



REPUBLIC OF KENYA



KENYA LAW
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**Eco Bank Kenya Limited v Miatu (Civil Appeal 40 of 2019)
[2024] KEHC 9844 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9844 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 40 OF 2019
S MBUNGI, J
AUGUST 6, 2024**

BETWEEN

ECO BANK KENYA LIMITED APPELLANT

AND

HARUN MACHUGIA MIATU RESPONDENT

*(Appeal from the judgement of the Hon Kagendo Chief Magistrate
in Nyeri CMCC No. 293 of 2014 delivered on 29/5/2019)*

JUDGMENT

Introduction

1. This appeal arises from the judgment of the Chief Magistrate, Honourable Kagendo, in Nyeri CMCC No. 293 of 2019 delivered on 29th May, 2019.
2. The plaintiff/respondent had sued the defendant/appellant for damages for loss of user/special damages for motor vehicle registration No KBT 436A after the appellant allegedly repossessed the motor vehicle without a good reason for he had paid all the loan amount/arrears due at the time of repossession.
3. The Appellant being dissatisfied with the judgement of the lower court filed an appeal on the following grounds.
 - a. That the trial Magistrate erred in law and fact in awarding the Respondent herein with damages in respect of loss of user without the same being proved to the required standard.
 - b. That the trial Magistrate erred in law and fact in awarding the respondent herein with special damages without taking into consideration that the same were not proved as required.



- c. That the trial Magistrate erred in law and in fact for completely misapprehending the issue before her and thus arriving at the wrong conclusion hence causing gross injustice to the appellant.
 - d. That the trial Magistrate erred in law and in fact for completely ignoring the appellant's evidence before her and hence arriving at the wrong conclusion of facts. A gross injustice was thereby occasioned against the Appellant.
4. The Appellant in his appeal filed Memorandum of Appeal dated 2nd February 2023 seeking the following orders: -
- i. That the appeal be allowed.
 - ii. That the judgment of Honourable Chief Magistrate delivered on 29th May, 2019 in Nyeri CMCC No. 293 of 2024 be set aside.
 - iii. That costs of the appeal be to the Respondent.
5. The court directed both parties to file their written submission.

Appellant's Submission

A. That the Magistrate erred in law and fact in awarding the respondent herein with damages in respect of loss of user as well as awarding the respondent herein with special damages without taking into consideration that the same were not proven as required.

6. The Appellant submitted that the Respondent did not produce sufficient evidence to prove that indeed motor vehicle registration number KBT 436 A earned Kshs. 25,000 per day, stating that the respondent only provided the court with an agreement for carrier services between him and mt. Kenya bottlers ltd which did not contain the exact amount pleaded by him for loss of user. And that his KCB bank statement did not state for what purpose the money was credited into his account and for how many months. He referred the case of David Bagine vs Martin Bundi (1997) eKLR where the court of appeal addressed the issue of loss of user 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”. These damages as pointed out earlier by us must be strictly proved.” It is trite law in evidence that he who asserts, must prove his case. Section 107 of the *Evidence Act* succinctly states: “Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. As was quoted in *Ignatius Makau Mutisya V Reuben Musyoki Muli (2015) e KLR*, Denning J. stated in the case of *Miller Vs Minister of Pensions (1947) 2 All ER 372*, that: “Thus proof of a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

7. The Appellant submitted that the Respondent failed in his duty to prove loss of user and that he should not have been awarded damages for the same.



On Special Damages

8. The Appellant submitted that the special damages must be proved and pleaded. Stating that the Respondent pleaded damages of Kshs. 313,400 being the salaries of the driver of the truck and the tun boy, illegal auctioneers' charges and unutilized paid up insurance. He further submitted that the Respondent did not produce evidence to support this amount. He referred to the case of Zacharia Waweru Thumbi Vs Samuel Njoroge Thuku (2006) eKLR, Mutungi, J. which states as follows: -

“If I were to explain, or define, special damages to a lay man, I would say “they are a reimbursement to the plaintiff/victim of the tort, for what he has actually spent as a consequence of the tortuous act (s) complained of”. This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed... I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test.”

9. The Appellant submitted that the Respondent did not prove his claim for special damages and he should not have been awarded the same.

B. That the trial Magistrate erred in law and in fact for completely misapprehending the issue before her and thus arriving at the wrong conclusion hence causing gross injustice to the appellant & also ignoring the Appellant's evidence before her and hence arriving at the wrong conclusion of facts. A gross injustice was thereby occasioned against the Appellant.

10. The Respondent submitted that the Respondent was unable to prove that indeed motor vehicle registration No. KBT 436 A earned Kshs 25,000 per day and that there was no proof that the Respondent indeed had employed a driver and a turn boy for 3 months as regards his claim for special damages
11. He submitted that he did not dispute that he had executed a chattel mortgage with the Appellant and that he had put up motor vehicle registration No. KBT 436A as security.
12. The Respondent submitted that he was not in arrears and that the repossession of motor vehicle registration No. KBT 436 A by the appellant was conducted legally and in exercise of their contractual rights.
13. The Appellant submitted that the Respondent had the responsibility to prove a prima facie case with a balance of probabilities to clearly show the court that he is entitled to the orders sought.
14. The Appellant submitted that they brought all the relevant documents to support their case. He referred to the case of Mrao Ltd vs. American bank of Kenya Ltd & 2 others, where the court of appeal stated: “so what is a prima facie case? I would say that in civil case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Respondents Submission

15. The Respondent submitted that he proved his case to the required standard of proof on a balance of probabilities and referred the court to civil Case Kinyungu Njogu Vs Daniel Kimani Maingi (2000) eKLR where the standard of proof on a balance of probabilities was defined. The court said “... that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is no show that one probability was more probable than the other”.



16. The Respondent submitted that the learned trial Magistrate correctly made a finding that the respondents motor vehicle was repossessed although the arrears had been cleared.
17. In paragraph 14 of the judgement the learned trial magistrate found that:

“The payment was on the day of repossession. So clearly it is mischievous of the bank to feign ignorance.”
18. The Respondent submitted that the trial court found in paragraph 22 that:

“The Plaintiff exhibited the contract with mt Kenya Bottlers and showed how they were paid.”
19. The Respondent submitted that special damages were specifically proved and the court did not arrive at the wrong conclusion. He referred to the case of China Wu Yi Limited & Another Vs. Irene Leah Musau (2022) eKLR where the court stated that:

“Regarding proof of loss while it is true that it is trite law that special damages must not only be specifically pleaded but strictly proved, what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done.”
20. The Respondent submitted that the learned Magistrate rightly found that the contract between the Respondent and Mt. Kenya Bottlers was produced as exhibit together with bank statement indicating how much the Respondent was paid, and thus special damages were proved.
21. The Respondent submitted that the pleadings and evidence tendered by the Appellant were considered and in particular in paragraph 3,11, 12, 13 and 16 of the judgment dated and delivered on the 29th of May, 2019.
22. The Respondent submits that the appeal lacks merit and should be dismissed with costs.
23. I have considered the submissions of the parties, the pleadings, the proceedings of the lower court and the judgment of the lower court.
24. From the above analysis I find the issues for determination can be condensed to two;
 - a. Whether the trial Magistrate awarded the respondent damages in respect to loss of user and special damages without the same being proven to the required standard
 - b. Whether the trial magistrate misapprehended the issues before her and arrived at the wrong conclusion.

Determination

Whether the trial Magistrate awarded the respondent damages in respect to loss of user and special damages without the same being proven to the required standard

25. I have looked at the judgment of the trial court, I am satisfied that the trial court considered the evidence adduced in support for the claim of loss of user.
26. On 7th of June,2024 the respondent received a demand notice from the Appellant demanding Kshs.389,908.65/- being arrears for unpaid loan.



27. The respondent produced bank statements to show that the time the motor vehicle was repossessed that was 31st July 2014, he had paid Kshs.555,000/- which was more than the amount of money indicated in the demand notice, so the Appellant had no reasons to repossess the respondent's motor vehicle which it continued to hold for three months and only released it after court intervention.
28. It was not in dispute that the respondent was using the motor vehicle for transport business and in fact the day of repossession it was on the road, on a business trip.
29. The respondent produced a contract between him and Mt. Kenya Bottlers Limited dated 8th May, 2014. He also produced bank statements showing the amount of money he used to be paid by Mt. Kenya Bottlers which on average was Kshs.28,000/- per month, though in his pleadings he claimed Kshs.25,000/- per month for the period the motor vehicle was in the custody of the Appellant. (92 days) making a total of 2,300,000/- that is from 31st July, 2014 to 31st October, 2014.
30. It is clear that if the motor vehicle had not been repossessed the Respondent would have earned more than the amount claimed if other factors were constant and this court thinks the respondent claimed a lower figure of Kshs.25,000/- instead of the actual amount he was getting in order to take care of the unforeseen eventualities common in day to day business life.
31. The Appellant submitted that the figure of Kshs.25,000/- was not stated in the agreement between the Respondent and Mt. Kenya Bottlers Limited and again that the amount of money deposited in the Respondent's bank account by Mt. Kenya Bottlers Limited its purpose was not specified. This court is alive to the fact that the purpose of deposits made into one's bank account ordinarily are not specified in the bank statements.
32. The Respondent demonstrated that there were deposits made in his bank account by Mt. Kenya Bottlers Limited over the period relevant to this matter, to me this was sufficient proof on a balance of probability.
33. There being no other evidence adduced to the contrary the trial court was right to arrive to its decision that the claim for loss of user was adequately proven. This court has no reason to disturb that finding, it is therefore upheld.
34. The question as to whether the special damages were proved, I have looked at evidence produced by the respondent, on the issue of salary paid to the driver and conductor, the respondent produced a document titled Year 2014 vehicle registration 436A, Page 149 of the record of appeal. The document was contested by the appellant saying that it cannot be used to prove employment. I will agree with the Appellant, for the document produced cannot be equated to an employment contract. The court cannot tell as per that document the terms of the contract, whether the payments were for a month or for some days within the month or not, it could have sufficed if the respondent produced an employment letter and called the driver and conductor as witnesses to confirm whether they were employees and indeed received the amounts of money claimed.
35. The other claim in respect to special damages in respect to the insurance policy which he continued paying when the motor vehicle was in the custody of the Appellant, I find this claim cannot stand for the insurance policy covered the motor vehicle regardless whether it was in use or not. The motor vehicle was there if anything happened to the motor vehicle at that time, the insurance cover would come into effect, here, the respondent was only denied the use of the motor vehicle which the court has said he be compensated.



36. On the issue of the illegal auctioneer fee charges, I have not seen any receipts issued by the Dalali Traders Auctioneers showing that the respondent paid the said sum. Therefore, I find this special damages were not strictly proven by the Respondent. Thus the Appellant's Appeal succeeds on this.
37. All in all, the appeal partially succeeds, the trial courts judgment is upheld in respect to the award on loss of user however, the award on special damages is set aside.
38. This being a win win situation, each party is to bear its own cost on the appeal and also in the lower court.
39. Right of Appeal 30 days.

DELIVERED, SIGNED AND DATED THIS 6TH DAY OF AUGUST 2024 IN KAKAMEGA HIGH COURT.

HON. JUSTICE S. MBUNGI

JUDGE

Court:

Appellant:

Respondent

Court clerk- Elizabeth Angong'a

