



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO.171 OF 2001**

**KLAUS SCHWILK ..... PLAINTIFF**

**- VERSUS -**

**EMMANUEL KARISA MAITHA ..... DEFENDANT**

**JUDGMENT**

The Plaintiff is a German. On 4th April, 2001 he filed the plaint herein against the Defendant claiming Shs.1,316,754.60, General damages for loss of use of BMW motor vehicle and Yamaha motor cycle, interest and costs.

The claims are made on the grounds that on 31.5.1995 the Plaintiff advanced the Defendant Sh.105,000/- in respect of registration formalities for the Plaintiff's Yamaha motor cycle which Defendant failed to do. Also on 30/6/95 the Plaintiff lent a sum of Shs.300,000/- to be refunded in one month's time plus interest at the rate of 10% per month. Only Sh.30,000/- was paid for the first month. No further payment was made of either principal or interest.

Again on or around November 1995 the Plaintiff advanced to the Defendant a further sum of Shs.550,000/- by way of loan to purchase a Mercedes Benz in Germany. In December 1995 Sh.11,940 was advanced to Defendant for Defendants use. Further the Defendant undertook to carry out complete importation clearance formalities for plaintiff's BMW which Defendant failed to do. The Plaintiff had to pay penalties for late clearance amounting to Shs.240,935.55. As a result of length of detention in the port the BMW required some repairs which the Plaintiff had to pay for in the sum of Shs.108,879.10.

Although the Defendant was served with summons to enter appearance he failed to enter appearance and upon request judgment was entered in the sum of Shs.1,316,754.60 with interest on 16th May, 2001.

Thereafter formal proof was fixed for 19th February, 2002.

The Plaintiff proceed to proof damages as prayed in paragraph four of the plaint namely loss of use of his motor cycle – Yamaha. The Exhibit 2 is a receipt of payment to Defendant of Shs.51,056/- being port charges Agency fees and other charges specified thereon. On 11th December 1996 nothing happened afterwards. The container was not delivered to him in Malindi for 11 ½ months. Later he found vehicle was never registered. On 1.3.2000 he paid Shs.150,000/- for the container being in the warehouse. "I was without the car for 4 years". Counsel for Plaintiff claimed Shs.2,500 per day, loss of user for 4 years. Counsel referred to "***Bingham Berryman's***" "***Motor Claim Cases***" Tenth Edition at page 360 paragraph titled "LOSS OF USE". She has marked the case of ***Mediana 1900 AC 113*** reading –

*“The owner of a chattle who is wrongfully deprived of its use may recover substantial damages for the deprivation though he may have recovered no out of pocket expenses consequent thereon.”*

“Normal damages” is a technical phrase, which means that you have nega anything like real damages but you are affirming by your nominal damages that there is an infraction of a legal right ----- but the term normal damages does not mean small damages. Again the case of “Caxton Publishing Co. vs. Sutherland Publishing Co.” [1939]AC 178 –

“Even the loss of the use for a time of a chattle which the owner would not have used during that time may give rise to substantial damages”

In this case the Plaintiff claims loss of user for a period of 4 years. It is not clear on evidence when the period runs. It appears last payment was made on 1st March 2000, but no evidence of arrival at port. There is also no evidence of the time that would have been taken in normal clearance of the vehicle at the port and registration. The court is not told when the vehicle reached Malindi.

In the circumstances the award of nominal damages for the deprivation of the use of vehicle is assessed at Sh.500,000/- which is awarded to the Plaintiff together with costs and interest. Judgment entered by Deputy Registrar in the sum of Shs.1,316,754.60 is hereby confirmed.

Total judgment entered is Shs.1,816,754.60.

**Dated at Mombasa this 29th Day of April, 2002.**

**J. KHAMINWA**  
**COMMISSIONER OF ASSIZE**