



REPUBLIC OF KENYA



**Kimaru v Machira (Civil Appeal 22 of 2021)
[2023] KEHC 2354 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2354 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL APPEAL 22 OF 2021
CM KARIUKI, J
MARCH 23, 2023**

BETWEEN

PHILIP GICHUKI KIMARU APPELLANT

AND

MACHIRA GICHUHI MACHIRA RESPONDENT

*(Being an appeal against the Judgment of Honourable S N MWANGI
Senior Resident Magistrate delivered on 15th September 2021 in the
Chief Magistrate Court at Nyahururu Civil Case No. 115 of 2017)*

JUDGMENT

1. This an appeal arising from claim from refund of purchase price plus damages for breach of contract and loss of business, plus interest and costs.
2. The matter was heard and the Plaintiff/Respondent was awarded Ksh. 700,000 as refund of;
 - a) plus, penalty of 20% per month,
 - b) General damages Ksh. 100,000/=
 - c) Loss of business Ksh 1,825,000/=
 - d) Cost and interest
3. The appellant being aggrieved lodged instant appeal and set out in the record of appeal.
 - i) That the Learned trial Magistrate erred in law and in fact in finding that the Appellant was in breach of the sale agreement dated 17/10/2016 and that the respondent was entitled to a refund of the purchase price at Kshs. 700,000/= and penalty for breach of contract at 20% of the purchase price.



- ii) That the Learned trial Magistrate erred in law and in fact in finding that the respondent that pleaded and proved loss of use and income which is a claim in the nature of special damages and in awarding a sum of Kshs. 1,825,000/= to the respondent under the said head, against the pleadings filed and evidence tendered by the respondent.
- iii) That the Learned trial Magistrate erred in Law and in fact in awarding a sum of Kshs. 100,000/ being general damages for breach of contract with damages were not available and applicable in the case.
- iv) That the Learned Trial Magistrate erred in law and in fact in dwelling on extraneous matters while not pleaded by the parties deciding the case.
- v) That the Learned trial Magistrate erred in law and in fact in misapprehending the law and the facts in the matter in allowing the respondent's claim.
- vi) That the learned trial Magistrate erred in law and in fact in failing to take into consideration the Appellant's evidence and written submission while deciding the case and in failing to hold that it is the respondent who breached the sale agreement dated 17/10/2016 by refusing to take possession of the motor vehicle registration No. KBW 182X.

4. Parties Submissions were filed and exchanged to canvass appeal.

5.Appellant submission

6. The appellant submitted that, the evidence on record was clear that it is the Respondent who indeed breached the agreement and the trial court was therefore wrong in ordering that the Appellant refunds a sum of Kshs. 700,000/= plus 20% damages for breach of contract to the respondent.

a. Award on General Damages of Kshs. 100,000/= for breach of contract.

7. The aforesaid award was erroneous and not available in the instant case. And relies on the case of Kenya Power & lighting Co. Ltd v Abel M. Momanyi Birundu [2015] eKLR, and Kenya Tourist Development Cooperation v Sundowner lodge Limited [2018] eKLR. which held general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.

8. The court to set aside the award of Kshs. 100,000/=:, if the Appeal on (a) above shall not succeed.

C Award of Kshs. 1,825,000 as loss of business

9. He submitted that, this award was erroneous, a claim for loss of business qualifies to a claim for special damaged which must be specifically pleaded and strictly proved. He relies on Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR, Jivanji case (supra), Coast Bus Service Limited v Murunga & others Nairobi CA no. 192 of 1992 (UR) and

Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 .

10. The Respondent did not plead Special damages for loss of business in his plaint dated 11/5/2017 found in page 4 and 5 of the Record of Appeal. The daily earnings that were to be expected from the matatu



business alluded to were not pleaded in the plaint with specifications. The claim for loss of business was not proved to the required standards.

11. The records produced were not sufficient proof.
12. Thus the court is urged to allow the Appeal in its entirety with costs for the lower court and the Appeal being awarded to the Appellant.

13. Respondent Submission

14. The respondent submit that, timeline in the sale agreement was of essence on purchase price and possession. no consideration time line was breached as in this case, as the Appellant had received money and had failed and or neglected to deliver the motor vehicle. In fact, he took it into hiding where he knew the Respondent would not find it as he knew only of his Nairutia home and it dilapidated in value as he watched while he went ahead to keep the Respondent's money and in blatant breach of their contract.
15. The only proof of the Appellant's intention to defraud the Respondent is very simple. He received the money, lied for days on the whereabouts of the motor vehicle while it was parked in his homestead and never once asking the Respondent to even come collect the Motor Vehicle from the homestead or at all. Thus appellant breached contract.

16. Issue 1: award on general damages of Kshs. 100,000/= for breach of contract

17. The respondent relies on the case of Gideon Mutiso Mutua v Mega Wealth International Limited [2012] which held that the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things from such a breach of contract itself or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it.
18. He submitted that court ought uphold that the Respondent was entitled to general damages for breach of contract by the Appellant.

19. Issue ii award of Kshs. 1,825,000 as loss of business.

20. He submits that, he did indeed prove the amount the suit motor vehicle would have earned him had the defendant given him the possession of the same, and relied on the case of Wambua v Patel & Another [1986] KLR 336, where the court had found the plaintiff had not kept proper records of what he earned and still was awarded special damages claimed. .
21. He submits that, the loss of business was specifically pleaded as the same is in the plaint as prayer ii and the same was strictly proved since the Respondent was not in possession of the suit motor vehicle, he could not have used it to prove loss of business.

22. Issues, analysis, and determination

The court has gone through the record, proceedings, pleadings, and submissions, and thus the court finds the issues are; whether there was a breach of the Agreement/Contract dated 17th October 2016.

If the above is in the affirmative, what were the remedies to the aggrieved party or to the innocent party? What is the order as to costs?



23. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

24. In *Nkube v Nyamiro* [1983] KLR 403, the same court stated:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

25. The parties entered into an agreement aforesaid with the terms;

Prices Kshs. 700,000 paid immediately and possession same day of the transaction.

26. Other terms of the contract are:

- a) The vendor warrants that he is the rightful owner of motor vehicle registration No. KBW 182X Mazda which is registered under the names of Four N T Savings and Credit Society Ltd P of P O BOX 1591 -20300 Nyahururu and hereby indemnifies and agreed to keep indemnified the purchaser against demand and expenses whatsoever arising or incurred on account or want in the log book.
- b) The vendor shall hand over duly executed transfer forms. Photocopy of pin number and Id photocopy to the purchaser.
- c) The vendor has sold the said motor vehicle free from any encumbrance and if any he shall be liable.
- d) That the purchaser has seen the said motor referred herein and he is satisfied with its conditions and state.
- e) That the said motor vehicle is sold “as is where is basis”
- f) That any liability that might have occurred before the signing of this agreement to be shouldered by the vendor and any liability which may arise after signing of this agreement to be shouldered by the purchaser.
- g) That legal fees to be shared equally by both parties.
- h) That any party in breach of this agreement shall pay to the other party not in breach an amount equivalent to 20% of the consideration herein after fourteen (14) days notice in writing by the offended party in breach and who fails to remedy the same in the event the vendor will be the one at fault will also refund the purchase price that he will have received form the purchaser together with the interest at reigning bank rates.



27. Despite payment of the purchase price as agreed, the possession was not given as per the contract. From amendment to the agreement or subsequent agreement was made to vary the terms.
28. Thus, by a plaint dated 11/5/2017 a suit No. 115 of 2017 was lodged claiming Refund of consideration/purchase price. Damages for breach of contract Loss of business from date of Agreement until refund of consideration interest and costs,
29. Prior to instituting above suit, the Respondent issued demand notice claiming - vide letter of 1/11/2016: Refund of purchase price Ksh. 700,000/= Damages Kshs 140,000/= Collection charges Kshs. 50,400 Total 890,000/=
30. In defense dated 15/6/2017, states in part that payment of Kshs. 700,000/= price to the Respondent was done on the execution of the agreement, and the possession of the motor vehicle subject to the Agreement was to be done the same day of the agreement.
31. The statement of the Appellant filed states that the same possession was given. Thus, the claim was denied in his evidence as a court-recorded appellant testimony thus;

“It was in the evening, and he said that since it was in the evening and I had already given him the log book, he said he will come with the driver to my home at Mairo Inya to get the vehicle. He used to know my home and my parent’s home. He lied by saying that he does not know my home at Mairo Inya. After he failed to come for the vehicle, I went with another man to his home and asked him why he did not want the vehicle. I had already received the demand letter dated 1st November 2016 which he has produced as an exhibit and he had asked me to refund Kshs. 700,000/= and extra money thus coming to around Kshs. 800,000/=.”

32. The words of the appellant and the Agreement are incongruent, and thus, the written Agreement prevails. He never answered the demand letter to give his version of why possession was not given as agreed.
33. Thus, the terms of the Agreement were breached by the Appellant by not giving possession of m/v as agreed. On damages, the principles are clear. Special damages must not only be pleaded strictly but also strictly proved.
 - a) What was pleaded?
 - b) What was proved?
34. On penalties, 20% of the purchase price. What is the law?
35. The trial court awarded the following:
 - i) Kshs. 700,000 refund of the purchase price
 - ii) Kshs. 100,000 General Damages
 - iii) Kshs. 1,825,000 loss of business
 - iv) Cost and interest.

36. The court, in arriving at the above decision, held;

“Court must further interrogate whether there was a breach of the said contract. Black’s Law Dictionary, 9th Edition at, page 214, defined breach of contract as follows;



A violation of a contractual obligation by failing to perform one's own promise, by repudiating, or by interfering with another party's performance. A breach may be one by non-performance or by, repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he had at least a claim for nominal damages.”

As held earlier, there is no dispute whatsoever that the parties so entered into the said motor vehicle agreement and also that the defendant never handed over the motor vehicle to the plaintiff even after its sale. There is nowhere in his evidence or even in his submission did the defendant state any frustrations caused by the plaintiff in the fulfilment of his obligations. The defendant in the agreement acknowledged receipt of the full purchase price before the execution of the said agreement, which they referred to as a transaction. However, the defendant admitted that the vehicle, even at the time of the hearing, was still at his home compound, which therefore proves that he never handed over possession of the motor vehicle. I therefore find that indeed the plaintiff had the right to write a demand letter to the defendant 13 days after executing the agreement herein for failure to the defendant to hand over possession to the plaintiff.”

37. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also *Provincial Insurance Co. EA Ltd v Mordechai Mwangi Nandwa*, (KSM Civil Appeal No 179 of 1995,)
38. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.
39. In the agreement the damages agreed was penalty on penalties of 20% of the purchase price (ksh 700,000) which translates to ksh 140,000. No other damages in the name of general damages could be awarded.
40. On special damages, the case of the Court of Appeal stated in *Capital Fish Limited v Kenya Power and Lighting Company Limited* (supra):

The appellant apart from listing the alleged loss and damage, it did not... lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.
41. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), where the court stated that:

“ [The] Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it”
42. In *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax



this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

43. In *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another* [2011] JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering the judgment of the supreme court of Nigeria stated:

“I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

44. The principles that run through the decisions referred to above, are clear that special damages must be strictly proved and that courts must not relax this principle. The respondent did not attempt to plead and prove his particularized claims as required by law.

45. Thus, the award of ksh 1,825,000 loss of business was not pleaded and proved to the standard set by the law. Thus, the court holds that the only payable amount to the respondent were;

i. Refund of ksh 700, 000 purchase price, agreed damages 20% of the purchase price (ksh 140,000), interest from the date of the filing of the suit to date of payment in full plus costs of the lower court. As to the costs of the appeal parties to bear their costs as the appeal partially succeeded.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 23RD DAY OF MARCH 2023.

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CHARLES KARIUKI

JUDGE

