



**Kamau v Simba Corporation Ltd (Civil Suit 7 of 2021)
[2024] KEHC 8895 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8895 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL SUIT 7 OF 2021**

AC MRIMA, J

JULY 25, 2024

BETWEEN

PETER KAMAU PLAINTIFF

AND

SIMBA CORPORATION LTD DEFENDANT

JUDGMENT

1. The dispute subject of this judgment related to a transaction between the parties that culminated with the Plaintiff purchasing a Truck registration No. KCS 032A make Mitsubishi Fuso F1 from the Defendant herein (hereinafter referred to as ‘the truck’).
2. It was the Plaintiff’s position that the truck turned out to be defective and that the Defendant refused and/or failed to make good the defects yet the truck was still under a valid warranty.
3. The Defendant denied liability and the suit was heard.

The Plaintiff’s case:

4. Peter Kamau, the Plaintiff herein, instituted the Amended Plaint dated 27th May 2022. It was verified by his undated Affidavit. He pleaded that on 8th October 2018, he purchased the truck, from Simba Corporation Limited, the Defendant herein, at a consideration of Kshs.5,448,509/-.
5. It is his case that NCBA Bank, Kitale Branch financed the purchase and on 12th October 2018, he took possession of the truck whereupon the Defendant issued him with a 4 (four) year warranty or 200,000kms, whichever came first.
6. The Plaintiff claimed that two months after purchasing the truck, he detected faults in the differential unit, the propeller shaft, the air dryer, the braking system, the engine brake, Gear No. 1, the reverse gear, the dashboard and the acceleration system.



7. The Plaintiff averred that he reported the defects to the Defendant on 7th December 2018 and consequently, a Technical team from Kisumu was dispatched to Eldoret where the truck's braking system had failed. It is his case that repairs were made and he was charged Kshs. 16,000/-.
8. He pleaded further that in the month of June 2020, the truck developed a faulty differential unit and as a result it was grounded in Thika for a period of nine months before being towed to the Defendant's repair workshop at Shimo la Tewa along Mombasa Road.
9. It was his case that the truck was repaired and when he collected it, the mileage read 172,128 kms.
10. Further to the foregoing, the Plaintiff posited that on or about 19th January 2021, the truck's engine knocked. It is his case that it was temporarily repaired by the Defendant's Technical team at Mau Summit and was directed to return it to the Defendant's workshop for further servicing.
11. The Plaintiff pleaded that on or about 11th March 2021, he handed over the truck to the Defendant for repairs and servicing but as at the date of filing suit, they had not repaired it.
12. The Plaintiff asserted that the Defendant had breached the terms of warranty and subjected him to loss and non-performance of asset loan with the NCBA Bank.
13. The Plaintiff set out the particulars of breach by claiming that the Defendant dishonoured the warranty, failed to service the truck and by retaining the truck without servicing or repairing.
14. He claimed that the Plaintiff's failure to repair or service the truck resulted business loss of Kshs. 70,000/- on a daily basis for loss of user.
15. He claimed that consequently, he defaulted in loan repayment and he ended up being listed at the Credit Reference Bureau.
16. In reply to the Amended Defence and Counter-claim, the Plaintiff asserted that the delivery of the truck to the Defendant's garage was not repossession for any liability and as such could not claim any storage charges.
17. It was his case that he is a beneficiary of a four-year warranty from the year 2019 which lapsed on 17th October 2022 and that the Defendant had never written a demand letter or communicated that the warranty had expired.
18. On the foregoing, the Plaintiff prayed for the following reliefs;
 - a. A permanent injunction restraining the Defendant from retaining the Plaintiff's truck registration No. KCS 032A F1 Mitsubishi Fuso.
 - b. A declaration that the warranty dated 8th October 2018 is valid and is still binding to the parties herein and therefore the defendant is compelled to repair the Plaintiff's truck to current industrial standards and release it forthwith unconditionally.
 - c. The Defendant do pay special damages for loss of user of the truck from 19th January 2021 up to the date of release
 - d. Costs and interest of the suit at court rates from the date of filing suit until payment in full.
 - e. Any other or further relief the Honourable Court may deem fit and just to grant.
19. The Plaintiff herein testified and produced several exhibits in support of his case.

The Defendant's case:



20. Simba Corporation Limited challenged the Plaintiff through an Amended Statement of Defence and Counter-claim dated 1st February 2022.
21. From the outset, it was its case that it gave the Plaintiff a warranty of 2 years or 100,000 kilometres whichever came earlier.
22. As regards the breakdowns, it averred that the Plaintiff breached the terms of the warranty as a result of poor maintenance of the truck, overloading and servicing it in garages that were not certified and doing so irregularly and beyond the recommended mileage of 5000 kilometres per service.
23. It was its case that the repairs it carried out in June 2020 were on ex gratia consideration to retain customer though the warranty had expired at 100,000kms.
24. On the foregoing, the Defendant asserted that it had no legal obligation to repair and or service the Plaintiff's motor vehicle at 194,778 kilometres and that his failure to repay the loan with NCBA did not attract any liability upon it.
25. It was its case that the reliefs sought against it by the Plaintiff are not available in law.
26. It further asserted that whereas it does not deny that it took the Plaintiff's truck to its workshop for repair on 11th March 2021, it made clear to the Plaintiff that the warranty did not exist anymore and that the Plaintiff was required to make a deposit of Kshs. 90,000/- for repair work to commence but the Plaintiff declined to do so.
27. The Defendant further claimed that it wrote to the Plaintiff vide its letter dated 5th July 2021 offering him a 20% discount from the initial quote and requested for his authority to commence repairs but the Plaintiff never responded.
28. As such, the Defendant averred that the truck had remained in its workshop and accumulated storage charges which it reserves to counterclaim.
29. It was its case that in the year 2019, it started a new market campaign strategy whereby trucks like the one sold to the Plaintiff were sold with a warranty of 200,000 kilometres or 4 years whichever came earlier, fact which was not available in the year 2018.
30. In the Counter-claim that Defendant posited that it was entitled to storage charges at the rate of Kshs. 1000/- per day inclusive of VAT amounting to Kshs. 338,720/- with effect from 11th March 2021 to January 2022 which charges continue to accrue until the judgment herein.
31. The Defendant pleaded that despite expressly advising the Plaintiff to collect his vehicle, he was non-committal, hence, the accumulation of charges.
32. It was its case that the request for repairs was made by the Plaintiff but ignored it thus making the counterclaim necessary.
33. On foregoing, it urged the Court for reliefs in the following terms;
 - a. Kshs. 338,720/= for the period 11th March 2021 to 17th January 2022 an which continue to accumulate at Kshs. 1,000/- per day till judgment and until payment in full.
 - b. Costs of the counterclaim.
 - c. Interests on (a) and (b) above.



34. The Defendant tendered its evidence through one Loise Wambui Gonyi, its Senior Service Advisor. Several exhibits were also produced.

The Parties' submissions:

35. The Plaintiff filed his written submissions dated 4th July 2023. It was mainly a reproduction of the sequence of events as pleaded in the Amended Complaint.

36. The Defendant filed its submissions dated 8th July 2023.

37. The respective parties' further arguments in the submissions are incorporated in the analysis section of this judgment.

Analysis:

38. From the factual appreciation of the dispute, the following two issues arise for determination: -

i. Whether the Defendant breached the Truck's warranty terms.

ii. Whether the counter-claim is merited.

39. The Court will, hence, deal with the issues in seriatim.

a. Whether the Defendant breached the Truck's warranty terms:

40. There is no contest among the disputants that indeed there was a warranty in relation to the Truck. The point of contention are the terms thereof.

41. Whereas the Plaintiff claimed that the warranty was for a period of 4 years or 200,000 kilometres, whichever came earlier, the Defendant asserted that it was for 2 years or 100,000 kilometres whichever came earlier.

42. From the outset, the burden of substantiating the terms of the warranty rested on the Plaintiff.

43. As a legal principle, a party that asserts a factual position bears the 'legal burden of proof'. It is the obligation of such a party to demonstrate through evidence the existence or non-existence of a factual issue.

44. Once the burden is discharged, the adversary has a corresponding burden to disprove the position fronted. This is the 'evidential burden of proof'.

45. The *Evidence Act*, Cap. 80 of the Laws of Kenya, sums up the foregoing as follows: -

107. Burden of proof

(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. Incidence of Burden

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. Proof of Particular fact

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

46. In *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR, the Court of Appeal discussed the dynamics of burden of proof in the following terms: -
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. In this case, the incidence of both the legal and evidential burden was with the appellant.
- (23) The Defendant was the one who supplied the documents to the Plaintiff representing payment to KRA. The Defendant therefore bore the evidential burden of proof to prove that that payment was indeed made to KRA. The Defendant failed to shift that burden of proof.
47. In this case, the foundation of the Plaintiff's case rested on the Plaintiff to avail to Court the 'Warranty Document'.
48. That would, firstly, substantiate that the terms therein were in respect of the truck, KCS 032A, subject of this dispute, and secondly, that the terms therein were breached and as a result suffered loss.
49. To that end, this Court will refer to the documentary and testimonial evidence on record.
50. The Plaintiff filed a Statement dated 17th April 2023, a List of Documents and a Supplementary List of Documents annexed to the Plaintiff and Amended Plaintiff dated 15th December 2021 and 27th May 2022 respectively.
51. Item number two in the latter list of documents is the contested warranty. It is titled 'MFTBC Vehicle Warranty'. Whereas it was not dated in print, the Plaintiff handwrote the date on it as '8th October 2018'.
52. During cross-examination, it was the Plaintiff's case that when he purchased the Truck, he received all the documents including the original warranty document. He, however, could not avail it. He stated that he had left it at his home.
53. The Plaintiff went on to state that there was no stamp for Crater Automobiles Limited on the warranty document before Court. He further conceded that it is him who wrote his name, signature and Identification Number on the warranty presented as evidence in Court.
54. As regards the contention that the Defendant's Internal Memo dated 30th May 2019 benefitted him on extension of the warranty, the Plaintiff stated that the Memo was in respect of new vehicles, like the truck, and that it was addressed to MFTBC Sales team.
55. When he was asked who gave him the Memo, it was his case that the it was a Manager whom he could not name.



56. The Defendant's witness testified as DW1. In her statement dated 10th May 2023, it was her case that in the year 2018, the Defendant sold Trucks with a warranty of 100,000 kilometres or two years warranty whichever came first.
57. It was her position that contrary to the warranty terms, the Plaintiff brought the vehicle to the Workshop after exceeding the stipulated mileage.
58. In her evidence in Court, she stated that the Plaintiff bought the truck in 2018 and was issued with a Warranty of 2 years or 100,000 kilometres, whichever occurred first.
59. She stated that as a standard practise, any truck's warranty must be stamped and signed by the Dealer and the Purchaser and it must also have the details of the vehicle.
60. In disputing the copy of the warranty presented by the Plaintiff as Exhibit 6, it was her evidence that the document was not stamped by the alleged Dealer. It was her sustained contention that the Truck's warranty was for 2 years only or 100,000 kilometres, whichever occurred first and not otherwise.
61. She was categorical that the warranty document was not the one which was issued to the Plaintiff and that it was the reason the Plaintiff did not produce the original warranty document.
62. In reference to the Internal Memo, DW1 testified that the Memo was in respect of purchasers as from 1st June 2019 and not before.
63. Having carefully interrogated the Plaintiff's documents, there is no doubt that the original warranty document was not availed for this Court's perusal.
64. The uncontroverted evidence of the DW1 was that the Defendant and its Dealers issued every Purchaser with an original warranty document, signed by both the Purchaser and the Defendant or the Dealer as the case may be.
65. It was further the Defendant's undisputed evidence that the warranty document usually spells out the details of the vehicle in question which upon being signed by both parties is stamped and is handed over to the Purchaser.
66. The Plaintiff did not contest the fact that the warranty document was handed over to him upon purchase. His evidence was that he had the said document, but he did not bring it to Court having left it at his home.
67. The Plaintiff, despite being impressed upon the importance of the original warranty document in the case, did not offer to avail it.
68. The failure by the Plaintiff to avail the original warranty document imputes an adverse inference that could be drawn from it.
69. In view of the undisputed fact that the Plaintiff was the only one in possession of the original warranty document and that whole case revolved around the terms therein, the deliberate non-production of the document pointed to the fact that the Plaintiff was deliberately avoiding to bring the terms therein for this Court's inspection.
70. To that end, this Court's attention is drawn to Section 112 of the [Evidence Act](#) provides as follows;

112. Proof of special knowledge in civil proceedings



In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

71. In Civil Appeal E022 of 2021, Kenchic Limited v Kenya Power & Lighting Co Ltd (Civil Appeal E022 of 2021) [2024] KEHC 6545 (KLR) (Civ) (6 June 2024), the Court, in reference to the decision in Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR spoke to the implication of the failure of a party to produce evidence in its possession in the following terms: -

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the Court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho v KCB [2003] 1 EA 108 the Court held that adverse inference should be drawn upon a party who fails to call evidence in his possession.

72. Inevitably, therefore, the Plaintiff's failure to avail the original warranty document is evidence of its detrimental value to his own case. To that end, the warranty produced in Court was rendered of very low probative value, if any. It cannot, therefore, aid the Plaintiff in any way in his case.

73. As the Court comes to the end of this issue, it takes cognizance of the numerous newspaper cuttings the Plaintiff referred this Court to in a bid to prove his case. Its probative value of such evidence has been the subject of discussion by Courts.

74. In Civil Appeal 166 of 2018, Communications Authority of Kenya v Okiya Omtatah Okoiti & 8 others [2020] eKLR, the Court of Appeal discussed the topic as follows: -

(39) We agree the probative weight to be given to a statement of facts contained in newspaper cuttings, required the maker of the statement to appear in court and be subjected to court room processes for that statement to be admissible in evidence. See the case of Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR where this Court stated as follows on the probative value of evidence contained in newspapers: -

On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of statement appearing in court and deposing to have perceived the fact reported...



Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of *Laxmi Raj Shetty -v-State of TamilNadu* 1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence.

75. Therefore, the evidence proffered through the newspaper cuttings did not also aid the Plaintiff in any way in his case.
76. In sum, therefore, the Plaintiff failed to prove that the Defendant breached any of the Truck's warranty terms. As such, the issue herein is answered in the negative.
77. Next is the second issue.

b. Whether the counter-claim is merited:

78. The Defendant's sole claim arose from the averment that it ought to be compensated for storage of the Plaintiff's truck.
79. Compensation resulting from storage are a special breed of damages. A party must plead and specifically prove its case in order to succeed.
80. The calling under special damages is high. In Civil Appeal No 42 of 1983, *Hahn v Singh*, [1985] KLR, the Court of Appeal spoke of the nature special damages as follows: -

.... 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.....

Our decisional law is quite clear now that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.

81. The Court has gone through the Defendant's documents as well as the oral evidence by DW1. There is a letter dated 5th July 2021. I will reproduce the relevant excerpts.

5th July 2021

Re: Authority to start repairs

Vehicle registration No. KCS 032A

Entry date; March 31st 2021

Revised Repair Estimate No. EWB/3079/2021

We write to inform you that the above vehicle has been inspected in line with your instructions and a revised repair estimate prepared.

....

Please note that the vehicle continues to occupy valuable space in the workshop chargeable as storage charges at a daily rate of Kshs. 1,000/- plus VAT effective the date it was received 31st.03.2021. Your prompt action over this matter will be highly appreciated.



82. From the Counter-claim, there is no doubt that the Defendant specifically pleaded for storage charges. In its evidence, the Defendant testified of serving the Plaintiff with the above letter.
83. However, the Plaintiff denied service. It was, therefore, upon the Defendant to prove that indeed the said letter was delivered to the Plaintiff. That, the Defendant failed to do. As such, the claim for storage charges, as special damages, must fail since it was only pleaded, but not proved.
84. The issue is, hence, also answered in the negative.

Disposition

85. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.
86. In the end, the following final orders hereby issue: -
- a. The Amended Plaintiff dated 27th May 2022 is wholly without merit and is hereby dismissed.
 - b. The Defendant's Counter-claim dated 1st February 2022 fails and is hereby dismissed.
 - c. Each party shall bear their own costs.
87. Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Peter Kamau, the Plaintiff in person.

Mr. Samba, Counsel for the Defendant.

Chemosop/Duke – Court Assistants.

