



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 25 OF 2015**

**DANIEL KIMANI KABERE.....APPELLANT**

**Versus**

**LAWI WANGILA.....1<sup>ST</sup> RESPONDENT**

**FAULU KENYA LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of honorable Nicodemus N. Moseti*

*Resident Magistrate delivered on 27<sup>th</sup> Jan 2015 in Eld. CMCC no.845 of 2012)*

**JUDGMENT**

1. The appellant (**DANIEL KIMANI KABERE**) sued the 1<sup>st</sup> respondent (**LAWI WANGILA**) as the credit manager of **FAULU KENYA LIMITED** (the 2<sup>nd</sup> respondent) who is a limited liability company. The plaintiff in her amended plaint had prayed for the following orders against the defendants:

- a) Declaration that the plaintiff is not indebted to the defendants and permanent injunction restraining the 1st and 2nd defendants, their servants and/or agents from attaching, repossessing, seizing or in any other way interfering with his property,
- b) release of motor-vehicle reg. number **KBM 558Z Toyota NZE** and loss of user at **Ksh 5,000/= per day for the days the motor-vehicle** had been detained.
- c) Cost of the suit.

2. Any other remedy this court may deem fit to grant.

3. It was his case that on the 10<sup>th</sup> October 2012 he hired motor vehicle registration number **KBM 558Z Toyota NZE** from **Roseline Njagi** to use in his business course. The said vehicle was seized by the 1<sup>st</sup> respondent on allegation that he had been a guarantor to his wife **Ann Wairimu Muhia** for purposes of obtaining a loan.

4. He denied ever offering the said vehicle as security and lamented that he had suffered loss of user at the rate of **Kshs 5,000/= per day**.

5. The respondents in an amended defence denied the allegations set out by the appellant. It was their case that the appellant had met the 1<sup>st</sup> respondent to discuss on the loan repayment he had guaranteed **Anne Wairimu Muhia** who had defaulted in the loan repayment.

He offered the said vehicle to be retained as he went to bring the amount owed of **Kshs 84,002/-**. The loan amount was **Kshs 60,000/=**, and it was justified to seize the plaintiff's household goods which were offered as security.

6. The matter proceeded to hearing and the suit was dismissed for reasons that the motor-vehicle had been released and the default loan amount had been paid by group members.

7. The appellant was aggrieved by the said judgment and filed a memorandum of appeal on grounds that:

- i. *The trial magistrate erred in failing to appreciate the issues for determination in the case.*

ii. The trial magistrate erred by applying the wrong provision of law in determining the case.

iii. The trial magistrate erred failed to consider whether the seizing and detention of motor-vehicle reg. no. KBM 558Z was lawful or not.

iv. The trial magistrate erred in wrongfully determining the issue of ownership of motor-vehicle reg. No.KBM 558Z and failing to recognize the fact of beneficial ownership of motor-vehicle.

v. The trial magistrate erred in failing to consider whether the appellant was indeed indebted to the respondent and which property was to be attached.

vi. The trial magistrate erred in finding that the orders sought have been overtaken by events and failing to focus on circumstances at the time the cause of action arose

vii. The trial magistrate erred by over relying on the respondent's submissions while ignoring the appellant's submissions

viii. The trial magistrate erred in dismissing the plaintiff/appellant case.

The appellant prays that the appeal be allowed and the judgment/decision in Eldoret Chief Magistrate's Case No.845 of 2012 be set aside to wit:

The plaintiff/appellant's claim in Eld. CMCC No. 845 of 2012 be allowed with costs in that the seizures and detention of motor-vehicle reg.no. KBM 558 Z by the defendants/respondents be declared irregular and illegal, loss of user for the motor-vehicle and the appellant be declared not indebted to the respondent in respect of the loan in issue.

8. The parties agreed to canvass the appeal by way of written submissions.

#### **SUBMISSION**

The appellant's Counsel urged this court to reconsider the pleadings and evidence on record and come into its own conclusions being guided by **Selle & Anor v. Associated Boat Co. & Anor [1968] E.A 123.**

9. It was submitted that the respondent did not have any reason to detain the vehicle since it was never pledged as security and that the same had been hired. Further, that the respondents did not give notice to the appellant that his wife was in default of loan repayment. The trial court is faulted as having failed to consider this evidence.

10. In addition, the respondents had not indicated the amount of money **Anne Wairimu Muhia owed**, and the court erred to find that the appellant guaranteed a loan, his identity card could be accessed by **Anne Wairimu** yet the court concluded that he was a guarantor.

11. The appellant contends that the evidence proved that he had been denied user of the said vehicle for 25 days. That the court had failed to refer to the evidence on record by PW2 and that there was no revenue stamp on the invoice issued by **Roseline Njagi (PW2)**. The voucher did not require a revenue stamp as opined by the trial magistrate.

12. The court is faulted for finding that the claim was spent since group members had cleared the loan and that the subject vehicle had been released to the appellant. The case had been dismissed for the reason that the matter had been overtaken by events.

The respondents urged to invoke its unfettered discretion and re-evaluate the court's decision to find that the court did not err in his finding as alleged by the appellant as was held in **Abok James Odera, T/A Odera & Associates v. John Patrick Machira t/a Machira & Co. Adv (2013) eKLR.**

13. That the issue concerning the appellant as the guarantor to **Anne Wairimu Muhia** was based on the loan application form. The appellant had consented to that and even his identity card had been attached. He had not denied his signature and further that he was aware of the existence of the loan.

14. Further, the appellant had offered to handover motor-vehicle **reg. no. KBM 558Z** as security in order to go get the money and clear the loan arrears. The issue that the same was impounded against his will does not have any basis since he willfully left the car keys with the logbook at the 1<sup>st</sup> respondent's office.

15. In addition to the above, as relates to the appellant's prayer on an injunction to be issued restraining the respondents from interfering with their property, no evidence was adduced in this regard. The appellant had declined to show them his residence. The respondents were categorical that the loan arrears had been cleared by the group members.

16. It was pointed out that the appellant had claimed loss of user of the said motor vehicle on the ground that he had lost earnings for the duration the vehicle was in detention. That the logbook produced in court showed **Unik Car Hire & Safaris Ltd** as the legal owner.

17. That PW2's testimony and producing a certificate of insurance for the year 2013 and the invoice for Ksh 10,000/= was not proof enough for loss of user. It was submitted that loss of user can only be claimed by the owner of motor-vehicle and the same should be specifically be

pleaded and proved. In support of this submission, the respondent cited **Nakuru HCCA no.209 of 2003, County Council of Nakuru v. John Macahari Hinga** the plaintiff's suit was dismissed when the plaintiff failed to prove on loss of user and an injunction.

18. Further the appellant's allegation that the court failed to consider his submission did not hold water since submissions do not constitute evidence as was held in **Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Anor [2014]eKLR**. That the appellant ought to have adduced evidence.

19. Consequently, this court was urged to find that the magistrate came up with a well-reasoned judgment which should be upheld. **Analysis and determination.**

20. The issues that arise include:

**I. Whether the appellant had proved his case**

**II. Whether the court had erred by dismissing his case.**

21. This is the first appeal and this court is guided by **Selle v. Associated Motors Boat Co. Ltd [1968] EA 123** where the court stated as follows:

***“ An appeal from the high court is by way of a re-trial and the court od Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”***

22. In view of this the court shall refer to all the evidence adduced in the trial court with the consideration that it did not have the opportunity to see the witnesses' demeanor.

23. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. The appellant testified that he had gone for a meeting on **10.10.2012** using a hired car registration number **KBM 558Z Toyota NZE for 15 days at Ksh 5,000/= per day**. The vehicle was however detained by the 1<sup>st</sup> respondent for the reason that he had guaranteed his wife on a loan she had borrowed, an allegation that she denied. He produced an agreement and a voucher for payment. He never used the vehicle for the 25 days it was impounded.

24. On cross-examination he stated that **Anne Wairimu** used to be his wife and he was not aware of any loan advanced to her, which he had been a guarantor. He had also not been issued with a notice that **Anne** had defaulted in the loan repayment.

25. **PW2 (Roseline Mukami Njagi)** testified that she owned the vehicle and had hired out the vehicle to the appellant for a month at a cost of Ksh 5,000/= per day. A certificate of insurance for the period 28.2.2013 and 28.3.2013 was produced as exhibits. On cross-examination she testified that the vehicle was in the names of Unique car hire however the insurance certificates showed her names. Further that she had the vehicle after being released from the police station.

26. On the other hand, it was the 1<sup>st</sup> respondent's evidence that the loan was offered on group basis. Ann had been advanced a loan of Ksh **60,000/=** and she had failed to repay. However, the group informed the respondent that the appellant was willing to repay the debt. The appellant brought the vehicle to the 2<sup>nd</sup> respondent's premises as security and left the car keys. The loan was paid by the group.

27. The appellant had signed as a guarantor for the loan advanced to **Ann Muya**. On cross-examination he stated that the appellant was availed by other group members. The appellant was indebted to the 2<sup>nd</sup> respondent. The vehicle was released on 17.10.2013.

28. The appellant had a burden of proof as provided by section **107 of the Evidence Act**.

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

29. The evidence by the appellant indicates that the vehicle was released to PW2 after the court issued an order. He denied being a guarantor to the loan advanced to Ann Wairimu. The logbook indicated **Unik Car Hire** and not the appellant, as not the owner which this court is in agreement, since the logbook was the primary evidence. Then the certificates by PW2 were for the year 2013, yet the incident upon which this case arises was in October 2012.

30. The evidence differs with the cause of action and therefore the appellant had failed to prove if indeed he had hired the vehicle from PW2 as they both alleged. PW2 had testified that the vehicle was hers and that she had hired the same to the appellant for one month at a cost of Ksh 5,000/= per day. A cash payment voucher was produced indicating payment by the appellant.

### **Balance of probabilities**

31. The court has to consider on a balance of probabilities whether the appellant had proved his case and if the court had erred in dismissing the case. It was more likely to be true that the appellant had driven himself to the 2<sup>nd</sup> respondent's premises and assured the 1<sup>st</sup> respondent he

would pay the loan debt, only for him to change his mind. This is for the reason that, how could the car have been found at the premises. This then enabled the 1<sup>st</sup> respondent to detain the same.

32. This court is guided by Lord Denning J. in **Miller v Minister of Pensions (1947) 2 ALL ER 372** that the burden of proof in civil cases is on a balance of probability:

***“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”***

### **Special Claim**

33. The appellant averred that the court had failed to award loss of user. Indeed loss of user is a special damage claim which has to be specifically pleaded and specially proved as was held by the Court of Appeal in Civil Appeal No. 180 of 1993 **William Kiplangat Maritim & Anor vs Benson Omwenga as cited in Francis Muchee Nthiga vs David N. Waweru**. The same position was held in **Coast Bus Service Ltd vs Murunga Danyi & 2 Others** Civil Appeal No.192 of 1992(unreported) where it stated:-

***“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.”***

In this case, the appellant in his amended plaint dated 14.11.2012 does not plead loss of user as a special damage claim. He however went ahead to prove the same.

34. The appellant raised an issue that the court went ahead to determine ownership of the vehicle which was not the case. This ground would fail for the simple reason that the appellant’s evidence and his witness PW2 showed that the logbook which was the primary evidence indicated the vehicle was owned by Unique car hire and the certificates produced by PW2 did not in any way assist since they were for the year 2013 yet the cause of action arose in October 2013.

35. Further the appellant had sought for a *Declaration that the plaintiff is not indebted to the defendants and permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their servants and/or agents from attaching, repossessing, seizing or in any other way interfering with his property, release of motor-vehicle reg. number KBM 558Z Toyota NZE and loss of user at Ksh 5,000/= per day for the days the motor-vehicle had been detained.*

The vehicle had already been released to PW2 as she had confirmed to the court.

36. On the issue raised that the appellant was not indebted to the 2<sup>nd</sup> respondent, as stated, the group members paid off the loan arrears. This was a fact, and there was no error on the part of the trial court whether in+ applying principles of law or in analyzing the facts.

I hold and find that the appeal has no merit and is dismissed with costs to the respondents.

**Delivered, Signed and dated this 28<sup>th</sup> day of January 2020 at Eldoret.**

**H.A OMONDI**

**JUDGE**