant to pursue the recovery; and further, that the remedy of restitution will only be available to the plaintiff if he can prove there was unjust enrichment.
13. The issues for determination in this suit are as follows
- i. Whether the plaintiff is entitled to a refund of ksh 3,756,152.86 from the 1<sup>st</sup> defendant.
  - ii. Whether the plaintiff is entitled to special damages of kshs 5000 per day from the date of attachment of his vehicle until the date of this judgment.
  - iii. Whether the plaintiff is entitled a refund of kshs 350,000 in respect of hospital fees and medication he incurred as a result of his sickness following the attachment of his motor vehicle.
  - iv. Whether the plaintiff is entitled to punitive and exemplary damages from the defendants.
  - v. Who pays the costs of this suit?
14. On the issue as to whether the plaintiff is entitled to a refund of kshs 3, 756,152.86 from the 1<sup>st</sup> defendant I find that there is evidence that the 1<sup>st</sup> defendant repossessed the motor vehicle after the plaintiff had paid more than two thirds of his payment obligation without the intervention of the court.
15. Section 20 of the [Consumer Protection Act](#) 2012 states as follows:-
1. Where a consumer under a future performance agreement has paid two-thirds or more of his or her payment obligation as fixed by the agreement, any provision in the agreement, or in any security agreement incidental to the agreement, under which the supplier may retake possession of or resell the goods or services upon default in payment by the consumer is not enforceable except by leave obtained from the High Court.
  2. Upon an application for leave under subsection (1), the court may, in its discretion, grant leave to the supplier or refuse leave or grant leave upon such terms and conditions as the court considers advisable.



16. I therefore find that the plaintiff is entitled to a refund of ksh 3,756,152.86 from the 1st defendant. The plaintiff had paid more than two-thirds of his payment obligation and the 1<sup>st</sup> defendant was not entitled to retake possession of the motor vehicle upon default in payment except by leave of the High Court.
17. On the issue as to whether the plaintiff is entitled to special damages of Ksh 5000 per day, I find that the law requires that special damages be specifically pleaded and proved.
18. The plaintiff did not prove the loss of user and the claim must fail. In *Kenya Women Microfinance Ltd v Martha Wangari Kamau*[2021] eKLR, the court stated as follows: - “The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit.”
19. Further, the Court of Appeal in *National Social Security Fund Board Of Trustees v Sifa International Limited*[2016] eKLR, stated as follows:- “It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly proved. This Court in the case of *William Kiplangat Maritim & Another v Benson Omwenga*, Civil Appeal No 180 of 1993 (Nairobi) cited with approval its decision in *Coast Bus Service Ltd v Murunga Danyi & 2 Others*, Civil Appeal No 192 of 1992 (UR) and stated as follows:- “We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars...”
20. On the issue of refunding Ksh 350,000 in respect of hospital fees incurred by the plaintiff, I find that the plaintiff has not established the nexus between his sickness and the repossession of his vehicle. The said claim is barred by the doctrine of remoteness of damages. His sickness was not a foreseeable loss.
21. The Court of Appeal in *Johnson Mugwe Wanganga v Joseph Nyaga Karingi* [2014] eKLR, held as follows:- “ In contract, the principle relating to remoteness of damage is enunciated in the case of *Hadley –v- Baxendale*, (1854) 9 Exch 341. For loss to be recoverable, the damages should be such as may fairly and reasonably be considered either arising naturally ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. .”
22. In *Cotecna Inspection Sa v Hems Group Trading Company Limited*[2007] eKLR, the court of appeal stated as follows: - “My analysis and evaluation of the evidence, a summary of which is given above, must only be confined to the question as to whether or not that breach of duty was the cause of the losses the respondent suffered and if so, whether the assessment of damages was properly carried out by the trial court. But first, the law. What are the principles to be applied when considering the nexus between the acts of an offending party and the loss suffered by the offended party? I do agree with both learned counsel that there must be a link between the action complained of and the loss incurred. That to me goes without saying and is a matter of common sense. It underlies the doctrine of remoteness of damages.”
23. On the issue of punitive and exemplary damages I find that the amount sought by the plaintiff is excessive. The plaintiff is seeking Ksh 2,000,000 in respect of punitive damages and also kshs 2,000,000 in respect of exemplary damages.
24. I award the plaintiff ksh 500,000 in respect of exemplary damages.



24. Judgment be and is hereby entered in favour of the plaintiff against the 1<sup>st</sup> defendant in the sum of ksh 4,256,152.86 in respect of the refund of the amount paid by the plaintiff and exemplary damages.
26. On the issue of costs I order that the 1<sup>st</sup> defendant pays the plaintiffs costs.
26. The plaintiff's case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is dismissed with no orders as to costs for want of evidence against them.
28. Orders to issue accordingly.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 23RD DAY OF SEPTEMBER, 2022**

**A. N. ONGERI**

**JUDGE**

