REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 155 OF 2017

SAMUEL GACHIHI MAINA

GEORGE WANGONDU WANYAGA

T/A SAWA SAWA PAINTS AND ALLIED PRODUCTS.....APPELLANTS

VERSUS

UAP INSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal against the Judgment, findings, and orders of the Honourable L. Gicheha (SPM) in Nakuru Chief Magistrate's Civil Case Number 589 of 2013 delivered on 19th October 2017)

J U D G M E N T

1. Samuel Gachihi Maina and George Wang'ondu Wanyaga were the proprietors of Sawa Sawa Paints and Allied products, according to the Certificate of Registration dated 8th December 2008.

2. Sometime in 2011 they took a loan of Ksh. 1,575,000/= from CFC Stanbic Bank Limited (CFC) and bought motor vehicle registration number KBN 293W in the name of their business. On 27th January 2011 the motor vehicle KBN 295W Toyota Hiace was registered in the names of CFC Stanbic Bank Limited and Sawa Sawa Paints and Allied products. A comprehensive insurance policy number 060/080/1/005199/2011 was issued by the respondent for the motor vehicle with effect from 29th March 2011 to 28th March 2012 both dates inclusive. The sum assured was Ksh. 2,250,000/=.

3. On 9th November 2011 the motor vehicle was involved in a road traffic accident at Korowe area along Ahero Kisumu Road. It was self involving.

4. The matter was reported to the UAP Insurance Company Limited (the respondent). An assessment was made by the respondent's agent Diplomatic Accident Assessors, upon whose assessment the respondent decided to have the motor vehicle repaired. The estimated period of repairs was 12 days. The respondent directed the plaintiff/appellant to the respondent's appointed garage M/s Golden Motors.

5. After more than twelve (12) days, the motor vehicle was available for the road test. It is then that the appellants found out that M/s Golden Motors had done shoddy job of the repairs and they promptly lodged a complaint which took the respondent. It took the respondent about three (3) months to respond to this complaint and to take any remedial actions. In the meantime the motor vehicle was still in the custody M/S Golden Motors, and the appellants were deprived of its use.

6. When the respondent eventually took action, it referred the matter to Motor Vehicle Assessors Association of Kenya (MAAK) for re assessment. MAAK's verdict was made on 4th June 2012 and it confirmed that the appellants had genuine concerns. Its overall finding was that M/S Golden Motors repair work was unsatisfactory. It made recommendations on further repair works.

7. The respondent proceeded with this action but did not communicate any further with the appellants and by the time the plaintiff/appellants were filing suit the motor vehicle was, according to them, still in the garage.

8. By a plaint dated 3th July 2013 the plaintiff/appellants filed suit seeking;

- ***A replacement of their motor vehicle or in the alternative full payment of the sum assured of Ksh. 2,250,000/=***

- ***Loss of user of the motor vehicle from 9th November 2011 till payment in full at Ksh. 41,460/= per month.***

- ***Costs and interest of the suit.***

- ***Any other relief the court may deem fit and just to grant.***

9. The appellants claimed that the motor vehicle was used for business, commercial purposes and as a result the motor vehicle overstaying in the garage, they had lost business, were unable to service their loans due to the respondent's conduct.

10. In its defence dated 6th June 2014 the respondent averred that it acted within its options, to either repair the motor vehicle, replace the damaged motor vehicle or declare the damaged motor vehicle a write off and pay the insured sum less salvage.

11. That after the road traffic accident the damage to the motor vehicle was assessed at Kshs. 721, 810/= which was less than 50% the value of the motor vehicle which by then was about Kshs. 2 million.

12. That for some reason the plaintiffs wanted the motor vehicle declared a write off and when it was repaired they raised issues that were not entirely genuine.

13. That after the assessment by the Motor Vehicle Assessors Association of Kenya the motor vehicle was repaired but the appellants declined to collect the same from the garage instead demanding its value.

14. That in July 2012 CFC the co-owners claimed the motor vehicle from non-payment of the loan and since their interest was noted in the policy document the motor vehicle was released to their agents M/S Sheflo Auctioneers.

15. The respondent averred that the appellants were informed. That the respondent was not liable to pay for the loss of user, as it was expressly excluded in the insurance policy. That the demand had been received, and an appropriate response given, and that the plaintiffs were now seeking for a motor vehicle that had been repossessed by the bank for failure to repay their loan.

16. In reply to the defence, the appellants averred that they were not parties to the assessment for repairs by the respondent agents, they denied any campaign to have the motor vehicle declared a write off, and asserted that the repairs by M/S Golden Motors Garage were shoddy and substandard. They put the respondent to strict proof of its averments.

17. At the close of pleadings, the matter was heard. Each party called one witness.

18. For the plaintiffs Samuel Gachihi Maina testified. He reiterated what was in the plaint, his statement, and documents. He added that after the motor vehicle was repaired they noticed that the repairer had used old spare parts and they complained. On 16th January 2012 there was no response. They approached an advocate who wrote a demand on 27th February 2012. The respondent never responded.

19. That they were forced to hire motor vehicles to transport their goods because the motor vehicle was never handed over back to them. That he was not aware that the motor vehicle was released to CFC Stanbic or that CFC Stanbic had repossessed the same. He said the motor vehicle was taken to the garage on 10th November 2011 and the independent assessment was made on 10th June 2012. The witness also produced some receipts to prove that they were hiring motor vehicle to ferry their products.

20. For the defence, John Karori Gakuo testified that indeed the motor vehicle was insured by the respondent and after the road traffic accident repairs were assessed at Kshs. 721,000/=. That the appellants were not satisfied with the repairs. He testified that the matter was referred to other assessors who, according to him approved the initial assessors report. That subsequently, the respondent did some adjustments regarding the repairs. However when the motor vehicle was ready the appellants did not collect it and it was then that CFC Stanbic repossessed it.

21. He confirmed that the appellants' letter of complaint about the shoddy repairs was received on 17th January 2012. That the respondent did not have any document to prove that they had informed the appellants' that motor vehicle was ready for collection. That the report by MAAK assessors confirmed the appellants' complaint, and re-assessed damage at Kshs. 721,810/=; that he did not have a copy of the re-inspection report after the independent re-assessment by MAAK. He also confirmed that the alleged express authority giving the bank power to re-possess the motor vehicle was not properly executed. That the only thing that was clear was that the respondent would indemnify the bank.

22. On this evidence the trial court found that the appellants could not claim for the motor vehicle or its value because it had been repossessed by the bank as a result of their default in re paying the loan. The court also found that the insurance company had given no explanation for the delay in dealing with the appellants' complaint, and that if it had not been for the delay, the appellants' may have been able to mitigate their losses. The court also found that the respondent was liable for the appellant's loss of use of the motor vehicle as a result of their delays. However, that the court could not make any award because, it found that loss of user was a special damage which the appellants' had pleaded but had not proved the same specifically. Consequently the suit was dismissed with costs to the respondents on 19th October 2017 with costs.

23. Aggrieved by the judgment the appellants filed this appeal on 17th November 2017 on the following grounds;-

1. ***THAT the trial magistrate erred in law and fact by failing to consider the evidence of the appellants and critically analyse the***

same and accord it due weight to the extent that it was able to improve its case.

2. THAT the learned magistrate erred in law and in fact in holding that the appellants had established a prima facie case based on its pleadings on the plaint and evidence but failed to award as per the prayers sought.

3. THAT the learned magistrate erred in law and in fact by applying her own theory in assessing the pleadings, evidence and exhibits which made her fall into error of speculation and inserted her facts and findings which was not supported by the pleadings, evidence and exhibits.

4. THAT the learned magistrate erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence, exhibits and submissions of parties.

IT IS PROPOSED TO PRAY THIS HONOURABLE COURT;

A] THAT the Appeal be allowed.

B] THAT the judgment/Decree of the Honourable court dated 19th May 2017 be reviewed and judgment entered in favour of the Appellants against the Respondent.

24. Parties through their advocates Oumo & Company Advocates for appellants and Mirugi Kariuki & Company Advocates for respondent agreed to proceed by way of written submissions, which they each filed.

25. For the appellant it was submitted that;

4.1 *The appellants motor vehicle registration No. KBN 293W was comprehensively insured by the respondent to the tune of Kshs. 2 Million vide policy No. 060/080/1/005199/2019.*

4.2 The Motor Vehicle was registered jointly between the appellants and the financer ***CFC STANBIC BANK.***

4.3 The said motor vehicle was involved in an accident on the 9th November 2011 and the respondent referred the appellants to the respondent's agent's garage for repairs immediately.

4.4 It was the appellants'' evidence that the respondent took inordinately long time to repair the same and finally did shoddy job and used substandard spare parts in the attempt to restore to restore the said motor vehicle to its pre-accident position.

4.5 The appellants' complaint on the unsatisfactory vide a letter dated 17th January 2012 was confirmed by the post repairs inspection carried out ***by the Motor Assessors Association of Kenya*** *and a report prepared on the 4th June 2012.*

4.6 The respondent wrote on 12th September 2012 demanding for a sum of Kshs. 112,500/= from the appellants which amount had been demanded from the financier – C.F.C. STANBIC BANK and paid on 3rd July 2012.

4.7 The appellant was not satisfied with the alleged further repair work and the repairs had taken inordinately long time – in fact more than one (1) year and the appellant suffered loss of user of the motor vehicle.

4.8 ***The claim was premised on the contract of insurance between the appellants and the respondent.***

4.9 The appellants claim against the respondent was for indemnity of the sum assured and the loss of user as particularized and proved.

For the appellants the following issues were set out for determination:-

8.1 ***Whether the trial court's finding are based on sound evidence, exhibits and pleadings or no evidence.***

8.2 What are the parties' obligations under the policy of insurance and whether there was breach by the Respondent?

8.3 Who pays the costs of this Appeal and the costs of the Trial Court.

26. Relying on **Section 78 of the Civil Procedure Act which states** *78. Powers of appellate court;*

(1) Subject to such conditions and limitations as may be prescribed, an

appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

and **Butt v Khan** the appellant urged the court the re-evaluate or re-consider the totality of the evidence adduced and come up with its own findings and conclusions to determine whether the lower court's findings were based on the evidence on record and all the relevant factors were considered.

27. It was further submitted that the applicable law was **Law of Contract of Insurance,** the doctrine of indemnity under **Insurance Act** and the obligations of the insured and the insurance company under their contract. That under the contract of insurance the respondent was obligated to indemnify the insured by reinstating the insured's motor vehicle to its pre-accident state or for any loss or accident damage on the motor vehicle. In this case the motor vehicle was only ready for collection after six (6) months and allegedly released to CFC after one (1) year hence the insurance had violated the contract of insurance. On this the appellants' relied on **Kisumu CA No. 163 Of 2002 Concord Insurance Company Limited V David Otieno Alinyo & Another,** Citing *Harman L.J.* in **Darbishire v Warran (1963) WR.1067 page 1070** stating that:

"…the principal of restitution is to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general, the measure of damages is the cost of repairing the damaged motor vehicle but there is an exception if it can be proved that the cost of repairs greatly exceeds the value of the market of the damaged article, this arises out of the plaintiff's duty to minimize his damage." (Emphasis mine)

28. The appellant also relied on **British American Insurance Company Limited vs George Mokaya Ondieki [2019] eKLR** which had similar facts to this case except that in that case the cost of repairs was assessed to be more than 50% the value of the motor vehicle. The appellant urged the court to find that the case had been proved and to award it an order of indemnity plus, loss of user.

29. For the respondent it was submitted;

3. The said motor vehicle was involved in an accident on 9th November, 2011 and the Plaintiffs/Appellants registered a claim to the Defendant/Respondent. The Defendant/Respondent on receiving the claim did valuation of the damage and a recommendation was made to repair the said vehicle rather than replacing it with a new one. The motor vehicle was repaired and upon completion of the repairs the Plaintiffs/Respondents refused to pick the said motor vehicle and insisted that they wanted the motor vehicle replaced.

4. Later on the Defendant/Respondent received a claim from CFC Stanbic Bank who were the financier claiming to take possession of the said motor vehicle due to default in payment by the plaintiffs/appellants late on filed a plaint seeking the court to order the defendants/respondents to replace the said motor vehicle or in the alternative pay the insured amount of Kshs. 2,250,000/= and to pay loss of use of the said motor vehicle for the months it was not in use.

5. The defendant/respondent filed a defence and stated that the plaintiff/appellant had refused to pick the said motor vehicle after the repairs and had insisted that it be placed with a new motor vehicle. The defendant/respondent stated that the said motor vehicle had been inspected after the repairs and approved to be in good conditions. The defendant/respondent also informed the Court that the said vehicle had been repossessed by the financier upon the plaintiffs default to pay the instalments.

For the respondent the following issues were framed for determination:

a) Whether the plaintiffs appellants had proved a prima facie in the lower court.

b) Whether the plaintiffs appellants proved damages for loss of the said property (sic)

c) Whether the appeal should be allowed.

30. Relying on **Makube vs Nyamuro [1983] KLR 403** where the Court of Appeal stated;

"A court of 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." (emphasis mine)

The respondent urged the court to find that the appellants had not established a prima facie case in the lower court. Citing **Section 107 and 108 of the Evidence Act,** it was argued that the appellants had failed to discharge their burden of proof on a balance of probability and on this reference was made to;

i) **Isinya Roses Limited vs Zakayo Nyongesa [2016] eKLR.**

ii) **Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR**

31. Relying on **Christine Mwigina Akenya vs Samuel Kairu Chege [2017] eKLR & Hahn v Signh [1985] KLR 716** the counsel for the respondent urged the court to find that special damages for loss of user had not been specifically claimed or specifically proved.

32. Finally on the basis of **Wakim Sodas Limited v Sammy Aritos [2017] eKLR** I was cautioned in the following terms.

a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions.

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her, and

c. It is not open to the first appellant court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

I was urged to dismiss the appeal.

33. This is a first appeal. The guidance for dealing is set out in **Selle & Another vs Associate Motor Boat Company Limited (1968) EA 125.**

34. I have considered the two sets of issues set out by the parties and the main issue is **whether the trial court's finding was based on evidence before it.** Other questions to be interrogated simultaneously are

1. ***What is the basis of the appellant's claim?***

2. ***What were the obligations of the parties under the Contract of Insurance?***

3. ***Whether there was a breach on the part of the respondent.***

All these issues are intertwined and will be dealt with together.

35. It is not in dispute that the basis of the appellants' claim was the contract of insurance between them and the respondent on the **motor vehicle registration number KBN 293W, Policy Number 060/080/1/005199/2011** which was to run from **29th March 2011 to 28th March 2011.**

36. According to the **Clause 1.1 Insurance of Motor Vehicle** the policy document states *inter alia*:

1) Loss of damage

"The company will indemnify the insured against the insured against accidental loss or damage to the motor vehicle and its accessories and spare parts whilst thereon;

a) By accidental collision on overturning…"

In this case, the fact of the motor vehicle having been involved in a road traffic accident on 9th November 2011 is not in dispute and the respondent accepted to carry out its part of the contract by choosing to repair the motor vehicle. **Clause 1.3** provides for authority to repair whereby the insured may authorize the repair of the motor vehicle necessitated by damage for which the company maybe liable provided that the estimated cost of such repair does not exceed the authorized repair limit. I read through the policy document and did not find any clause on the "authorized repair limit".

37. That besides, the respondent appointed Diplomatic Assessors who by "Vehicle Repair Estimate" dated **15th November 2011**, estimated costs of repairs at Ksh 684,980 to be done within twenty one (12) days (subject to availability of parts). There were additional costs of Kshs. 13,500/= for rear view mirror and a set of wiper blades.

38. By a letter dated **22nd November 2011** the Claims Supervisor UAP wrote to Elmwa Insurance Agency regarding the repairs to the plaintiffs motor vehicle stating that they had authorized the repair on a without prejudice basis.

39. By a letter received by UAP on **17th January 2012** the appellants wrote,

"…the car has been in repair for 2 ½ months. The car has been duly finished and we went for road test and discovered the car had some changes in movement. Also the materials used for repair are substandard. We wish to inform you that we no longer trust the van to give us good service.

The appellants wrote again on the same issue on **16th February 2012,** no response came. They obtained the services of an advocate who wrote to the respondent on **27th February 2012**. No response came but I gathered from the documents on record that it is only on **17th May 2012** that the respondent took action by writing to Motor Assessors Association of Kenya (MAAK) who responded vide their letter of 18th May 2012.

"18th May 2012

ATT: MR. JAMES NJUGUNA – CLAIMS SUPERVISOR

THE PRINCIPAL OFFICER

UAP INSURANCE COMPANY LTD.

BISHOP GARDEN TOWERS

BISHOPS ROAD

P.O. BOX 43013 -00100

GPO, NAIROBI

Dear Sirs,

RE:RE-INSPECTION OF MOTOR VEHICLE REGISTRATION NO. KBN 293W

DATE OF ACCIDENT 09.11.2011

INSURED: SAWASAWA PAINTS & ALLIED PRODUCTS

DISPUTE RESOLUTION

1. We write to acknowledge receipt of your letter on subject matter, sent via E-mail on 17.05.2012, together with enclosures.

2. This matter will be referred to a ***Technical Committee of the Association,*** *made up of three (3) members, to jointly re-inspect the subject vehicle at Golden Motors, Nakuru, and submit a Re-inspection report, giving an opinion on the quality of repairs carried out and parts utilized.*

3. Please let us have a cheque of Kshs. 40,750/= (Forty Thousand Seven Hundred and Fifty Only) for this assignment, to enable us constitute the said Technical Committee. This charge is made up as follows:-

i) Assessment fees - Kshs. 32,500.00

ii) 330 km @ Kshs. 25 per km - Kshs. 8,250.00

Total Payable ---------- - Kshs. 40,750.00

Yours faithfully,

A. K. Mureithi

Chairman, MAAK*"*

MAAK did their motor vehicle post repair inspection report dated 4th June 2012 after inspecting motor vehicle on 23rd May 2012 .Out of 27 items, 12 had of them issues. Their overall finding; ***"Repair, painting and general workmanship were unsatisfactory".***

40. This validated the appellants' complaints with regard to the shoddy repair works. From here however there appears to have been no other communication with the appellants.

41. By a letter dated **12th September 2012** the Regional Manage UAP wrote to the appellants thus

"12th September 2012

The Manager,

SawaSawa Paints Limited,

P.O. Box 667, NJORO,

NAKURU KENYA.

Dear Sir,

RE: YOUR VEHICLE REG. KBN 293 W

The above refers.

As you are aware, we appointed a panel of assessors from Motor Assessors Association of Kenya to look into the complaints you raised with us with regard to the quality of workmanship done on your vehicle by Golden Motors following a road accident late last year.

Their assessment report picked up some aspects that had not been repaired satisfactorily which were subsequently fixed and the vehicle was later re-inspected. We have a confirmation that the vehicle has been restored to its pre-accident condition and request that you visit the garage and confirm that it is the case your concerns on repairs done have been sorted out to your satisfaction. Thereafter and as per the policy condition you will be required to pay an excess of shs. 112,500/= and collect the vehicle from the repairers.

It is important that you give the above the attention it deserves so that this long outstanding matter may be brought to a close.

Yours Faithfully,

NDEGWA GACHERU,

REGIONAL MANAGER

Cc: Elmwa Insurance Agency

NAKURU

Claims Manager

NAIROBI. (emphasis mine)

42. Apparently by this time the respondent had already entered into some kind of arrangement with CFC Stanbic as can be seen from CFC Stanbic letter of 3rd July 2012

"Date 3rd July 2012

RE: VEHICLE REG. NO. KBN 293 – TOYOTA HIACE MICRO BUS

Following the telephone conversation with our officers, please find a cheque of ***Kshs. 120,999.00*** *being payment of the excess amount.*

Kindly release the vehicle to KEVIN GITAU T/A SHEFLO AUCTIONEERS of ID. No. 22301603 who has authority to collect the vehicle on behalf of the bank.

We thank you and look forward to doing business with you in future.

Yours faithfully,

Oscar Obuna,

Head,

Customer Debt Management*."*

The bank had already paid the money being asked of the plaintiffs on 12th September 2012 and which money had already been paid two (2) months before writing to the appellants about collection of the motor vehicle. So, by September when the respondent was purporting to write to the appellants to collect the motor vehicle, it may already have been released to the bank!.

The respondent without involving the appellants had already decided to release the motor vehicle to the CFC Stanbic.

The letter of 7th November 2012, CFC Stanbic wrote to the respondent is suspect. Here they are asking for the release of the motor vehicle yet they had already asked in July. Now they are asking for the release the motor vehicle on *a repossession order following the default by the plaintiffs to pay for the motor vehicle.* There is no evidence before the court that this motor vehicle was not released after July or where the motor vehicle was after July 3rd. This appears to have been an afterthought. This can be seen from the letter that followed from the respondent.

43. On 12th November 2012, the respondent replied thus;

> ***"Our Ref: 060/080/9/0022780/2011***
>
> ***Your Ref: TBA***
>
> ***November 12, 2012***
>
> ***M/s CFC STANBIC Bank,***
>
> ***CFC Stanbic Centre,***
>
> ***Chiromo Road,***
>
> ***Westlands***
>
> ***NAIROBI.***
>
> ***Dear Sirs,***
>
> ***INDEMNITY RELEASE OF MOTOR VEHICLE KBN 293W HELD AT GOLDEN MOTORS GARAGE (NAKURU)***
>
> *We refer to the above matter and to your letter dated 7th November 2012.*
>
> *Your indemnity is acceptable to us and it is on that basis that we HEREBY authorize Golden Motors Garage to release motor vehicle KBN 293W to your agents M/S Sheflo Auctioneers Limited.*
>
> *Yours faithfully,*
>
> ***NDEGWA GACHERU***
>
> ***REGIONAL MANAGER***
>
> ***CC:***
>
> *1.* ***The Manager,***
>
> ***SawaSawa Paints & Allied Products:***
>
> ***P.O. Box 667, NJORO***
>
> ***NAKURU, KENYA***
>
> *Please note the contents of our letter as well as the attached copy of the later under reference.*
>
> *2.* ***Legal Manager"***

For the first time since the MAAK inspection the letter was copied to the appellants, together with a copy of the letter from the respondent of 7th November 2012. With that the respondent assumed that the matter had come to a close.

44. Reading from the policy document placed before me, the Hire Purchase endorsement at clause M15 does not speak about the motor vehicle being released to the bank but the bank's interest being any monies which would be payable to the insured under the policy. This is how it is written;

> **M 15 HIRE PURCHASE ENDORSEMENT**

> *"It is hereby declared and agreed that (hereinafter referred to as the Owners) are the owners of the Motor vehicle described in schedule to this Policy and that the said Motor vehicle is subject to a Hire Purchase Agreement made between the owners of the one part and the insured on the other part. It is further declared and agreed that the said owners are interested in any monies which but for this endorsement would be payable to the insured under this policy in respect to the loss or damage to the said Motor Vehicle (which loss or damage is not made good y repair reinstatement or replacement) and such monies shall be paid to the said owners as long as they are the owners of the vehicle and their receipt shall be a full and final discharge to the Company in respect of such loss or damage."*

Where did the respondent get the authority or power to release the motor vehicle to the bank? It appears to me that the bank and the respondent could only transact on the said policy, only to the extent of the provisions of clause M-15.

Secondly the document that would have brought the bank into the policy document, labeled Bank Guarantee was never executed by the Bank itself or by the insurance company. i.e. the respondent. The only signatures in that document belong to the appellants.

Diplomat Assessors the respondent's agents had indicated that the repairs would take 12 days. From the evidence on record, which is not controverted by the respondent, the appellants were only able to take the motor vehicle on a road test **2 ½ months** after the motor vehicle had been taken in for repairs. They immediately raised their complaints in January 2012, and the respondent only took action in May of 2012. All this time the respondent was aware that the motor vehicle had been brought by the appellants for COMMERCIAL USE. That was in the Insurance Policy Document. The respondent was aware the motor vehicle had been purchased for business purposes and on hire purchase. The same was expected to make money to pay the installments, but the respondent did not give a hoot. It kept the motor vehicle in the garage all this time while deciding on what to do. The respondent was not being honest when it said that the plaintiff/appellant complaints were "not so genuine". An independent assessor found that their agent had not only under assessed the repairs, their other agent had done a shoddy job of the repairs, and to make matters worse, had re-used some parts from the accident motor vehicle while purporting to replace them. The independent assessors found the whole works unsatisfactory hence the appellants were justified to reject the motor vehicle in the first instance.

After the re-assessment the respondent did not communicate with the appellants until September 2012 to tell them the repairs had been done to their satisfaction, and there had been a re-inspection and therefore they could collect the motor vehicle. There was no inspection report annexed. This was ten (10) months after the accident. The respondent was not serious. Taking into consideration that a shoddy job had been done previously they owed it to the plaintiffs/appellants to confirm that they were satisfied with the repairs. In any event it is clear that they were only "pretending" to be asking the appellants' to collect the motor vehicle because by this time they had already 'released' the motor vehicle to the bank which was not a party to the insurance contract. The letter asking the appellants to pay excess and then collect the motor vehicle from the repairs was clearly a sham and made in bad faith.

45. The respondent's position was that the appellants could not ask to be indemnified for a motor vehicle that had been repossessed by the bank. Firstly the respondent produced no proof that the motor vehicle had been released to the bank or the bank had actually taken possession of the motor vehicle. Except for the bank's letter making that request, no evidence was ever produced to support it. Secondly, even if the motor vehicle was released to the bank, the insurance policy was between the respondent and the appellants, with a clause specifically acknowledging the bank's interest. There is nothing there saying that the respondent was obligated to release the motor vehicle to the bank. It is therefore openly evident that it is out of the respondent's breach of their contract with the appellants that the appellants suffered loss of user of their motor vehicle and loss of their motor vehicle which the respondent has never released to them.

46. So, I do not agree with counsel's submissions that the appellants had not established a prima facie case, it is all there in the respondent's conduct, and that was the trial court's finding. By not repairing the motor vehicle in good time and releasing it to the appellants, a motor vehicle that was expected to make money to pay for itself, the respondent actually caused the cost of repairs to exceed the value of the motor vehicle, how? Because every day the motor vehicle was in the garage, the appellants were losing money. They testified as such. The motor vehicle was used to transport paints and other products to customers, how else were they expected to service their loan? Every single day, they made losses that added up to months of no business.

47. The trial court found that the plaintiffs were entitled to claim for loss of use but did not award any sum because, the plaintiffs did not produce receipts with revenue stamps to prove the same. I am persuaded otherwise, that the fact that the motor vehicle was to be used for commercial purposes was not in dispute. My line of thinking finds resonance in the words of *Ogola J* in **George Onyango Liewa vs Madison Insurance Company Limited [2017] eKLR;**

> ***"The plaintiff did not provide proof that indeed it was earning Kshs. 6,000/= per day. However, the court has already found that the plaintiff lost the said motor vehicle. The vehicle was not to be idle. It was made in the structure of a matatu but was not yet being used as a matatu, but was being used for transporting beer in the plaintiff's bar business. So, it is true that the plaintiff lost income."***

The Judge proceeded to assess and award an amount for the said loss. Hence even in this case, without those receipts, it is my finding in agreement with the trial court that the appellants established that they were using the said motor vehicle for business and in the months the respondent held the motor vehicle in the garage, they lost income. I differ with the trail court on the refusal to asses and award an amount for that loss.

48. The respondent took possession of the motor vehicle for repair and never returned it to the plaintiffs, the plaintiffs could not pay the instalments because the motor vehicle was in the hands of the respondent for repairs. It is the respondent who knows where they took the motor vehicle, and as far as the appellants are concerned, the respondent owes them the motor vehicle. The appellants had no obligation to collect a motor vehicle whose repairs were not to their satisfaction, see **British American Insurance Company Limited vs George Mokaya Ondieki [2019] eKLR.**

49. **In conclusion**

From the foregoing it is my finding that the plaintiffs/appellants did establish their case on a balance of probability. The respondent was in violation of their contract of insurance and to date has never released the motor vehicle to the appellants the same becoming a complete loss for the appellants. I find and hold that the plaintiffs/applicants were entitled to loss of user.

In assessing the award there is the persuasive decision of *Ogolla J* above, and **Hahn vs Singh** where the Court of Appeal stated;

> ***"Special damages must not only be specifically claimed but also strictly proved. For they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree and certainty and particularly of proof required depends on the circumstances and nature of the acts themselves."*** *(emphasis mine)*

50. The circumstances of this case speak for themselves. In this case, there is a basis for the claim for loss of user, and without the benefit of specific evidence, I would assess it at Kshs. 25,000/= per month. It took the respondent the best part of a year to get the m/vehicle supposedly ready for collection. After that year the appellants ought to have mitigated their damages. This sum will be paid for a period of 12months.

51. Secondly as I have already stated, the respondent never released the motor vehicle to the appellants. It was insured for Kshs. 2,250,000/=. The respondent is liable to pay the insured sum.

The appeal therefore succeeds on the grounds that the trial court did not consider the entire evidence available and applied the wrong principles in refusing to award a sum for loss of user. I therefore find in favour of the appellants. I set aside the judgment of the trial court and enter judgment as follows:-

1) The respondent to pay the appellants Kshs. 2,250,000/= the insured sum/value of motor vehicle; and

2) The respondent to pay the appellants the sum of Ksh 25000 per month for loss of user for 12 months (Ksh 300,000) and;

3) Interests on (1) from 3rd July 2012 and (2) from 17th January 2011 at Court rates till payment in full.

4) Costs to the appellants of the suit here and below and interest at court rates.

Delivered, Dated and Signed at Nakuru 23rd day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of:- Via Email by consent of;-

Oumo & Co Advocates for the appellants

Mirugi Kariuki & Co Advocates for the respondent

Edna Court Assistant