



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO.137 OF 2001**

**MUNICIPAL COUNCIL OF THIKA .....APPELLANT**

**VERSUS**

**ELIZABETH WAMBUI MUKUNA.....RESPONDENT**

**JUDGMENT**

This is an appeal from the Judgment of the Principal Magistrate's Court, Thika (Hon. Hellen Omondi) delivered March 26, 2001 in CMCC 243/93.

The Judgment arises out of an action for breach of contract filed by the Respondent (Plaintiff in the lower Court) for "general damages and loss of user" arising from her unlawful eviction by the Appellant (Defendant).

The lower Court found the eviction to be unlawful and awarded her

1. shs75,000/= for "loss of user" and
2. shs40,000/= for "general damages"

The Appellant's contention at this Appeal is that neither of the above awards should have been made because the claim for loss of user, being special damages, was neither pleaded nor proved; and there is no such thing as "general damages" for breach of contract.

The Respondent's argument is that the lower court found as a fact that the eviction was unlawful, and damages was the appropriate remedy; and that the Court also found that both the items were properly pleaded and proved.

Both the original Complaint dated May 28, 1993 and the Amended Complaint dated July 29, 1993 make absolutely no reference, in the pleadings, to a claim for loss of user, and to "general damages". The Complaint is a short one-page document that has only one pleading – "that the suit premises be re-opened and that the Plaintiff's household goods be returned" (para. 6). That prayer was overtaken by events, and abandoned. The only reference to general damages and loss of user is in the prayer section of the Complaint, which states that the Plaintiff prays for "general damages suffered by the Plaintiff and loss of user of the suit premises for 14 days."

The issue before this Court is whether the lower court erred in awarding the aforesaid two items. Let me consider both the items separately.

1. General Damages for breach of contract

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 in had the breach not occurred and the contract had been performed. The law of contract does not seek to punish; its purpose is compensation, and compensation alone (see Atiyah, on Law of Contract),

There can be no general damages for breach of contract (**see Joseph Ungadi Kedera v. Ebby Karai (C.A. 239/97 Kisumu)**). The usual remedy for breach of contract is damages to compensate the aggrieved and put him in the same position that he would have been if the contract had been performed (**see British westinghouse Electric Co. v. Underground Electric (1912) AC 673**)

It was, therefore, wrong for the lower court to award general damages,” and the same is set aside.

## 2. Loss of User

The Claim for loss of user is a claim for special damages (**see: David Bagine V. Martin Bundi (CA 283/96, Nairobi)**). It must be specifically pleaded and proved (**see Coast Bus Services Limited V. Sisco & Others (CA 192/92 Nairobi)**) Neither of these two claims were pleaded. In Mbaka Nguru V. James G. Rakwar (CA 133/98, Nairobi), the Court of Appeal said:

“It will suffice to say that the Plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the absence of any pleading as to damages claimed under this head we are constrained to disallow the whole of that award and we set it aside wholly.”

According, and for reasons outlined, this appeal is allowed, with costs, and the Judgment of the lower Court is set aside.

**Dated and delivered at Nairobi this 26th day of April, 2004.**

**ALNASHIR VISRAM**

**JUDGE**