Payless Car Hire & Tours Limited v Wells Fargo Limited (Commercial Case 5 of 2009) [2025] KEHC 2338 (KLR) (Commercial and Tax) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 5 OF 2009

WA OKWANY, J

MARCH 6, 2025

BETWEEN

PAYLESS CAR HIRE & TOURS LIMITED ..... PLAINTIFF

AND

WELLS FARGO LIMITED ..... DEFENDANT

JUDGMENT

1. The Plaintiff and the Defendant are limited liability companies incorporated in the Republic of Kenya under the *Companies Act* (Cap. 486 Laws of Kenya). The parties herein carry out business within the aforesaid Republic.

2. The Plaintiff sued the Defendant through the Plaint dated 23rd December 2008 seeking the following orders: -

    1. Kshs. 11,284,481.55

    2. Interest on (a) above at Court rates from the date of filing suit until payment in full;

    3. Costs of and incidental to the suit;

    4. Interest on (c) above at Court rates from the date of Judgment until payment in full.

3. The Plaintiff amended the Plaint on 12th October 2012 by substituting the claim in prayer number 1) in the initial Plaint with a prayer for the sum of Kshs. 29,699,819.45.

The Plaintiff's Case

4. The Plaintiff's case was that it on 14th February 2007 entered into an agreement with the Defendant (hereinafter "the Agreement) and that parties signed further Rental Agreements for each motor vehicle

that was subject of the Agreement. The Agreement was to run for a period of two (2) years from 14th February 2007 to 13th February 2009. The Plaintiff stated that parties agreed as follows: -

i. That the Plaintiff will hire vehicles to the Defendant on the terms and conditions of the Agreement and the applicable schedules thereto;

ii. That the hirer shall pay punctually, without demand, deduction, counterclaim or set-off to the Plaintiff the rentals and all other sums due at the specified times;

iii. That the rentals and additional rentals shall be specified in the schedules; and

iv. That the Defendant shall pay the hire rentals to the Plaintiff by way of a banker's standing order payable on the last day of each month.

5. The Plaintiff averred that pursuant to the said Agreement, it hired to the Defendant various motor vehicles, at the Defendant's instance on the following terms: -

i) For saloon motor vehicles

a) Kshs. 3,000/= plus 16% VAT per day

b) Kshs. 1,200/= plus 16% VAT per day.

ii) The total number of units was agreed at 25 units.

6. The Plaintiff's claim was that on 31st May 2008 the Defendant unlawfully and/or maliciously without notice, provocation or warranty returned all the Plaintiff's motor vehicles thereby occasioning the Plaintiff loss and damage.

7. The Plaintiff contended that it was an express term of the Agreement that a party wishing to terminate the contract was required to give the other party three (3) months' equivalent of the hire fees.

8. The Plaintiff averred that the total value of services that it rendered to the Defendant, according to the invoices, was Kshs. 37,831,776 out of which the Defendant paid the sum of Kshs. 16,645,996.45 thereby leaving a balance of Kshs. 21,185,780 plus 3 months' hire fees in lieu of notice of Kshs. 8,211,039.55 thereby making a total of Kshs. 29,699,819.45

9. At the hearing of the case, the Plaintiff presented the evidence of its Managing Director Mr. Jai Radia (PW1) who adopted his witness statement as his evidence-in-chief and produced the Plaintiff's initial bundle of documents dated 15th May 2014 and a further list of documents dated 12th July 2021 (202 pages) as exhibits as follows: -

i. Motor Vehicle Hiring Agreement – P.Exh1

ii. Schedule to the Motor Vehicle Hiring Agreement P.Exh2

iii. Copies of Invoices – P.Exh3

iv. Copies of Cheque Deposit Slips – P.Exh 4

v. Statement Account – P.Exh6

vi. Demand Letter – P.Exh6

10. PW1 testified that whenever there was an overcharge, the Plaintiff would raise a credit note and that they hired the vehicles on self-drive with full-tank fuel, in good condition and would charge the Defendant if there was any damage to the said vehicles. He testified that the Plaintiff had prior

engagements with the Defendant before they signed a formal agreement. He stated that the agreement provided that the vehicles were to be returned in good condition with a full tank of fuel. It was his testimony that the statements provided details of what was invoiced, what was paid and what was outstanding. He added that the Plaintiff had initially underpriced the services by Kshs. 12,378,400 as the contract indicated that they were to charge Kshs. 3,000 daily yet they charged Kshs. 2,500 which defect they rectified.

11. PW1 further testified that the relationship between the parties ended when the Defendant did not return the vehicles for service over the weekend and that the Defendant did not turn up to pick the vehicles. He stated that the Plaintiff was entitled to charge 3 months of rental charges in lieu of notice and that the Plaintiff's total claim was therefore Kshs. 30,863,367.55 inclusive of VAT.

The Defendant's Case

12. The Defendant filed an amended defence dated 28th February 2019 wherein it conceded that it entered into the Agreement in question but denied the claim that the agreed rate of motor vehicle hire was Kshs. 3,000 per day. It stated that the agreed rate was Kshs. 2,500 per day. The Defendant further stated that there was no specific agreed number of units of motor vehicles to be hired as alleged by the Plaintiff and that instead, the Defendant hired the motor vehicles on an "as needed" basis.

13. The Defendant denied the claim that it had breached any term(s) of the Agreement as alleged in the Plaint.

14. The Defendant acknowledged receipt of the Plaintiff's demand letter on 17th November 2008 wherein the Plaintiff's claimed Kshs. 11,284,481.55 together with a spreadsheet print listing certain amounts in respect to what appeared to be purported invoice numbers but stated that at no time, during the course of its dealings with the Plaintiff, did they ever exchange such a document which is not a recognized accounting document.

15. The Defendant averred that the Plaintiff's claim for the payment of Kshs. 29,699,819.45 was unfounded and an afterthought. It urged this court to dismiss the Plaintiff's claim, with costs.

16. At the hearing of the defence case, the Defendant presented the evidence of its Chief Accountant, Mr. Harrison Mugucia Chege, who testified that the Defendant only hired vehicles when needed and did not hire the vehicles over the weekends and holidays thus explaining why there were miscellaneous deductions for the days when the vehicles were not hired. He testified that the Defendant did not owe the Plaintiff any money at the end of their contract as it had paid the sum of Kshs. 16 Million which was sufficient to settle the claim and further, that the invoices produced in court were for Kshs. 11Million yet the Plaintiff claimed the sum of Kshs. 29,699,819.45 in the amended Plaint based on a fictitious schedule contained at page 266 of the Plaintiff's bundle of documents. He stated that the said schedule was evidently an afterthought as it was filed 5 years after the filing of the case.

17. DW1 testified that there was a discrepancy in the schedule because the Plaintiff charged Kshs. 2,500 less the miscellaneous deductions but that in the new schedule, the Plaintiff claims Kshs. 3,000 instead of the agreed hire rate of Kshs. 2,500. He further noted that the Plaintiff charged the Defendant for the full period of 30 days per month yet not all the days of the month were utilized especially the weekends and public holidays when the vehicles were not hired.

18. DW1 further stated that the Defendant did not sign the alleged Rental Agreements and that the invoices for repairs and maintenance were not applicable as the Agreement showed that it was the responsibility of the Plaintiff repair its vehicles. He noted that the Plaintiff did not show what was repaired and the costs thereof and that there were no supporting documents showing the fuel expenses

incurred. The witness testified that their contract ended on one Monday morning when the Plaintiff declined to release the hired vehicles to the Defendant. He added that the Plaintiff was not entitled to the 3 months payment in lieu of notice as such a clause does not exist in the Agreement.

19. Parties canvassed their respective cases by way of written submissions.

The Plaintiff's Submissions

20. The Plaintiff submitted that the Defendant's arbitrary decision to terminate the contract without notice amounted to a gross violation of the Master Rental Agreement and that the Defendant's actions caused it financial losses. It was submitted that the Defendant was aware, that part of the periodic rental payments were utilized to settle bank loans that the Plaintiff secured to enable it acquire the rental vehicles. Reference was made to the decision in Capital Fish Kenya Limited vs. Kenya Power and Lighting Company Limited (2016) eKLR and Nkuene Dairy Farmers Co-Operative Society Limited & Another vs. Ngacha Ndeiya (2010) eKLR for the argument that Plaintiff's claim was specifically pleaded in the Plaint and proved through the evidence of Mr. Jai Radia (PW1).

21. The Plaintiff submitted that besides the outstanding balances, the rented motor vehicles were also returned with defects, thus occasioning it costs of repair which were to settled by the Defendant according to the terms of the agreement.

The Defendant's Submissions

22. The Defendant submitted that the Plaintiff did not prove its claim and was therefore not entitled to the reliefs sought. The Defendant contended that the special damages were neither pleaded nor proved as the Plaintiff did not particularize the claim for services rendered. The Defendant observed that the amount of Kshs. 8,211,039.55 claimed for payment in lieu of notice was not amount payable for a service.

23. On the invoice presented by the Plaintiff for refund for repairs, it was submitted that the claim was not payable since Clause 5.9 and 6.2 of the Agreement vested the responsibility of repairs and maintenance on the Plaintiff. The Defendant noted that the Plaintiff did not demonstrate that the Defendant or any of its employees were negligent in the manner in which they drove the hired motor vehicles so as to justify the issuance of the said invoices.

24. On the claim for fuel expenses, it was submitted that the Plaintiff the did not prove that the Defendant did not fuel the hired motor vehicles.

25. It was submitted that the invoices produced as proof of the vehicle rentals amounted to Kshs. 4,494,729 only and that there were no supporting invoices for the additional sum of Kshs. 33,337,047/=. The Defendant also noted that the invoices were not accompanied by corresponding rental agreements for each month and argued that if indeed the services were rendered, then Plaintiff ought to have produced documents in support thereof. It was submitted that the Plaintiff did not also present invoices for the sum of Kshs. 16,645,996 that the Plaintiff paid to it thereby failing to discharge the burden of proof on a balance of probabilities. Reference was made to the decision in Peter Otieno Nyarega vs. Gulf Fabricators Ltd [2017] eKLR.

26. The Defendant contended that since the motor vehicles were hired on 'as needed' basis, the Plaintiff's position that the Defendant hired 25 vehicles for 2 consecutive years was flawed. The Defendant observed that the Plaintiff's own documents indicated that vehicles were not hired on all the days of the months thus explaining the deductions that the Plaintiff's witness referred to as miscellaneous deductions that represented the days when the particular motor vehicles were not used by the

Defendant. It was submitted that clause 3.2. of the Agreement referred to payment on a prorated basis for the actual days that the vehicles were hired. It was further submitted that none of the rental agreements produced by the Plaintiff were signed by the Defendant and that the said agreements and the accompanying invoices therefore lacked probative value. The Defendant cited the cases of Kenya Women Microfinance Ltd vs. Martha Wangari Kamau [2021] eKLR and David Bagine vs. Martin Bundi [1997] eKLR where the courts emphasized on the need to prove special damages.

27. It was submitted that the Plaintiff's amended claim was an afterthought because the Plaintiff initially claimed Kshs. 11,284,481.55 (inclusive of the purported claim for payment in lieu of notice) only to later inflate its figures to Kshs. 37,871,776 without proof of how the amount was arrived at thus making the claim disingenuous. The Defendant noted that the Agreement did not have any clause for damages in lieu of notice and further, that the invoice for payment in lieu of notice indicated the sum of Kshs. 6,906,554 which figure was incongruent with the claim of Kshs. 8,211,039.55 pleaded in the Plaint.

28. It was further submitted that in the Defendant did not terminate the contract as alleged as it was the Plaintiff who inexplicably declined to continue providing the motor vehicles after the Defendant released the vehicles in its possession sometime in May 2008 for service and repairs according to the terms of their agreement.

Analysis and Determination

29. I have considered the pleadings filed herein, the oral and documentary evidence presented by the parties together with their rival submissions. I find that the main issue for determination is whether the Plaintiff made out a case for the granting of special damages in the sum of Kshs. 29,699,819.45.

30. It is trite that Special Damages must not only be specifically pleaded but must also be strictly proved. In Hahn vs. Singh, Civil Appeal No. 42 of 1983 (1985) KLR 716, at P. 717, and 721 the Court of Appeal held thus: -

> " Special damages must not only be specifically claimed (pleaded) 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 of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

31. Similarly, in Richard Okuku Oloo vs. South Nyanza Sugar Co Ltd, (2013) eKLR, the Court of Appeal, held thus: -

> " ...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of..."

32. The principle that flows from the above cited authorities is that a party claiming that it is owed a specific amount of money must state the claim with utmost particularity and demonstrate, through sufficient evidence, on a balance of probability, that it is owed such monies.

33. It was not disputed that the parties herein entered into a car rental agreement on 14th February 2007. A perusal of the said Agreement reveals that it was executed by both parties' representatives who also affixed their respective company stamps to the Agreement.

34. The Plaintiff's claim was for car rental charges that were allegedly outstanding as at the date of termination of the contract. The Plaintiff alleged that it issued the Defendant with invoices on diverse dates between 1st February 2007 and 20th June 2009, but that the Defendant, in part performance

of its obligations under the Agreement, settled only some of the invoices. The Plaintiff stated that the Defendant failed, refused and or neglected to settle the part of car hire rentals amounting to the sum of Kshs. 29,699,819.45. In its submissions, the Plaintiff claimed that its claim includes the sum of Kshs. 6,906,554 being damages payable for termination of the Agreement.

35. The Plaintiff produced a bundle of documents comprising of the Master Rental Agreement of 14th February 2007, copies of invoices and a schedule of the Agreement among other documents in support of its claim. At paragraph 4(c) of the Amended Plaint the Plaintiff reiterated that its claim is for the payment of the sum of Kshs. 29,699,819.45 made up as follows: -

    i. Service rendered – Kshs. 37,831,776

    ii. Add notice Period for 3 months for 25 units @ 104,400 plus VAT – Kshs. 8,211,039.55

    iii. Total – Kshs. 46,042,815.00

    iv. Less amount received – (Kshs. 16,645,996.45)

    Total due - Kshs. 29,699,819.45

36. I have done a quick calculation based on the foregoing figures and deducted the sum of Kshs. 16,645,996.45 allegedly paid by the Defendant from the total claim of Kshs. 46,042,815.00 and I find that the outstanding sum ought to be Kshs. 29,396,818.55 and not Kshs. 29,699,819.45 that was claimed by the Plaintiff. This means that the Plaintiff inflated the outstanding balance in the amended Plaint by an additional sum of Kshs. 303,000.35. It did not also escape the attention of this court that PW1 testified as follows on the amount claimed during examination in chief: -

> " The total balance due is 30,865,367.55 which is the amount we claim from the Defendant inclusive of VAT. We also claim costs and interest."

37. From the above noted discrepancies in the actual amount claimed by the Plaintiff, this court is at a loss as to the Plaintiff's exact claim. The discrepancy in the figures can only lead to the conclusion that the Plaintiff did not plead its claim to the degree of certainty and particularity that is expected in a claim for special damages.

38. My above finding notwithstanding, I am still minded to consider if the Plaintiff proved its claim for the alleged outstanding amount to the required standard. I will in this regard, consider the various items claimed at paragraph 4 of the amended Plaint.

Kshs. 37,831,776 for Services Rendered

39. It is instructive to note that even though the amount of money owing from the Defendant, as pleaded in the amended Plaint is Kshs. 46,042,815.00, in his evidence however, PW1 testified that the total value of the contract was Kshs. 47,509,364. Once again, this means that Plaintiff did not specifically plead and particularize the outstanding amount.

40. Turning to specific proof of the amount claimed, I am alive to the fact that the Plaintiff was required to tender documentary proof of its claim. In doing this, I note that the Plaintiff produced a bundle of invoices alongside Schedules of the Agreements. Before I comment on the amounts contained in the various invoices, I wish to point out the fact that the Plaintiff indicated, both in the pleadings and at the hearing, that some of the invoices were settled through the payment of Kshs. 16,645,996.45. I however note that the Plaintiff did not distinguish which invoices, out of the bundle of invoices that it presented before the court, were settled so as to enable this court determine the actual outstanding amount.

41. I also note that the Schedules of Agreements that were attached to the invoices were neither signed by the Plaintiff nor the Defendant. For this reason, I find that the Schedules lack probative value for purposes of specifically proving the existence of the invoices and by extension, the outstanding debt. I note that at the hearing of the suit, the Plaintiff's witness merely gave examples of the invoices that were allegedly issued to the Defendant at various stages but did not give a breakdown or tabulation of how the individual invoices gave rise to the total sum claimed.

42. This court is reminded of the provisions of Section 107 of the *Evidence Act* which states as follows: -

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependant 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."

43. In the instant case, I find that the Plaintiff did not tender sufficient documentary proof of the specific damages of Kshs. 29,699,819.45 or any plausible explanation for the discrepancy between its own figures pleaded in the plaint and the witness's testimony.

44. The Plaintiff contended that the Defendant owed it monies in respect to car hire costs, fuel expenses, repairs and payment in lieu of notice of termination. The Plaintiff did not however distinguish or specify the amounts due to it for rental costs, fuel expenses and repairs in the amended plaint.

45. On rental costs, PW1' testified, during examination-in-chief, that the invoices that the Plaintiff initially issued to the Defendant and attached to the original Plaint were under-quoted as that the amount that was to be charged per vehicle was Kshs. 3,000 and not Kshs. 2,500/=. He produced the Schedule to the Agreement to justify the difference in figures. DW1 on the other hand averred that the agreed rental cost was Kshs. 2,500/-.

46. As I have already stated in this judgment, the individual rental agreements that are attached to the invoices were not signed by the Defendant and do not indicate or show the Defendant as the renter. It is therefore not clear who the other contracting party was. I find that in the absence of the Defendant company's name and signature of its official on the said documents, it cannot be said that the said agreements were binding on the Defendant. All that the agreements reveal is that the cost of hiring a vehicle was Kshs. 3,000/= plus VAT per day and the details section shows 24 months. It is however not clear if the Schedules were specifically in relation to the Defendant company.

47. My finding is that based on the conflicting evidence placed before it, the Court cannot to tell the correct hiring costs as the Plaintiff did not present any other documentary evidence to show the actual amount charged for every hired vehicle. During ross-examination, PW1 stated that the rental agreements for the individual vehicles recorded the costs, the mileage, the amount of fuel and the period of hire.

48. Having found that the rental agreements were not signed by the Defendant company, I do not need to belabor the point on the probative value of a document that was not signed by the Defendant. In the absence of documentary or other evidence, I find that the Plaintiff did not discharge its burden of proving that the vehicles were hired for Kshs. 3,000 and not Kshs. 2,500 so as to support the amount claimed in the amended Plaint.

49. I further find that failure to produce the individual rental agreements signed by the Defendant also dispenses with the issue of the claim on fuel costs which were neither pleaded nor proved. A closer scrutiny of the invoices reveals that they were prepared in a general manner such that it is impossible

to tell how much each vehicle was hired for. For instance, Invoice No. KS102800 in respect of KAW 885P indicates that the outstanding rental amount was Kshs. 6,781. If the said amount is considered against the alleged hiring costs of Kshs. 3,000 per day, it would mean that the vehicle was hired for 2.26 days which does tally with the evidence that the vehicles were hired for a full day.

50. The evidence on record points to the possibility that the Plaintiff may have unilaterally increased the rental costs from Kshs. 2,500 to Kshs. 3,000 and proceeded to impose this figure on the Defendant without a proper agreement. Clause 3.5 of the Master Agreement states that:-

> "Any adjustments to the Rentals shall be determined by mutual agreement between the parties, failing which this agreement may be terminated by the party seeking the adjustment on not less than six (6) months' notice to the other party."

51. I have also considered the claim in respect to repair charges which were apparently also lumped together with the amount claimed in the amended Plaint under 'service rendered'. I note that the invoices with respect to repairs amount to Kshs. 475,361. It was the Plaintiff's case that the Defendant was responsible for the repair of any damage to the hired vehicles. A perusal of the Master Rental Agreement however shows that it was agreed as follows under clauses 5 and 6 thereof: -

5. Insurance

.4. The Hirer shall be responsible for the payment of the excess as per the Policy of Insurance payable in respect of any claim under the Insurance Policies.

.....

5.9. Subject to Clause 5.4. the Owner shall be responsible for the repair of any vehicle if it shall be damaged or the subject of an accident and not declared a total loss.

6. Maintenance

6.1. The Owner shall ensure that the Vehicles are properly maintained and serviced and that records of maintenance and service are properly kept by the Owner.

6.2. The Owner shall be responsible for all maintenance, repairs and servicing of the vehicles including without limitation, the provision of tyres, batteries, spare parts save that the Owner shall not be responsible for any repairs required as a result of the negligence of the Hirer or its authorized personnel. For the purposes of this clause, negligence means driving on flat tyres, tyre bursts, engine damage due to lack of oil or water or riding on the clutch. The Owner will report to the management of the Hirer any instances of negligence or alleged negligence involving the Hirer's personnel in order to avoid any future repetition.

6.3. The Hirer shall observe the following restrictions with regard to maintenance, repair and servicing of the vehicles:

6.3.1. Where possible, all maintenance, repairs and servicing shall be carried out by the owner' service depot in Nairobi, Kisumu, Mombasa or an authorized agent.

6.3.2. All expenses incurred by the Hirer or its authorized personnel in respect or maintenance or repair shall be supported by receipts.

6.4. ----------

6.5. The Hirer shall be responsible at its costs for repairing all punctures and repairing or replacing any burst tyres.

.....

11. Miscellaneous

11.4. The Hirer shall not be liable for the fair wear and tear of the vehicles and the burden of depreciation resulting from any such fair wear and tear shall fall upon the Owner who shall be entitled to claim all capital allowanced in respect of the Vehicles.

52. The above clauses show that the Plaintiff was solely responsible for the maintenance, service and repair of the vehicles except in instances where the damage to the motor vehicles was to such an extent that it would require repair by an insurance company. In such an eventuality, the Agreement states that the Defendant would be called upon to pay the excess according to the insurance policy.

53. The said clauses also stipulate that the Defendant was responsible for damages resulting from negligence by their staff. In the present case, it was not established that there was any act of negligence on the part of the Defendants' employees. Furthermore, the Plaintiff did not tender any receipts to support the claim that it repaired any of the hired vehicles.

54. It is my finding that the generalized manner in which the individual costs were lumped up in the total sum claimed in the Plaint means that the claim fails the test of specificity in pleading and proving special damages.

55. Lastly, I have considered the claim the payment of the equivalent of 3 months' rental fees in lieu of notice. In considering this claim, the court will be required to consider who, between the Plaintiff and the Defendant was responsible for the termination of the contract. The Plaintiff contended that the contract ended when Defendants returned all the vehicles sometime in May 2008 without justification or notice while the Defendant stated that the Plaintiff refused/declined to give them the vehicles when they went to pick them after the weekend.

56. PW1 testified as follows regarding the circumstances under which the contract was terminated: -

> " The relationship ended when they failed to bring back the vehicles as agreed. They needed to bring the vehicles on Saturday or Sunday for service. On the date of termination, they never turned up to pick the vehicles. We made attempts to find out why the motor vehicles were not picked but they did not explain to us what had gone wrong."

57. From the above extract of the Plaintiff's witness's testimony, it is clear that he is not consistent on the circumstances under which the contract was allegedly terminated by the Defendant as he on one hand stated that the Defendant did return the vehicles for service as agreed and in the same breath testified that the Defendant refused to pick the said vehicles. It was not disputed that the Defendant would return the vehicles to the Plaintiff on Saturdays for service after which they would collect them on Mondays. In the witness statement however, the Plaintiff stated that the Defendant returned all the vehicles without a just cause. I note that the date given in the Plaint, as the date of return of the vehicles being 31st May 2008 was a Saturday. In my considered view, this demonstrates that the Defendant merely complied with the terms of the contract when it returned the vehicles over the weekends for service.

58. I find that the inconsistency in the evidence of PW1 paints him as an unreliable witness and lends credence to the Defendant's position that the Plaintiff was responsible for the termination of the contract by refusing to release the vehicles to them when they went to pick them.

59. I have perused Clause 12 of the Agreement wherein the parties agreed the circumstances under which the Agreement could be terminated as follows: -

> Termination
>
> 12.1 This agreement may be terminated at any time:
>
> 12.1.1 By either party giving to the other not less than three (3) months' notice period.
>
> 12.2 Either party shall be entitled to terminate this agreement by not less than 21 days notice if:
>
> 12.2.1 the other party shall be in breach of any term of this agreement ad does not remedy any breach which is capable of remedy within 21 days of service of a notice specifying the breach and requiring its remedy.
>
> Provided that if the breach is on the part of the hirer the hirer shall on early termination be liable to pay for the reminder of the term of hire; or
>
> 12.2.2 the other party shall be liquidated or wound up or have a petition for winding up presented against it or pass a resolution for voluntary winding up (otherwise than for a bona fide reconstitution); or
>
> 12.2.3 the party shall have a receiver appointed in respect all or any part of the assets; or
>
> 12.2.4 the other party shall convene any meeting of its creditors or make a deed of assignment or arrangement or otherwise compound with its creditors; or
>
> 12.2.5 any step shall be taken to levy a distress or execution or if a distress or execution shall be levied or threatened to be levied upon any chattels of or in the possession of the other party.

60. The above clause is clear that either party had the option of terminating the Agreement as long as they issued the other with not less than three (3) months' notice period. The termination clause also provides that either party was entitled to terminate the Agreement by issuing not less than 21 days notice if the other party was in breach of any term of the Agreement and does not remedy any breach which is capable of remedy within 21 days of service of a notice specifying the breach and requiring its remedy. Parties further agreed that where the breach is on the part of the hirer the hirer shall on early termination be liable to pay for the reminder of the term of hire.

61. My finding is that going by the above stated terms of the termination clause and considering that the Plaintiff's claim was that the Defendant breached the terms of the contract by returning the vehicles and refusing to continue with the contract, the Plaintiff was required to issue the Defendant with 21 days' Notice to remedy the breach. No material was presented to show that the Plaintiff issued such a notice to the Defendant. I further find that the Plaintiff's claim that the Defendant was to pay 3 months rental charges in lieu of notice was not in tandem with the terms of the Agreement.

62. It is noteworthy that the clause on termination required the Hirer (Defendant) to pay the Owner (Plaintiff) for the remainder of the term of hire as opposed to the Plaintiff's claim of payment of the equivalent of 3 months' rental charges in lieu of Notice.

63. It is a well-established principle that parties are bound by the terms of their own contract. In National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal stated that:

> " It was clear beyond para adventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

64. More recently, in Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR, the Court of Appeal held that it was "alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

65. Having found that the Plaintiff made reference to provisions that were not contained in the contract, and in particular, the requirement of payment of 90 days' rental costs in lieu of notice in the event or termination of the contract, I find that the Plaintiff did not prove this limb of the claim to the required standard.

66. Having regard to the findings and observations that I have made in this judgment, I find that the Plaintiff's case was not proved to the required standard. The Plaintiff did not prove the special damages claimed in the amended Plaint on a balance of probabilities and I therefore dismiss the suit with costs to the Defendant.

67. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI VIA MICROSOFT TEAMS THIS 6TH DAY OF MARCH 2025.

W. A. OKWANY

JUDGE