



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1598 OF 1996

GRAGAN (K) LIMITEDPLAINTIFF

VERSUS

GENERAL MOTORS (K) LIMITED1ST DEFENDANT

RYCE MOTORS (K) LIMITED2ND DEFENDANT

JUDGMENT

1. The plaintiff **Gracan (K) Ltd** sued the defendants **General Motors(K) Ltd** and **Ryce Motors Limited** vide a plaint dated 1st July 1996 and filed in court on the same day, claiming for special damages for loss of user, cost of repairs of a motor vehicle, general damages for breach of contract, costs of the suit and interest on special damages and costs.
2. In the said plaint, the plaintiff pleaded that it is a limited liability company and the records show that it is engaged in transportation of goods since 1991, after commencing its operations in 1989.
3. The 1st defendant is described as a limited liability company engaged in the business of manufacturing, assembling, marketing and or distributing Isuzu Lorry trucks and other motor vehicles within the Republic of Kenya and elsewhere.
4. On the other hand, the 2nd defendant is also described as a limited liability company duly incorporated in Kenya and was at all material times the 1st defendant's authorized dealer and or agent and engaged in motor vehicle business similar to that of the 1st defendant.
5. The plaint alleges that on or about the 29th day of August 1995 the plaintiff entered into an agreement with the second defendant whereby the second defendant agreed to sell and the plaintiff agreed to buy two Isuzu trucks model CXZ registration Nos KAG 417B and KAG 418B at an agreed price of kshs 11,500,000. That the fundamental period or implied terms and conditions of the said agreement as warranted by the defendant were that:
 - i. The said vehicles were of a merchandise quality.
 - ii. The plaintiff was entitled to a six months and or 40,000 kilometers warranty of full indemnity from the 1st and 2nd defendant for any defects ,repairs and loss among in respect of the said motor vehicle in the ordinary course of their operation.

6. It was alleged that on or about the 13th day of October 1995 while being driven carefully and diligently by the plaintiff's driver/agent along Nairobi- Meru Road and within one month of the date of its purchase, motor vehicle registration No. KAG 418B developed serious and fundamental engine defects. As a result thereof, the motor vehicle became useless and incapable of propulsion after covering a mere 3175 kilometers, in a breach of the fundamental condition of the agreement, and despite efforts to repair it, it was out of business for 162 days. The plaintiff blames the defendants jointly for breaching the terms of the agreement by:

- a) Selling a motor vehicle that was not fit for use for the purpose for which it was sold.
- b) Selling a motor vehicle that was not of merchantable quality.
- c) The motor vehicle not satisfying conditions or terms of the warranty.
- d) Selling a motor vehicle that had a fundamental factory defect. The plaintiff therefore claimed for:-

a) Loss of user for 162 days x 25,000 period	Ksh 4,050,000.00
b) Cost of the repairs.....	Ksh 562,452.85
	Total Ksh 4,612,452.85

- c) General damages for breach of contract.
- d) Failing to indemnify or compensate the plaintiff for loss and damages in accordance with the terms of the warranty or agreement.
- e) General damages for breach of contract
 - i. Costs of the suit and
 - ii. Interest on special damages and costs.

7. The defendants entered a joint appearance dated 12th August 1996 through the firm of Mukuria and Company Advocates. The firm of Asike Makhandia entered a separate appearance for the 2nd defendant on 9th August 1996 and filed defence on 26th August 1996, stating that save that it was acting as an agent of the 1st defendant, and not as a dealer, all other allegations against it were denied. Further, that it was authorized by the 1st defendant to make the contract referred to, which contract was binding on the first defendant and pleaded contribution or indemnity if at the end of the trial the defendants are found liable to pay jointly and severally.

8. Particulars of loss and damage were denied in toto and the plaintiff put to strict proof. The record shows that albeit the firm of Mukuria did enter appearance and file defence on behalf of both defendants on 22nd August 1996, it had to seek leave for filing of an amended memorandum of appearance and defence to reflect that it was acting for the 1st defendant only. The amended memorandum of appearance is dated 27th January 1997 whereas the amended defence was filed on 20th January 1997.

9. On 17th February 1997, the plaintiff sought to have the 1st defendant's amended defence struck out for disclosing no reasonable defence, as it was a mere denial, scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action and for being an abuse of the court process which application dated 17th February 1997 was, by a ruling delivered don 27th May 1997 by Honourable G.P. Mbitio J (as he then was) dismissed with costs and the suit allowed to proceed to

hearing on merit. On 5th June 1997 the plaintiff filed a notice of appeal with the intention of challenging that ruling of Honourable G.P. Mbitio but there is nothing to show the progress of the intended appeal.

10. Summons for directions under the old Civil Procedure Rules were filed and taken on 21st February 2000 with agreed issues being filed on 11th February 2000. The case then commenced for hearing before Gacheche J on 25th January 2001 who only heard PW1's evidence in chief in part which evidence was restarted before Kubo J on 12th January 2006. Honourable Kubo J could not conclude the hearing. Many other judges who came after him and before me including Honourable Justice Mary Angawa heard part of the evidence after the parties agreed to continue from where the case was left by Honourable Kubo J on 5th December 2012, six years after the matter commenced for hearing before Honourable Kubo J. The proceedings were typed and parties did agree that they were in order. Honourable Angawa J did commence the defence hearing which closed on 5th December 2012 with all parties agreeing to file written submissions and to appear for further hearing on 5th February 2013 at 9.00am.

11. Regrettably on 5th February 2013 Honourable Angawa J was not available and the matter was listed before Honourable Waweru J. In the meantime, all parties did in fact file their written submissions and on 4th November 2013 the matter landed in the hands of Honourable Justice Onyancha J who reserved it for judgment for 10th February 2014 at 9.00 am. On 10th February 2014 the judgment was postponed to 9th April 2014.

12. However, on four consecutive occasions 1st April, 2014, 9th April 2014, 19th June 2014 and 21st July 2014, Honourable Onyancha J was unable to deliver a judgment on the grounds that the defence evidence was sketchy, illegible and or made up of hearsay and incapable of being understood. The learned Judge therefore directed that the matter be mentioned before Waweru J on 23rd July 2014 for directions. Honourable Waweru J was seized of the matter on 23rd July 2014 to enable him render a judgment. Regrettably, by 30th September 2014 when the matter came before him, Honourable Waweru J had been transferred to Muranga High Court Station hence he placed it for mention on 22nd October 2014 before the presiding judge of the Civil Division for further directions. That is how this age old matter of nearly twenty years landed into my hands and court for determination.

13. I must therefore confess from the onset that I have not had a chance to hear or see the witnesses as they testified, but I shall endeavour to put in my best to appreciate the evidence on record, assisted by the parties' written submissions and the law to endeavour to do justice to all the parties.

Evidence of the plaintiff

14. Before commencement of the hearing, the plaintiff counsel sought for an amendment to the plaint regarding special damages which was allowed by Gacheche J, enhancing the same to as follows:

(ii) Repair costs 1,370,366/50 instead of shs 562,452/85. The total special damages therefore reads 5,420,366.20 instead of the earlier amount of shs 4,612,452/85.

15. PW1 Richard Nyaos Buget testified on oath that he was an Electrical Engineer operating various businesses. He was the Managing Director for the plaintiff company and was also a director in the said company which carries out the business of transportation of goods since 1991. That the company started its operations in 1981. Further, that the plaintiff had a fleet of ten heavy commercial motor vehicles, including motor vehicle registration No. KAG 418 B Isuzu CXZ model with the capacity to carry a maximum load of 15 tones and pull a 15 tones trailer.

16. PW1 testified that in September 1995, the plaintiff bought 2 motor vehicles Isuzu CX2 registration Nos. KAG 417 and KAG 418B at price of shs 11,500,000 at an agreed 5,750,000/- from Ryce Motors Ltd – the 2nd defendant herein. He produced receipts to that effect and the sale agreement. That in October 1995, one of the motor vehicles registration No. KAG 418B broke down which break down he

attributed to breach of implied terms as to quality and warranty. He stated that the 2nd defendant is the authorized dealer of the 1st defendant with express and ostensible authority to sell and service the 1st defendant's motor vehicles and related spare parts and accessories as shown by the Dealer Sales and Service Agreement between the 1st and 2nd defendant -produced in court as defence exhibit 1. The witness produced the Handing over Certificate dated 29th September 1995 as P exhibit No. 2. He stated that on 13th October 1995, one of the purchased motor vehicles KAG 418B broke down while being driven between Nanyuki and Meru while carrying goods enroute from Mombasa to Meru. That he had witnessed the loading of the said goods which were 15 tones of fertilizer from Mombasa as it left for Meru. He was called by the driver of the said motor vehicle, a Mr Stephen Kiberenge who informed PW1 that the motor vehicle had broken down and could not move. The witness PW1 then called the 2nd defendant and notified them of the breakdown and they advised him to call Associated Motors who were their authorized dealers, who responded and towed the motor vehicle to their depot in Meru. PW1 followed the motor vehicle to Meru to establish its condition after about 2 days. On arrival he learnt that some part of the motor vehicle had failed, which failure was attributed to the manufacturer's fault. The motor vehicle was eventually repaired after two months and it was released for use by the plaintiff, who prepared a schedule of number of days that the motor vehicle stayed out of work.

17. The PW1 further narrated that no sooner had the said motor vehicle been released to the plaintiff to start transportation work, than it broke down enroute to Nairobi. He produced the schedule dated 14th May 1996, as PEX4 showing that the motor vehicle stayed at Associated Motors from 13th October 1995- 2nd December, 1995. The motor vehicle was returned to the workshop for further repairs. It remained therein until 14th April 1996 for a total number of 162 days.

18. According to PW1, since the motor vehicle had broken down during the warranty period, then the defendants ought to have repaired it free of charge but that the 1st defendant took too long to decide that is why the plaintiff decided to pay for the repairs which amounted to shs 1,370,366.50. He produced statement of account from Associated Motors Ltd containing No. of invoices, dates, and the amount together with receipts for payments made all totaling shs 853,744/75 due and owing as P EX 5.

19. PW1 further testified that the plaintiff was advised by the 1st defendant that they(plaintiff) could pay ½ the cost of repairs as the 1st defendant waited for the confirmation of the facility of parts from Japan, which repairs turned out to be very costly.

20. The plaintiff therefore claimed for loss of user of the motor vehicle in the sum of (a) 25,000 per day for 162 days totaling shs 4,050,000 (b) cost of the repairs shs 1,370,366/50. According to PW1, the repairs were not carried out within reasonable time as a result of which they incurred losses as they were in business and as the motor vehicle was purchased on loan from the financiers who paid the purchase price to the defendants directly.

21. PW1 further testified that even after it was repaired, the motor vehicle in question broke down several times after the initial breakdown and that after a serious breakdown, Associated Motors declined to touch the motor vehicle again and he approached Mr George Woods of the 1st defendant who went to examine the motor vehicle engine personally and instructed Associated Motors to repair the motor vehicle and it was done at no fee.

22. PW1 further contended that even after the motor vehicle was repaired, he insisted that the whole engine be replaced but this s request was declined and the repairs were carried out on the existing engine which again led to the motor vehicle breaking down. When they returned it, it was repaired and again it failed so they replaced the engine with a second hand engine which never failed and the motor vehicle worked very well. That on the occasion when the suit vehicle left Meru workshop and was driven direct to Associated Motors workshop in Nairobi where it stayed for one month and upon its release, he gave it to a different driver, Mr Mutai and after about 10,000 kilometers, it had a more serious engine breakdown than the first breakdown at Meru in that there were cracks in the

engine block after Machakos junction towards Mombasa. PW1 went to the scene with a service and maintenance mechanic as the vehicle was under a warranty and again they towed it to Associated Motors work shop who repaired it at no cost to the plaintiff.

23. That the motor vehicle never performed well even after the latter repairs and that the plaintiff's request for a new engine was turned down. He produced a bundle of 8 receipts (a) – (h) as P EX 6 being repair charges. PW1 testified that the loss of user was in respect of hire as the plaintiff hired out to International NGOs KTDA and other general companies and individuals to do the work which the suit motor vehicle was supposed to perform. He produced KTDA contracts for hire for transportation of fertilizer for shs 35,000 per day, Ecumenical Action in Sudan at 66,000 per day and stated that on average, they earned shs 25,000/- per day taking into account the fact that Sundays were rest days.

24. In cross examination by Mr Mukuria Advocate for the 1st defendant, PW1 maintained that the loss of user claimed was shs 25,000/- per day although they earned more. He confirmed that PEX 8 an agreement dated 21st September 1997 was a general agreement and not specific to any motor vehicle and that clause 1:2:1 of the said agreement set out quantities of goods to be transported, with clause 1:3 thereof setting out payment once the quantities are transported. He further confirmed that PEX 7 dated 22nd July 1996 was another general agreement for transportation with KTDA whose terms of payment were set out in clause 4 thereof. He stated that a new engine was fitted towards the end of 1996 after which the motor vehicle worked perfectly well and when PEX 8 transportation agreement was entered into, the suit motor vehicle was back on the road and functioning properly and that the company fulfilled its obligations under the general agreements. He maintained that as the motor vehicle was still under warranty, the defendants were under an obligation to pay repair charges and that the plaintiff paid for the repairs because the 1st defendant said they were investigating why parts of the engine failed by taking parts to Japan and asked the plaintiff to pay 50% of the cost as they investigated which the plaintiff obliged. He maintained that some receipts only reflected company (Plaintiff) name while others referred to the subject motor vehicle KAG 418B and conceded that receipts bearing dates 14th January, May 1998 and for 1997 would have no bearing on repairs to KAG 418B, subject matter of this suit. He conceded that he must have included such receipts by mistake. He further admitted that a receipt not bearing the plaintiff company name or motor vehicle KAG 418B would not relate to repairs to KAG 418B.

25. PW1 maintained under what seemed to be intense cross examination that motor vehicle KAG 418B was under warranty but that he was unaware that loss of user was excluded from any claim on breach of warranty. However, upon being shown the exclusion clause on loss of use, he maintained that that clause would only apply if repairs were done within a reasonable time. He further maintained that the breakdown was due to the engine manufacturer's defect. He further responded that the plaintiff had not sued the manufacturers of the engine but sued the 1st defendants who had sold the motor vehicle and provided the warranty.

26. On being cross examined by Mr Otenyo Advocates for the 2nd defendant, PW1 stated that they had sued Ryce Motors although the latter were not manufacturers of the subject motor vehicle KAG 418B, but were sale agents for the 1st defendants and that they (Ryce Motors) are the ones who received purchase price for the purchased motor vehicles. PW1 responded that the motor vehicle KAG 418B broke down on 13th October 1995 and on being shown PEX 8 general agreement for hire, he stated that it was made about 1-2 years after the motor vehicle had broken down. The same applied to PEX 7 agreement with KTDA which he stated was made after the motor vehicle had broken down. He maintained that the two agreements showed the earning capacity of motor vehicles of similar capacity as KAG 418B.

27. In re-examination by Mr Omotii advocate, PW1 maintained that the warranty was between the plaintiff and 1st defendant as manufacture or supplier, which warranty was that the motor vehicle was free from defects in material and workmanship under normal use and service. Further, that the defendants had never claimed that the suit motor vehicle had been put into improper use or service. He maintained that on loss of use, the plaintiff sued the defendants because they did not repair and or deliver the motor

vehicle within reasonable time, after it broke down. That it took the defendants 162 days to deliver the suit motor KAG 418B to the plaintiff. According to PW, reasonable period would have been 3 days to 7 days.

28. When questioned by the court, the witness PW1 confirmed that the PEX 8 is dated 21st July 1997 whereas PEX7 is dated 22nd July 1996. He stated that KAG 418B was back on the road towards the end of 1996 and that the agreements he produced were general contracts giving examples of the earning capacity of motor vehicles similar in capacity as KAG 418B. He stated that price negotiations for the purchase of the suit motor vehicle was done with Ryce Motors who also delivered the motor vehicle to the plaintiff and gave out a Handing over Certificate produced as PEX 1, although there was nothing to show that Ryce Motors were dealing on behalf of any other person, and that Ryce Motors were sued because they sold a motor vehicle which was not fit for the purpose for which it was sold.

29. The plaintiff also called PW2 Stephen Kiberenge, who testified that at the material time, he worked as a driver with Swiss Foundation for Mine Action, Sudan, although the foundation had an office in Nairobi. He stated that he had been a driver since 1991 and drove motor vehicle registration NO. KAG 418 B an Isuzu lorry between Nanyuki and Meru. He stated that PW1 was his employer and director of the plaintiff company. That while he was driving the suit motor vehicle KAG 418 B from Mombasa to Meru via Nairobi carrying fertilizer which the plaintiff had been hired to transport, and a month into driving the said motor vehicle, on 13th October, 1995 after staying overnight at Kerugoya and examined the motor vehicle and finding it to be in order he ran the engine for 30 minutes and drove for 30 minutes to Nanyuki but near Isiolo junction to Meru, while descending in gear No. 3, he heard a knock/noise in the engine. He pulled the vehicle aside and stopped, opened the cabin and checked and saw smoke from the engine. He found a rod connecting the engine and injector pump broken whereas the front cover of the engine had cracked and oil was leaking. He switched off the engine, took a matatu to Meru town and called the plaintiff's office in Nairobi who directed him to Associated Motors Meru Branch Manager. He went to Associated Motors, Meru where he met the manager and reported the problem. They gave the witness a foreman mechanic called Njenga who went with the PW2 to the scene where the motor vehicle had broken down and the said Njenga upon checking the motor vehicle remarked that it was a "manufacturer's fault" and the motor vehicle was towed to Associated Motors Meru after 2-3 days with the plaintiff meeting towing charges. PW2 collected the motor vehicle one(1) month after it was repaired but it again broke down at Matuu when the engine pulley loosened. A mechanic from Nairobi Associated Motors went to their rescue and drove the motor vehicle to Nairobi Associated Motors.

30. That following the frequent break downs to the suit motor vehicle, the witness was given a different motor vehicle KAG 417 B Isuzu CX2 same as KAG 418B bought on the same day. He stated that KAG 417B never experienced any problem. He maintained that for the 2 years he had driven heavy commercial vehicles, he had never experienced such a problem with motor vehicles and that he had never been blamed for badly driving motor vehicle registration No. KAG 418B.

31. On being cross examined by Mr Mukuria advocate for the 1st defendant, PW2 stated that he obtained his driving license class ABC in 1991 after which he worked for Kyondo New Service as a driver for 3 months. He stated that on the material day when the motor vehicle broke down, he was driving at 20-30 kilometers per hour descending and in gear 3 which would not strain the engine. That he was carrying 15 tonnes of fertilizer. He maintained that he heard a knock in the engine and when he stopped and checked he found a broken rod and oil leaking through a crack on the engine with smoke emanating from oil touching the hot metal. That even after the motor vehicle was repaired at Associated Motors in Meru, the engine did not run smoothly and when he reached Matuu, the pulley got loose and the motor vehicle only moved after the mechanic came and fixed the pulley, and the said mechanic drove the motor vehicle from Matuu to Nairobi. That from hence, he was given a different motor vehicle to drive.

32. In cross examination by Mr Otenyo advocate for the 2nd defendant, PW2 stated that before driving the suit motor vehicle, he was driving other Mitsubishi, Isuzu and Mazda trucks. That Isuzu

CX2 had just entered the Kenyan market so KAG 418B was his first Izusu to drive and that he was its first driver. He maintained that he heard noise from the engine and tried to start the engine after stopping but after seeing smoke and broken rod and crack, he switched it off and never tried to start it again. He denied being negligent or causing the faults found in the suit vehicle. He stated that after he was relieved of the motor vehicle, Mutai was given the said motor vehicle but denied that he did not know how to handle the motor vehicle causing the faults.

33. In re-examination by Mr Omotii advocate, the witness maintained that he was in gear No. 3 when going down the slope, and not in gear 4 or 5 because of the slope and that he only restarted the engine to establish where the smoke was coming from and that, that in itself would not cause the damage alleged by the defense counsel. He stated that he drove the motor vehicle from Meru to Matuu then the mechanic took over and that the engine remained rough. He stated that after he was given another motor vehicle of the same model, he drove it without any problem.

34. At the close of the plaintiff's case on 26th November 2007, the 1st defendant called its one witness on 23rd June 2008, Mr Patrick Wanjohi Mwangi who testified as DW1 that he worked for the 1st defendant as a motor vehicle workshop supervisor and his work entailed supervising the day to day repairs of motor vehicles. He had worked for 16 years for the 1st defendant. He was a holder of an Ordinary Diploma in Mechanical Engineering from Kenya Polytechnic, Automotive Option. He confirmed that motor vehicle KAG 418B was sold to the plaintiff by the 2nd defendant, who is the authorized dealer for the 1st defendant. He confirmed that when motor vehicle KAG 418B developed a problem, it was repaired by Associated Motors, Meru, one of their dealers. He stated that he learnt from the available records left by his predecessor, that the motor vehicle KAG 418B developed engine problems when one of the connecting rods that puncture the engine blocks broke, disabling the engine, which engine failure was attributable to the operator/driver. He testified that Associated Motors repaired the motor vehicle satisfactorily and it was handed over to the plaintiff but before it could cover 7000 kilometers, it developed another engine problem which involved the knocking noise as a result of one of the connecting rods that puncture the engine block.

35. From thence, the witness stated that the engine could not operate again. When it was opened, they found that piston No. 1 and 2 were extensively damaged and that the piston rod was also bent. DW1 stated that the vehicle was purchased when it was new and broke down at 3,175 kilometers and that it was repaired satisfactorily and given back to the customer. He stated that the engine failure was due to how the motor vehicle was being driven. He denied that the 1st defendant manufactured the vehicle. He stated that it only assembled the parts of the motor vehicles and that the engine came when it was fully assembled and what the 1st defendant did was to mount it on the chassis.

36. He also admitted that Ryce Motors the second defendant was only one of their dealers who distributed vehicles for the 1st defendant. He denied that the dealer was the agent for General Motors. Referring to Dealer's Sale and Service Agreement at page 19 of the bundle of documents for the defendant, DW1 stated that clause 3 of page 20 of the said document was clear that ***the dealer shall not represent itself as an agent or representative of General Motors Kenya. That the relationship between General Motors Kenya and the dealer is that of vendor and purchaser and not that of principal or agent or employer and servant.*** DW1 also stated that the parts were replaceable, according to the warranty, covering 40,000 kilometers or one year and denied that the warranty covered loss of user, pointing out to page 18 of the defendant's bundle of document on what is not covered by warranty as ***“loss of time, inconvenience loss of use of the vehicle or other consequential damages are not covered.”*** The defence witness maintained that the mode of failure of the suit motor vehicle was not covered by the warranty and urged the court to dismiss the plaintiff's suit.

37. In cross examination by the plaintiff's counsel, and on being shown the investigation report on page 1 and 2 of the bundle of documents for the defendants, DW1 stated that the investigation report revealed that the cause of failure of the suit motor vehicle was established to be due to the engine damaged pistons 1,2 and 3 and engine overrun which is usually caused by the driver's fault or negligence. He stated that the vehicle was repaired under “good will” policy and the plaintiff paid for

the repairs. He conceded that according to the dealer's obligation, repairs were to be done within reasonable time.

38. In cross examination by the 2nd defendant's counsel, DW1 stated that in the process of driving the motor vehicle, the driver may have done something not in line with what the vehicle had and that the driver must have overstretched the vehicle when accelerating.

39. The 2nd defendant did not call any witness. At the close of the defence hearing on 5th December 2012 before Honourable M. Angawa J, the parties' advocates consented to file and exchange written submissions.

40. The plaintiff filed theirs on 4th February 2013, the 1st defendant filed theirs on 24th January 2013 with the 2nd defendant filing theirs on 22nd February 2013.

41. In their written submissions, the plaintiff raised 4 issues for determination and relied on several authorities to persuade the court to find that the plaintiff had, on a balance of probabilities, proved their case against the defendants jointly and severally.

42. The four issues framed by the plaintiff for determination are

1. Whether the plaintiff entered into an agreement with the 2nd defendant as dealer and or agent of the 1st defendant.
2. Whether negligence was pleaded and proved .
3. Whether there was fundamental breach of agreement and/or implied warranty.
4. Whether the plaintiff is entitled to general and special damages.
5. On whether the plaintiff entered into any agreement with the 2nd defendant as dealer and/or agent of the 1st defendant, the plaintiff's counsel submitted that the agreement was in respect of the 2nd defendant acting as authorized dealer and not agent of the 1st defendant, as stipulated in the Dealer Sales and Service Agreement.

43. The plaintiff's counsel submitted that it was upon the 1st defendant to ensure that the parts fitted into the vehicles in the process of assembly were of good quality and fit for use. He submitted that the engine of the suit vehicle was defective and that the 1st defendant failed to establish and correct the problem before hand, leading to the plaintiff incurring losses due to engine failure after covering a distance of 3175 miles only.

44. With regard to the liability of the 2nd defendant, it was submitted that the latter proceeded to sell the motor vehicle to the plaintiff despite the defect. The plaintiff referred to the agreement under "Additional Responsibilities of the Dealer" at paragraph 4: 10 and submitted that it provided that:

" The dealer shall perform pre-delivery inspection and adjustments on each motor vehicle at its dealership premises and shall carry out any warranty repairs and campaign inspections and corrections and corrections as required by General Motors Kenya before delivery to the customer without charge to the customer."

45. Reference was also made to paragraph 9 of the warranty that obligated the 1st defendant to warrant products, parts and accessories which was limited to repair or replacement of products. It was therefore submitted that the 1st defendant is liable under the warranty as the owner and /or manufacturer of the suit motor vehicle and the second defendant is liable as the seller thereof of the suit motor vehicle for breach of warranty.

46. On the second issue of whether negligence was pleaded and proved, the plaintiff's counsel submitted that none of the defendants pleaded negligence or raised it as an issue for determination but only alleged it in the course of the hearing, to the effect that the suit vehicle was driven negligently as a result of which the engine failed. Further, that there was no such evidence of negligence and that PW2 was an experienced and skilled driver who could not have caused the suit vehicle's breakdown.

47. The plaintiff also submitted that according to DEX 1 the investigation report stated the cause of the vehicle breakdown to be engine overrun and not negligence or the driver's fault. Furthermore, it was submitted that the evidence of DW1 was hearsay since the maker of the investigation report was never called to testify. Further it was submitted that the fact that the 1st defendant proceeded to repair the vehicle under warranty meant that there was no negligence or driver's fault since PEX4 at page 18 stated "what is not covered under warranty" is among others, (1) conditions resulting from misuse, negligence, alteration accident or lack of performance of required maintenance services or overloading beyond that the applicable weight rating.

48. Reliance was placed on **Galaxy Paints Company V Falcon Guards Ltd[2000] e KLR** where the court of Appeal held that the issues for determination in a suit generally flow from the pleadings and the court may only pronounce judgment in the issues arising from the pleadings or such issues as the parties have framed for the court's determination.

49. In this case, it was submitted that negligence is not one of the issues before the court for determination and that it was only raised as an afterthought to defeat the cause of justice.

50. On the third issue of whether there was fundamental breach of the agreement and or implied warranty, the plaintiff's counsel submitted that pursuant to Section 16(a) and (c) of the sale of Goods Act, Cap 31, it was the 1st defendant's duty to ensure that the parts they imported and assembled were of merchantable quality and free from any defects, in material and form. It was submitted that the 1st defendant failed to ensure that the vehicle was fitted with an engine that was not defective and fit for the purpose and that as the defendants refused to repair the vehicle as per the warranty, they should reimburse the costs incurred in terms of damages.

51. On whether the plaintiff is entitled to special and general damages, the plaintiff relied on Section 53 and 54 (a) of the Sale of Goods Act which allows the buyer to maintain suit against the seller for damages for breach of warranty, together with interest.

52. On the claim for loss of user as a special damage, the plaintiff maintained that it was due, for reasons that the defendants failed to timeously carry out effective repairs to the vehicle for a total of 162 days as per PEX 4. Further, that the suit motor vehicle was for commercial use and lost shs 25,000 per day and that the plaintiff mitigated the loss by paying part of the repair charges and replacing the fundamentally defective engine to avoid any consequential loses. It relied on **County Council of Nakuru V John Macharia Thinga [2006] e KLR** where the court declined to award the respondent the total amount claimed as loss of user for failure to mitigate the loss he sustained subsequent to the wrongful confiscation of his goods but awarded loss of user for the days his goods were confiscated. More reliance was placed on **Mark Khan Transporters Ltd Vs Peter Mbugua [2009] e KLR** where the Court of Appeal found the appellant liable to the respondent in damages and awarded him shs 185,000 in respect of loss of user calculated at the rate of shs 5,000 per day for 37 days, the period the respondent's car was undergoing repairs. In the instant case shs 4,050,000 was claimed at shs 25,000 per day for 162 days.

53. On the claim for the cost of repairs, it was claimed that shs 1,370,360.50 towards repair costs had not been disputed by the defendants, which costs included cost of replacement of the defective engine and that the plaintiff paid for the repairs because the defendants took too long to act as per the warranty.

54. On the claim for general damages for breach of contract, the plaintiff relied on Section 53(1) (b) of the Sale of Goods Act and maintained that equity will not be suffered without a remedy. Reliance

was placed on **Great Lakes Transport Company (U) Ltd V Kenya Revenue Authority[2009] e KLR** where the Court of Appeal assessed and awarded general damages with interest to the appellant. In this case, it was submitted that the court should consider the inconvenience caused to the plaintiff by the defendants and award it shs 5,000,000 general damages for breach of warranty.

55. The 1st defendant filed its submissions on 24th January 2013. It was the contention by the 1st defendant that it did not manufacture the malfunctioned engine and therefore it could not be held liable for the alleged fundamental engine defect. Further, that the manner in which the driver operated the motor vehicle must have caused the defect and or engine breakdown.

56. The 1st defendant also submitted that the plaintiff failed to prove that the 2nd defendant was an agent of the 1st defendant and that from the documents produced, the 2nd defendant was an independent contractor. The 1st defendant prayed for dismissal of the plaintiff's suit with costs.

57. The 2nd defendant filed its submissions on 22nd February 2013 and submitted on the four issues framed by the plaintiff.

58. On the 1st issue of whether the plaintiff entered into an agreement with the 2nd defendant as dealer/and /or agent of the 1st defendant, It was contended that there was no formal agreement between the plaintiff and the second defendant but receipts and handing over certificate, which documents do not set out terms of the agreement or arrangement between the plaintiff and the 2nd defendant. It was also submitted that DEX1 was an agreement between 1st and 2nd defendant which was a Dealer Sale and Service Agreement whose effective date was 17th November 1997 whereas the date the plaintiff bought the suit motor vehicle was 29th August 1995 hence the defence exhibit was irrelevant and cannot assist both the plaintiff and 1st defendant.

59. On whether negligence was pleaded and proved, the 2nd defendant submitted that DW1 was an expert who had worked with the 1st defendant company for a long time and that as the actual maker of the report had retired, that expert evidence cannot be wished away, as opposed to PW1 and PW2 who knew nothing about the engines and how they work and operate. Further, that in any case, the 2nd defendant was a seller and not agent, which former the plaintiff pleaded hence it cannot run away from its own pleadings which binds it.

60. On whether there was fundamental breach of the agreement and or implied warranty, it was submitted by the 2nd defendant that it inspected the vehicle and did all the preliminaries before handing over the suit motor vehicle to the plaintiff.

61. On whether the plaintiff was entitled to special damages, it was submitted that the receipts produced in court did not bear revenue stamps hence not admissible in law and that as regards loss of user, it had not been shown that at the time the vehicle stalled, the plaintiff had any contract with any company and or that because the vehicle had stalled, he lost she 25,000 per day.

62. In all, the 2nd defendant urged the court to find that the plaintiff had not proved its case to warrant any award of special damages or general damages and that therefore this suit should be dismissed with costs.

Determination

63. I have considered the pleadings, evidence adduced in court both *viva voce* and documentary and the rival submissions filed by the respective parties' advocates. I have also considered the authorities cited and the statute law relied on by the plaintiff's counsel.

64. In my humble view, and from the pleadings and evidence adduced, the following issues emerge for

determination:

1) Whether, on the plaintiff's pleadings and evidence, the suit motor vehicle contained a fundamental manufacturing defect or was the defect due to the negligence of the plaintiff's driver in the manner in which he drove the suit motor vehicle?

2) Whether the plaintiff is entitled to special damages and general damages for breach of contract as pleaded in the plaint.

3) What orders should this court make?

4) Who should bear the costs of this suit?

65. On the first issue the plaintiff claimed that the motor vehicle broke down within one month after he bought it from the dealer and despite the initial repairs, it continued breaking down until it was found that the engine had failed which prompted the plaintiff to replace the engine.

66. In the plaintiff's view, the engine failure was due to a fundamental defect which was the manufacturer's defect. On the other hand, the 1st defendant contended in its defence and evidence of DW1 that the said motor vehicle was negligently driven by the plaintiff's driver and as a result, the engine failure occurred. According to DW1 who testified and produced the report of his predecessor who inspected the suit motor vehicle, the engine failure was attributed to the driver. However, the defence exhibit 1 at page 1 and 2 stated that the cause of the breakdown of the suit motor vehicle was engine overrun and not the driver's fault. According to the plaintiff, engine overrun is a manufacturer's fundamental defect and that furthermore, the defendant only introduced the issue of the driver's negligence in the evidence and not in the pleadings. The plaintiff maintained that parties are bound by their pleadings and that no particulars of negligence were given.

67. I am in agreement with the plaintiff's submission that to maintain an action in negligence, the defendant must, first, have pleaded negligence and given particulars thereof. In the instant case, the 1st defendant only introduced the issue of negligence in its evidence of DW1 and in the submissions. Furthermore, the 1st defendant's exhibit 1 which is the vehicle inspection report did not attribute engine overrun to the driver's fault. It is for that reason that I would wholly agree with the plaintiff's counsel's submissions that a party is bound by their pleadings and cannot be permitted to adduce evidence or submit to prove an issue that was never pleaded. To allow that to happen would be to encourage trial by ambush since the plaintiff did not have an opportunity to examine the unpleaded facts and provide an appropriate defence.

68. Furthermore, submissions are not substitute to evidence, however well choreographed they may be. Secondly the defendant, in order to sustain a plea of negligence, must show that the driver owed a duty of care and that he breached that duty as a result of which the plaintiff suffered loss and damage. The defendants relied on the report DEX1 prepared by another person who was said to be a motor vehicle expert yet no basis was laid why that expert could not come to court and testify in support of his report, which, though admitted in evidence, does not state that the engine overrun was due to the driver's fault. Nobody has explained to the court even in the respective parties' submissions what an engine overrun is all about.

69. In the end, I find that there was no basis for claiming that the engine failure was due to the plaintiff's driver's negligence or fault and I dismiss that assertion by the defendant.

70. The second question for determination under issue No. 1 is whether on the evidence available, the suit motor vehicle contained a fundamental manufacturer's defect at the time of sale and delivery to the plaintiff. The plaintiff in its pleadings and evidence claims that the terms and conditions of the sale agreement contained implied terms and conditions that the said motor vehicle was of merchantable quality and that the plaintiff was entitled to a six month and or 40,000 kilometers warranty of full indemnity from the defendants for any defects, repairs and loss arising in respect of the

said motor vehicle and in the ordinary course of their operation. The plaintiff also claimed that in breach of the above implied terms and conditions, the defendants sold them a motor vehicle that was not fit for the use for the purpose for which it was sold; that the vehicle was not of merchantable quality; it did not satisfy terms and or conditions of the warranty; the vehicle had a fundamental factory defect; and that the defendants failed to indemnify and or compensate the plaintiff for loss and damage in accordance with the terms of the warranty and or agreement.

71. The plaintiff contended in its submissions that the 1st defendant failed to ensure that the parts imported and assembled were of merchantable quality and free from defects in material and form, and that the 2nd defendant also breached the agreement by selling to the plaintiff the said motor vehicle knowing the same was not fit for the intended purpose.

72. The defendants vehemently denied the allegations by the plaintiff, although at the end the defendant did not call any evidence to rebut the plaintiff's averments.

73. It is trite law that he who alleges carries the burden of proving that which he/she alleges. The plaintiff relied on Section 16 of the Sale of Goods Act on the implied warranties and maintained that the second defendant did not carry out pre-delivery inspection and adjustments on the motor vehicle at its dealership premises. Section 16 of the Sale of Goods Act Cap 31 Laws of Kenya provides that:

“ 16 No implied warranty as to fitness, except in certain cases.

Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality of fitness for any particular purpose of goods supplied under a contract of sale, except as follows;

a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, as to show that the buyer relied on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not,) there is an implied condition that the goods shall be reasonably fit for that purpose: provided that in case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

b) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;

c) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

d) An express warranty or condition does not negative a warranty or condition implied by the Act unless inconsistent therewith.”

74. What is striking about the plaintiff's submissions and reference to the above provision of the Sale of Goods Act is that counsel only isolated and cited Section 16(a) and (c) of the Act as being relevant to this case and maintained that it was the 1st defendant's duty to ensure that the parts they imported and assembled were of merchantable quality and free from any defects, in material form, while the 2nd defendant was faulted for breach of the agreement by selling the suit vehicle to the plaintiff yet the same was not fit for the purposes for which it was intended.

75. However, a plain reading of the whole of Section 16 of the Sale of Goods Act as reproduced

above clearly shows that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, and what the plaintiff isolated are the exceptions to that rule under Section 16 of the Sale of Goods Act on **‘No implied warranty as to fitness, except in certain cases.’**

76. The question that this court must therefore answer is whether any of the exceptions under Section 16 of the Sale of Goods Act applied to the plaintiff's case and therefore the agreement relied on by the plaintiff when he purchased the suit motor vehicle from the 2nd defendant dealer. For example, did the plaintiff rely on the defendant's skill or judgment in purchasing the suit motor vehicle and was there evidence that the defendants dealt with that particular engine which overrun or was that engine of the description which was in the course of the defendant's business to supply to the plaintiff? The other question is, was there evidence that the defendants dealt with goods of description that was sold to the plaintiff and thirdly, was there evidence led in respect of trade usage as to imply a warranty or condition as to the quality or fitness of the goods for a particular purpose in the circumstances under which the sale agreement between the buyer and the seller was concluded?

77. In other words, this court would only imply a condition in the agreement between the plaintiff and the defendants when such a condition could fall under any of the known exceptions to the legal provision under section 16 of the Sale of Goods Act that in a contract of sale, there is no implied warranty or condition as to the quality or fitness for any particular purpose of the goods supplied.

78. In the instant case the court has to examine the new vehicle warranty and policy on owner service document produced as PEX 4 by the plaintiff in order to determine whether there was an express warranty and if not, then it will imply, in accordance with Section 16 of the Sale of Goods Act.

79. In the said Maintenance and Warranty Booklet document PEX4 issued by the 1st defendant on **“what is warranted and for how long”** It is stated as follows:

“ Each new truck or chassis, including all equipment and accessories thereon manufactured or supplied by General Motors Kenya Ltd, sold by an Authorized Dealer is hereby expressly warranted by Dealer, as seller thereof and not as agent of the manufacturers to be free from defects in material and workmanship under normal use and service, and on terms set out below.

***Dealer's obligation under this warranty (except as to diesel engines is that for a period of 12 months from the delivery or 20,000 kilometers (12,000 miles), whichever first occurs, the dealer will repair any defective or malfunctioning part of the vehicle except tyres (plus tubes where applicable) or batteries which are warranted separately by the respective manufacturer. The Diesel engines manufactured by the Detroit Diesel Allison Division, Vauxhall Motors Ltd, Isuzu Motors Ltd and General Motors Truck and Coach Division, which are original equipment in vehicles supplied by General Motors Kenya Ltd; are warranted to the retail purchases for a period of 12 months from the date of delivery or before such vehicle has been driven 40,000 kilometers (25,000 miles) whichever shall first occur. Dealer's obligation under this warranty however, is limited to repair or replacement of any defective or malfunctioning part of such motor vehicle or chassis which shall within the aforementioned time and mileage limitation, be returned to dealer at dealer's place of business and which dealer's examination shall disclose to it's satisfaction to have been defective”.*(emphasis added).**

80. The said exhibited document also sets out what is not warranted namely:

- 1) Conditions resulting from misuse, negligence, accident, or lack of performance or required maintenance service or overloading beyond the applicable weight rating;
- 2) The replacement of maintenance items (such as spark plugs, ignition points, positive crank case ventilator valve, filters, brake and clutch lining) made in connection with normal

maintenance services;

3) Loss of time, inconvenience, loss of use of the vehicle or other consequential damages of whatever nature;

4) Any vehicle on which the odometer mileage has been altered and the vehicle's actual mileage cannot be readily determined.

5) Special bodies, body conversions or equipment not manufactured or supplied by general motors Kenya Ltd;

6) Any part of the vehicle which fails or malfunctions as a result of improper conversion or installation of special bodies or equipment by other manufacturers or suppliers;

7) Normal deterioration of soft trim and appearance items due to wear and exposure”

81. The Dealers obligations are also stated in the exhibited document as well as the owners obligations as follows:

“ Dealer’s obligations

Repairs qualifying under this warranty will be performed by any authorized dealer handling the owner’s make of General Motors vehicle within a reasonable time following delivery of the vehicle to the Dealer’s place of business.

82. The owner’s obligations are listed as follows:

1. Service adjustments are considered to be items of normal maintenance resulting from use and are to be paid for by the owner;

2. The vehicle must be delivered to the dealer’s place of business during regular business hours for performance of warranty repairs or service adjustments.

83. The exhibited document also exempts the General Motors Kenya Limited and the Dealers from any consequential damages which may result from any breach of this warranty.

84. I must clarify that although the plaintiff blamed the 2nd defendant for failure to carry out pre-delivery inspection to ensure that the motor vehicle was fit for the purpose for which it was intended and as to its merchantability, PEX 2 – the Handing over Certificate dated 29th September 1995 and as produced by the plaintiff in support of its case is clear that the vehicle was inspected and an inspection report prepared and given. It is therefore clear to my mind that the allegation that there was no pre-delivery inspection was not correct and I reject that averment.

85. Further, from the maintenance and warranty booklet issued by the 1st defendant it is clear the defendants expressly warranted the vehicle to be free from defects in material and workmanship under normal use and service on the listed terms. However, there was no warranty as to the merchantability or fitness for the purpose for which the vehicle was intended . Such warranty would only be implied if the buyer relied on the skill and judgment of the seller or dealer or where the vehicle(goods) were bought by description from a seller dealing with such goods. The plaintiff did not adduce any evidence to show that it relied on the skill and judgment of the defendants or that the suit motor vehicle was bought by description and for a specific purpose.

86. In my humble view, the plaintiff was under a duty to check if there were any defects before using the motor vehicle for its intended purpose. There is no dispute that the said motor vehicle broke down after covering 3175 kilometers. According to the warranty document as exhibited, if the engine malfunctioned during the duration of the warranty, then *the buyer would deliver it to the dealer for*

repair or replacement of the diesel engine after the dealer satisfied itself that the part was defective. In this case, there was evidence that after the vehicle broke down, the same was delivered to the 2nd defendant dealer for repairs, and that it was repaired but that and when it returned to the buyer, it broke down again on 23rd October 1995.

87. The 1st defendant confirmed that the vehicle had engine failure due to engine overrun and that when the vehicle was delivered to the plaintiff, it broke down at mileage 10,247 and on 13th February 1996, the report was the same as that of engine failure due to suspected engine overrun. What is missing from both the plaintiff and defendant's evidence is what an engine overrun is. This is information which could have been explained by an independent motor vehicle or automotive expert. The expert would, in my view be in a position to explain to this court whether engine overrun is a fundamental manufacturer's defect in a motor vehicle or can be caused by normal usage of the motor vehicle. In the absence of the independent expert's evidence as to whether engine overrun in the suit motor vehicle was due to a manufacturer's fundamental defect, or due to other causes, this court would not be in a position to find that the engine failure was due to a fundamental manufacturer's defect. To find otherwise would be speculating the meaning of technical terms used in a different profession and setting. Furthermore, DW1 did not explain to the court what that engine overrun was. That being the case, it was upon the plaintiff to call for such independent expert to explain to the court the meanings of such technical terms since DW1 did not even inspect the suit motor vehicle.

88. It is also trite law that he who alleges must prove. Sections 107,108 and 109 of the Evidence Act Cap 80 Laws of Kenya are clear that:

107(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.

108: The burden of proof in a suit or proceeding lies in that person who would fail if no evidence at all were given on either side.

109: the burden of proof as to any particular fact lies on the person who wished the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

89. I reiterate that in the instant case, it is the view of this court that it was incumbent upon the plaintiff to prove that the engine breakdown was due to a manufacturer's fault. The plaintiff was entitled to hire the services of an independent expert in engines of the type of the suit vehicle to examine it and determine whether the engine was fundamentally defective which defect could be attributed to the manufacturer's fault, since there is ample evidence that there was pre-delivery inspection by the defendants. What this court notes is that the plaintiff left it to the defendants to prove that the defects in the engine were not manufacturer's fault and secondly, the plaintiff also left it to this court to determine what would be the probable cause for the engine overrun.

90. In my humble view, the defendant's inspection report having shown that the engine failure was due to engine overrun, which report the plaintiff had before this suit was instituted as there was no contrary evidence, the plaintiff should have obtained an automotive expert's opinion as to whether that overrun of the engine was due to a manufacturer's fundamental defect. In the absence of that crucial evidence of an automotive expert, this court is unable to find that the defect in the engine of the suit motor vehicle was a fundamental or material manufacturer's defect which the defendants knew or ought to have known prior to the delivery of the suit motor vehicle to the plaintiff. I find that the plaintiff has failed on a balance of probabilities to establish that the suit motor vehicle had a manufacturer's defect.

91. On whether the plaintiff is entitled to special and general damages for the costs of repairs and

loss of user of the suit motor vehicle, the plaintiff maintained in its evidence and submissions that loss of user occurred as a result of failure on the part of the defendant to carry out timeous and effective repairs to the motor vehicle. The plaintiff also claims that the defendants should be liable for grounding the suit motor vehicle in the garage for a total of 162 days. It was submitted that the plaintiff avoided consequential loss arising from loss of user by mitigating its loss. It claimed for shs 4,050,000 at the rate of shs 25,000 per day for 162 days.

92. The plaintiff produced some contracts for purposes of proving loss of user in PEX 7, a KTDA fertilizer Transportation Agreement dated 30th July 1996 wherein the suit vehicle is stated to have earned shs 35,000 per day; and another vehicle earned it a net of shs 66,000 contracted with Church Ecumenical in Sudan. It is dated 21st July 1997. The plaintiff also claimed for shs 1,370,360.50 towards repair charges and replacement of a defective engine, which repairs it paid because the defendants allegedly took too long to repair and replace the defective engine as required under the contract.

93. The law regarding special damages is that they must be specifically pleaded and strictly proved by way of evidence. In the case of **David Bagaine V Martin Bundi [1997] e KLR**, the Court of Appeal while addressing the issue of loss of user stated as follows:

“We must and ought to make it clear that damages claimed under the title “loss of user” can only be special damages. That loss is what the claimant suffers specifically. It cannot in the circumstances be equated to general damages to be assessed in the standard phrase “doing the best I can.” The damages as pointed out earlier by us must be strictly proved. Having so erred, the learned Judge proceeded to assess the same for a period of nearly three years. There the learned judge seriously erred. Damages for loss of user of a chattel can be limited (if proved) to a reasonable period which period in this instance could only have been the period during which the respondent’s lorry could have been repaired plus some period that may have been required to assess the repair costs (emphasis added).

94. The plaintiff in the instant case claimed that the suit motor vehicle broke down on 13th October 1995 and stayed grounded at Associated Motors in Meru to 2nd December 1995. PW1 testified that the vehicle again broke down on its way to Nairobi and it remained in the workshop until 14th April 1996.

95. For the court to award damages for loss of user, it was necessary for the plaintiff to prove the loss specifically suffered between 13th October 1995 and 14th April 1996. Albeit the warranty provided that repairs shall be *carried out within a reasonable period of time*, and although the vehicle was out of use for 162 days, the plaintiff in this case produced contracts which were entered into post the 162 days, after the motor vehicle had been repaired and the engine replaced. The plaintiff ought to have adduced evidence showing that prior to the motor vehicle breaking down, it used to fetch an amount of money which money could not be earned during the period when the vehicle was undergoing repairs or grounded.

96. In **SAGOO v DOURADO (1983) KLR page 366** the court held **inter alia** as follows:-

“...in contracts of all types, time will not be considered to be of essence unless:-

a. The parties expressly stipulate that conditions as to time must be strictly complied.

b. The nature of the subject matter or surrounding circumstances show that time should have been considered of the essence; and/or

c. A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence....”

97. Similarly in the case of **BIR SINGH v PARMAR** (1972) EA. 211, Law JA at page 212, the Appellate Court held as follows:

“This appeal concerns an agreement for the sale of land, a condition of which was that a deposit was payable. The agreement did not specify that the time was of the essence in connection with the payment of the deposit, and the judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in 8 Halsbury’s laws, 3rd Edn. Pp.164-165, and held that in the absence of an express stipulation or clear implication that time in relation to the payment of the deposit was of the essence of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The position would of course have been different if the vendor had given notice making time for payment of the deposit of the essence of the contract and specifying a reasonable period for payment, but this he did not do. He preferred to treat the contract as not binding on him but I agree with the judge that in these circumstances the contract continued in force.(emphasis added).

98. In the case of **Aida Nunes vs J.M.N Njonjo & C. Kigwe (1962) EA page 89**, the court stated that:

“when time has not been made the essence of a contract, it is clear that at least in contracts for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time the essence..... in the circumstances the respondents could have avoided the agreement only if they made time the essence of the contract by fixing a reasonable time within which the sublease must be granted coupled with a notice that, if not then granted the agreement would be avoided and this they failed to do.”(Emphasis added).

99. In the instant case, the warranty only provided that the vehicle would be repaired within a reasonable time. No specific timeframe was fixed for effecting repairs and neither did the plaintiff give to the defendants notice that if repairs are not effected within a given timeframe then the agreement or contract would be avoided.

100. Furthermore, PEX7 and PEX 8 are general transportation agreements which were not specific to that problematic motor vehicle. The plaintiff also failed to demonstrate mitigation of loss in that there was no evidence that during the 162 days, it hired another vehicle to perform the work which the suit motor vehicle was or could have performed, since from evidence on record, the vehicle was to be hired out to transport goods. General agreements giving examples of earning capacity of motor vehicles similar in capacity as KAG 418B is not evidence of loss of user of that particular motor vehicle especially when those general agreements relate to the period post the repair period and not during the repair period.

101. In addition, loss of user claim was expressly excluded from the warranty. The law is clear that courts cannot re-write contracts between parties. The court only enforces/interprets the contracts to give effect to the intentions of the parties to the agreement and not to deviate from the intention of the parties to a contract. In the case of **GATOBU M’IBUUTU KARATHO v CHRISTOPHER MURIITHI KUBAI [2014] eKLR** the court cited with approval the decision of the Court of Appeal in **NATIONAL BANK OF KENYA LTD V PIPEPLASTIC SAMKOLIT (K) LTD AND ANOTHER (2002) EA 503** where it was stated that:-

“This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause.

102. It is for the above reasons that I find that the claim for loss of user though specifically pleaded, was not strictly proved by the plaintiff to the required standard of balance of probabilities.

103. On the issue of special damages amounting to shs 1,370,360.50 for the cost of repairs on the suit

motor vehicle, I have already found that the plaintiff did not produce any evidence of a motor vehicle expert evidence to prove and or to determine whether the defect in the engine was a manufacturer's fundamental defect or whether it was due to normal use of the motor vehicle. In support of the prayer for repair costs, the plaintiff produced PEX 5 which is a reconciliation statement showing payments for motor vehicle KAG 418B from Associated Motors Ltd and several receipts from automotive dealers produced as PEX 6. The question that I must answer is whether the evidence adduced sufficiently proved damages suffered by the plaintiff.

104. According to the plaintiff, the suit motor vehicle broke down during the warranty period therefore the defendants ought to have repaired the motor vehicle according to the warranty, free of charge, but that the defendants took too long to decide on whether or not they should repair it that is why the plaintiff repaired the motor vehicle. However, from the exhibited receipts produced by the plaintiff showing repair charges, some receipts were in the name of the plaintiff making no reference to what motor vehicle was or had been repaired.

105. The plaintiff's witness PW1 also conceded in cross examination that the receipts of 14th January 1998 and May 12th 1997 were included in the bundle of documents by mistake and PW1 also conceded in the cross examination that receipts not bearing the plaintiff's name or motor vehicle KAG 418B would not relate to repairs to the suit motor vehicle. The court also notes that whereas the plaintiff's oral evidence and pleadings seek for repair costs incurred to bring the motor vehicle into operation between 13th September 1995 and April 1996, some receipts in PEX 7 are for 14th January 1998, 12th May 1998, 1st October 1997, 25th November 1996, 10th September 1997, 19th January 1998, 9th September 1996, 1st October 1997, 11th May 1998 which were issued after the 162 days. It is not clear whether in the period those receipts were issued, the suit motor vehicle was still in the warranty period, that is, whether it had been driven less than 40,000 kilometers, even if it was before expiry of 12 months, since the warranty provides that the engine was warranted to the first purchaser for a period of 12 months from the date of delivery of the motor vehicle, or before such vehicle has been driven 40,000 kilometers whichever shall first occur.

106. I have no doubt in my mind, on the evidence adduced that receipts issued after 29th September 1996 were outside the 12 months period hence outside the warranty period. On the other hand, I am equally persuaded that the plaintiff has not proved that receipts issued after April 1996 and before 29th September 1996 were within the 40,000 kilometers warranted since they do not reflect the suit motor vehicle's mileage for that period.

107. In addition, would those receipts for the purchased parts be prove of repair costs to the required standard for this court to award damages for repair costs? I think not. I am fortified by the decision in the case of **Nkuene Dairy Farmers Co-operative Society Ltd & Another V Ngacha Ndeiya [2010]** where the Court of Appeal observed that:

“ In our view, special damages in a material damage claim need not be shown to have been actually incurred . The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the value of repairs was given with some degree of certainty.”

108. In the instant case, the plaintiff only claimed for cost of repairs and placed a value on it. Its pleadings and evidence did not specify the exact repairs that were undertaken. In my view, the actual damages to the motor vehicles were never ascertained and pleaded with specificity and no evidence was adduced to show with precision the exact repairs and the cost assigned to each item repaired. And as earlier stated, the plaintiff did not engage a motor vehicle expert to assess the specific damages and assign a value to each item requiring repair. The plaintiff only produced receipts for purchase of various automotive parts, which is not sufficient evidence of the specific damage to the motor vehicle. I am fortified by the decision though persuasive, in the case of **Patcliffe V Evans [1892] 2 QB 524(CA)**

where the appellate court stated:

“ In all actions accordingly, on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As such certainty and particularity must be insisted on, both the pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

109. According to the plaintiff, the suit motor vehicle broke down and required parts to put it back to its working condition. Nonetheless, no motor vehicle expert was called upon to examine the vehicle and identify the specific parts that required replacement and a specific estimated cost placed on those parts. In **David Bagaine V Martin Bundi**(supra) the Court of Appeal in considering the issue of cost of repairs stated as follows:

“ No evidence by any expert was called to prove the exact repair costs. Nor was there any evidence to show what was the pre-accident value of the lorry and the salvage value(if the lorry was indeed a wreck) There was nothing to show if the sum of kshs 277,750 could have properly been spent to put the lorry back on the road. It is for the claimant to prove his damages. In this case, the claimant simply produced to court an estimate. He said he had not at all repaired the vehicle as he could not afford it. This seems farfetched. If he was earning, as he said, she 5,000 to shs 9,000 a day he could easily have repaired the vehicle and put it back on the road. The best evidence in this respect could have been supplied by an automobile assessor. But as we have no such evidence we have no choice but to also set aside that award in its entirety. We are not saying that the respondent did not suffer damage. We are saying he did not prove it” (emphasis added)

110. In **Omari Gulea Jana V BM Muange [2010] e KLR** Okwengu J (as she then was) held as follows though persuasively on a matter of similar nature:

“Although it was alleged that motor vehicle KAC 996F was damaged, the assessment report was not produced in evidence. This was crucial evidence as without the assessment report it was impossible for the court to establish the damages to the motor vehicle on the estimated costs of repairs. The fact that UAP Insurance paid a sum of kshs 271,874 to Unity Auto Garage is not sufficient to establish that payment was in respect of repairs to the damage to motor vehicle KAC 996F arising from the accident subject of this suit. I find the evidence adduced by the respondent was inadequate to strictly prove his claim. The trial magistrate appears to have been swayed by the fact that the appellant did not call any evidence. The trial magistrate apparently lost sight of Section 107 of the Evidence Act which placed the burden of proof squarely upon the respondent. Her judgment cannot be supported.

111. B. Thurania J in **Gachanja Muhori & Sons Ltd & another V Catholic Diocese of Machakos [2014] e KLR** in determining an appeal where the appellant contended that there was no proof of repair works done and or that the respondent's motor vehicle was damaged, in a case where no motor vehicle assessor was called to give evidence, the learned judge held that:

“There was nothing to show if the sum stated by the respondent was properly spent to put the motor vehicle back on the road. The best evidence in this case would have been supplied by the motor vehicle assessor.....(see David Bagaine V Martin Bundi CA Nairobi 283/1996)without the motor vehicle assessor's report, it is very difficult to tell what duration it would have taken to repair the motor vehicleThe award of loss of user for a period of 90 days was therefore not based on any cogent evidence.”

112. The plaintiff in this case relied on the case of **Wilfred Irungu Ndirangu V CMC Motors**

Group Ltd[2012] e KLR which though relevant to this case, but in that case, it is clear that the plaintiff claimed for replacement of a new motor vehicle and in the alternative, that a new engine be fitted together with pressure plate system, cooling and gear transmission system. In addition, the plaintiff in the above cited case enumerated the defects in the motor vehicle (see page 4 of 15 of the said judgment. He also produced job cards for the repair works carried out on the suit motor vehicle unlike in the present case where as I have stated, no evidence of the exact repair works carried out was presented before the court for consideration. In **Kenya Industrial Estate Ltd V Lee Enterprises Ltd [2009] KLR 135** it was stated (as approved by the Court of Appeal in **CA 310/2005 Abdi Ali Dere V Firoz Hussein Tundai & 2 Others [2013] e KLR** that:

“Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished. The cost of repair is prima facie the measure of diminution in value of goods and therefore the correct measure of the loss suffered. where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of goods, that is the market value at the time and place of destruction.”

113. This court has also not lost sight of the fact that although the plaintiff was required to take his purchased motor vehicle for service at 1000 kilometers, as per the Maintenance and Warranty Booklet PEX 4, there is no evidence that the plaintiff ever took the suit motor vehicle for service at 1,000 kilometers.

114. In addition the PEX 5 – Reconciliation Account issued by Associated Motors Limited is undated and only provides for date, invoice Nos and amount while giving credit for payments made. The exhibit does not provide a detailed account of the exact repairs effected on the suit motor vehicle.

115. On the claim for general damages for breach of contract, the plaintiff averred that the defendant owed it a duty of care to ensure repairs were done to the motor vehicle within a reasonable time and to the satisfaction of the plaintiff. The plaintiff further submitted that taking all factors into account, an amount of shs 5,000,000 will be reasonable under the circumstances.

116. It is now settled law that the purpose of an award of damages is to put the plaintiff in the position he would have been, had the breach not occurred and the contract had been performed.

117. In the instance case the plaintiff had pleaded general damages for breach of contract. Mere breach of contract in my view does not result into an award of general damages. Such damages must be proven by evidence. In this case, no such damages have been proved in view of my finding that there was no specific period of time stipulated for effecting repairs and neither did the plaintiff give notice to the defendant giving a specific period for repairs and in default the contract be avoided. Further, there was no warranty specified in section 16 of the Sale of Goods Act which was breached by the defendants.

118. In the end, I find that the plaintiff failed to prove its claims against the defendants jointly and severally on a balance of probabilities. I dismiss the suit herein.

119. Costs are in the discretion of the court and in any event to the successful party. In this case, the plaintiff has lost his claim, not because it did not suffer any damages but because it was unable to prove on a balance of probabilities to the standard required by law. This suit has been lying in court since 1996. It is now 20 years and 48 days old, for no fault of the parties, who had a legitimate expectation to get justice expeditiously but lost out on each occasion following either the transfer or demise of the judge handling this case. I neither saw nor heard the witnesses as they testified and even after I took over the case which had been heard by not less than 5 judges, it was not an easy task making head or tail of the proceedings. I have spent a considerable period of time understanding what my predecessors scribbled. Proceedings were typed severally with some judges simply edging themselves from the case for one reason or the other. I have done my best in arriving at the decision that I have made. In the premise, I would hesitate awarding costs to the defendants and I therefore order that each of the parties bear their own costs of this suit.

Dated, signed and delivered in open court this 18th day of August, 2016.

R.E.ABURILI

JUDGE

In the presence of:

Mr Mwangi h/b for Omotii advocate for the plaintiff

Ms Kuria advocate for the 1st defendant and h/b for Mr Otenyo for the 2nd defendant

Court Assistant: Adline