



**Lari Highway Carriers Ltd & another v Gathuru & 2 others (Civil Suit
739 of 1994) [2023] KEHC 20333 (KLR) (Civ) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20333 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 739 OF 1994

CW MEOLI, J

JULY 14, 2023

BETWEEN

LARI HIGHWAY CARRIERS LTD 1ST PLAINTIFF

FREDRICK MBURU GATOME 2ND PLAINTIFF

AND

DAVID KIMANI GATHURU 1ST DEFENDANT

**STANLEY THAARA MUGACHA T/A GALAXY AUCTIONEERS 2ND
DEFENDANT**

KENFIN SERVICES LIMITED 3RD DEFENDANT

JUDGMENT

1. Lari Highway Carriers Ltd and Fredrick Mburu Gatome (hereafter the 1st and 2nd Plaintiffs, respectively) by the plaint dated 22/02/1994, amended on 8/11/1999 and further amended on 21/01/2004 instituted this suit against David Kimani Gathuru, Stanley Thaara Mugacha T/A Galaxy Auctioneers and Kenfin Services Limited (hereafter the 1st, 2nd, and 3rd Defendants, respectively) seeking damages in the sum of Kshs. 78,000,000/-, costs of the suit and interest. The claim was founded on alleged unlawful attachment of the Plaintiffs' property and/or breach of contract.
2. The Plaintiffs averred that the 1st Plaintiff was at all material times the registered owner of the motor vehicles registration number KAA 387H and KAA-;7F make Isuzu, both valued at Kshs.6,000,000/- (the first and second motor vehicles); that the 2nd Plaintiff was at all material times the registered owner of the motor vehicle registration number KAA 201Z (the third motor vehicle) also valued at Kshs.6,000,000/- ; and that the three motor vehicles were at all material times stored in the godown premises owned by the 3rd Defendant herein who acted as a bailee.



3. Further it was averred that the 1st Defendant was the plaintiff and decree holder in HCCC No. 6181/1990-David Kimani Gathuku v Lari Bus Carriers & the AG (the primary suit) whereas the 2nd Defendant carried on the business of an auctioneer. It was pleaded that on 31.01.1994 the 1st and 2nd Defendant while purporting to execute a warrant of attachment issued in the primary suit, wrongfully attached the subject motor vehicles, and thereafter illegally sold them by way of a public auction held on 14.02.1994.
4. It was further averred that the 2nd Defendant failed to carry out relevant searches prior to the attachment and sale of the subject vehicles to ascertain the ownership of the properties in question. That searches would have shown that the attached properties belonged to the Plaintiffs herein, who were not parties to the primary suit. The Plaintiffs averred against the 3rd Defendant that in breach of its duty as bailee it illegally released the subject motor vehicles to the 2nd Defendant. That as a result, the Plaintiffs had suffered loss and damage in the following manner:

“Particulars Of Loss

 - i. Value of the buses at Kshs. 6 Million each totaling Kshs. 18 Million
 - ii. Loss of use to date at Kshs. 3 Million per month from 1st February 1994 when the Plaintiff intended to collect them for use from the 3rd Defendant at Kshs.60,000,000.” (sic).
5. Upon service of summons, the Defendants entered appearance and filed their separate statements of defence, essentially denying the key averments made in the Further Amended Plaint. On his part, the 1st Defendant by his statement of defence dated 12.05.2004 stated that the attachment and sale of the subject motor vehicles was lawful. The 2nd Defendant filed his statement of defence on 5.01.2000 therein asserting that the Plaintiffs did not lay claim to the subject motor vehicles at the time of attachment and sale by auction, the latter which was advertised in a local newspaper on 12.02.1994 and 15.02.1994. Further that the Plaintiffs did not mount objection proceedings in the primary suit.
6. The 2nd Defendant pleaded in the alternative that the Plaintiffs had at all material times been associated with the name LARI BUS CARRIERS, sued with other defendants in the primary suit. Hence the 2nd Defendant averred that the attachment and sale of the subject motor vehicles was regular. Similarly, the 3rd Defendant, through the statement of defence filed on 13.03.2000 denied the averments in the plaint, including the assertion that it acted as a bailee for the Plaintiffs in respect of the subject motor vehicles for a consideration.
7. At the hearing only the Plaintiffs, the 1st and 2nd Defendants adduced evidence. However, the 3rd Defendant beyond filing its defence statement, did not participate further in the matter, despite due notice of the subsequent steps taken in the suit and of the trial.
8. The 2nd Plaintiff (PW1), identifying himself as a director of the 1st Plaintiff proceeded to adopt his witness statement filed on 2.07.2018 as his evidence-in-chief, and produced the Plaintiffs’ bundle of documents filed on even date as P. Exh. 1 (pp 1-32, and 58-61), leaving out the Valuation and Assessment Report (pp. 33-57) which would later be produced by his witness, an accountant.
9. During cross-examination, PW1 stated that having learned of the subject public auction on 28.02.1994 he had proceeded to file an application in the present suit seeking injunctive orders pending the hearing and determination of the suit. But he subsequently discovered that the subject motor vehicles had already been transferred to the respective purchasers pursuant to the sale by public auction. He asserted that the subject motor vehicles having been delivered on 5.02.1993 for storage were at all material times at the 3rd Defendant’s premises prior to the attachment and sale.



10. He confirmed that in the period between 5.02.1993 and 30.11.1993 the subject motor vehicles had not been bringing in any income but asserted that although the subject motor vehicles had been in storage, they were not intended for sale, and he had intended to collect them from the 3rd Defendant on 1.02.1994. He denied awareness of the existence of the case between the 1st Plaintiff and the 1st Defendant not having received any notice thereof. He reiterated that the first and second motor vehicles were registered in the name of the 1st Plaintiff whereas the third motor vehicle was registered in his name. And that the subject motor vehicles were new at purchase and were used as public service vehicles. Despite asserting that the said vehicles were earning income previously, he admitted that he had not tendered any records in that regard. The 2nd Plaintiff denied having ever heard the name “Lari Bus Carriers.”
11. Regarding the value of the subject motor vehicles, he asserted that each was worth Kshs.6,000,000/- despite his purchase documentation not bearing such figure as consideration. He said he had sourced the said price from dealers but had no documentation with him. He explained that after the court had granted injunctive orders and an order for repossession of the vehicles in favour of the Plaintiffs, the purchasers of the said vehicles moved the court resulting in the cancellation of the injunctive orders. In re-examination, the 2nd Plaintiff referred to the certificate of incorporation in respect of the 1st Plaintiff as evidence that the latter company was a separate entity from “Lari Bus Carriers” which was sued in the primary suit and against which subsequent execution issued.
12. Francis Karanja Kaminja testified as PW2. Adopting his executed witness statement as his evidence-in-chief, he proceeded to produce the Valuation and Assessment Report found on pages 33-37 of the Plaintiffs’ collective bundle of documents, as P. Exhibit 2. In cross-examination, the witness who indicated that he was an employee of the J.N. Matheka & Associates at all material times, stated inter alia, that in arriving at the value of the first and second motor vehicles at Kshs.2,300,000/- and Kshs.2,230,000/- respectively, he considered the purchase loan amount and interest thereon, admitting however that the particulars were not indicated in his report.
13. He stated that he assessed the life span of the vehicles at 10 years ending in the year 2001 and said he did not physically assess the subject motor vehicles, but instead relied on the logbooks and loan statements. He maintained, despite having no documentation in proof, that the Plaintiffs’ transport business was prospering in the material time. He admitted that he could not tell the condition of the subject vehicles at the time of attachment and that he did not obtain current values thereof from dealers or manufacturers. Stating that he was an accountant and not a valuer, PW2 said that his firm did not engage the services of a motor vehicle valuer prior to preparing the report, relying instead on other methods in determining loss. He however admitted that the assessment did not take depreciation in value of the vehicles into account. This marked the close of the Plaintiffs’ case.
14. For his case, the 1st Defendant testifying as DW1 equally adopted his signed witness statement as his evidence-in-chief and produced his bundle of documents as D. Exhibits 1. Under cross-examination, he testified that he obtained a decree against Lari Bus Carriers and the Attorney General (AG) in the primary suit and not against the 1st Plaintiff herein. That through his advocate the 2nd Defendant was instructed to execute the decree in the primary suit. That execution was completed, and the decree was satisfied. In re-examination, the 1st Defendant reiterated that his advocate handled the execution process. This marked the close of the 1st Defendant’s case.
15. The 2nd Defendant (DW2) adopted his witness statement and produced his bundle of documents as D. Exhibit 1-10. He introduced himself as an auctioneer by profession and stated that he had received for execution, the warrants issued by the court in the primary suit and received instructions from the 1st Defendant’s advocate on the location of the movable properties of the judgment debtor at the premises



- of the 3rd Defendant. That he proceeded to attach the subject motor vehicles which he later advertised for sale by way of a public auction. That no party objected to the auction held thereafter.
16. That following issuance of interlocutory injunctive orders in the present suit, negotiations were held between the purchasers of the subject vehicles and the Plaintiffs herein, resulting in a consent order pursuant to which the Plaintiffs received a settlement sum of Kshs.300,000/- from the purchasers in exchange for the vesting of the title to the vehicles in the purchasers who also received certain parts that were missing from the vehicles.
 17. In cross-examination, the 2nd Defendant stated that prior to executing the decree, he did not carry out any search to ascertain ownership by the judgment debtor of the subject vehicles but relied on the information provided to him by the 1st Defendant's advocate, disclosing the location of the subject motor vehicles. DW2 admitted that he did not directly deal with the 1st Defendant and only communicated with his advocate.
 18. He said that upon locating the vehicles and presenting the 3rd Defendant's agents with a copy of the warrants of attachment, the said Defendants released the subject motor vehicles to him, and thereafter he advertised them for sale by public auction. And only later did he learn that the subject motor vehicles belonged to different owners, adding that his attempts to obtain ownership information from the Registrar of Motor Vehicles had proved unsuccessful.
 19. During re-examination, DW2 stated that he was not a party to the consent entered into between the Plaintiffs and the purchasers of the subject motor vehicles. He reiterated the difficulty he faced in his bid to obtain official searches for the vehicles but emphasized that the 3rd Defendant did not object to the attachment. His position was that he exercised due diligence in executing the warrants of attachment and sale. This marked the close of the 2nd Defendant's case.
 20. The parties were thereafter directed to file written submissions. On the part of the Plaintiffs, their counsel submitted on diverse issues. Asserting that there was no dispute that the 1st Plaintiff was a limited liability company, and the 2nd Plaintiff was its director, and that the Plaintiffs were not parties to the primary suit, he argued that the sale and attachment of the said vehicles by the 2nd Defendant was unlawful, and that the 3rd Defendant ought to be held liable for releasing the said vehicles to the former Defendant. He reiterated the value of each of the vehicles at Kes. 6,000,000/-.
 21. The Plaintiffs' counsel therefore proposed a sum of Kshs.1,000,000/- as general damages for unlawful attachment citing *Sorget Sawmills Ltd v J. M. Ndirangu t/a Molain Auctioneers & 3 others* [2006] eKLR where the sum of Kshs.100,000/- was awarded as general damages. The Plaintiffs also proposed the sum of Kshs.78,000,000/- in respect loss of value and use of the subject motor vehicles, based on PExh.2. Reliance was placed once more on the authority of *Sorget Sawmills Ltd v J. M. Ndirangu t/a Molain Auctioneers & 3 others* (supra) in which the court awarded a sum of Kshs.850,000/- being the value of the attached vehicle in that case. Counsel also urged the court to award the costs of the suit to the Plaintiffs.
 22. For the 1st Defendant, counsel anchored his submissions on the decision in *Serah Njeri Mwobi v John Kimani Njoroge*, C.A NO 314 of 2009 inter alia to argue that since the Plaintiffs received a sum of Kshs.300,000/- from the purchasers of the subject motor vehicles, they were estopped from claiming any further damages. Counsel further submitted that the Plaintiffs have no cause of action against the 1st Defendant in absence of evidence that the 2nd Defendant in executing warrants in the primary suit was acting upon the instructions of the former. Reference was made to *Simiyu v Sinino* [1985] eKLR in this respect. The court was urged to dismiss the suit against the 1st Defendant, with costs.



23. On the part of the 2nd Defendant, it was equally submitted that the Plaintiffs are estopped from claiming damages from the Defendants as the consent order compromised the entire suit. The same authorities cited by the 1st Defendant on estoppel were cited in the submissions of the 2nd Defendant. Regarding damages, counsel contended that the claim for loss of user is unsustainable because the subject motor vehicles were not in use at the time of attachment and sale and could not therefore have generated any income, as evident from material tendered by the Plaintiffs.
24. Counsel further contended that the Plaintiffs are not entitled to any sums for the loss of the subject motor vehicles in the absence of credible evidence to support the purported value in the sum of Kshs. 6,000,000/- per vehicle, counsel citing contradictory figures pleaded and in the Plaintiffs' evidence. He also argued that neither special nor general damages were available here. The decisions in *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR and *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR were cited in that regard. Consequently, the court was urged to dismiss the suit with costs.
25. The court has considered the pleadings, the evidence, and submissions of the respective parties. Some basic facts are not disputed. These include the fact that the Plaintiffs as described herein were not defendants in the primary suit in which warrants of attachment were issued; the storage of the subject vehicles in the material period in the custody of the 3rd Defendant which, on 31st January 1994 released them for attachment and sale by the 2nd Defendant; and the subsequent sale of the vehicles by the 2nd Defendant to third parties who at some point made an application to be enjoined in the suit but eventually entered into a consent with the Plaintiffs.
26. Although the Defendants had, by their pleadings, disputed the Plaintiffs' ownership of the subject vehicles the issue was seemingly abandoned at the hearing, possibly in light of the ownership records presented by the Plaintiffs in that regard. The Defendants instead appearing, without tangible proof, to assert an association between the 1st Plaintiff herein and the defendant known as Larry Bus Carriers in the primary suit. On their part the said Plaintiffs tendered a certificate of incorporation indicating its name as cited in this case.
27. To my mind the key issues falling for determination are as follows:
 - a. Whether Plaintiffs' claim herein is bar under the doctrine of estoppel.
 - b. Whether the Plaintiffs have established to the required standard the unlawful attachment and sale of the subject motor vehicles against the Defendants.
 - c. Whether the Plaintiffs are entitled to the reliefs sought in their pleadings.
28. Regarding the first issue, raised by the 1st and 2nd Defendants separately in their submissions, the parties cited as a basis the consent order entered into between the Plaintiffs herein and the purchasers of the subject motor vehicles. The Defendants arguing that in view of the consent order by which it was agreed, inter alia, that the Plaintiffs would receive the sum of Kshs.300,000/- from the purchasers in respect to the said vehicles, the Plaintiffs were precluded from pursuing the present claim against the Defendants.
29. As to the definition and application of the doctrine of estoppel, the court in addition to considering the authorities cited by the Defendants, also considered the decision of the Court of Appeal in *Dhanjal*



Investments Limited v Shabaha Investments Limited (Civil Appeal 80 of 2019) [2022] KECA 366 (KLR) where the Court stated that: -

“...estoppel is defined as “a bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true”. The doctrine of equitable estoppel is a defense that is raised when such conduct or representation has been relied on by another party, with the result that the other party has suffered a detriment or injury. See in this regard the decisions by this Court in John Mburu vs Consolidated Bank of Kenya (2018) eKLR and Kenya National Assurance Company vs Kimani Another (1987) eKLR.

There is an intertwined connection between the application of the concepts of affirmation, estoppel and waiver in the law that applies to performance and discharge of contracts. Affirmation and estoppel both arise from clear and unequivocal representations or conduct by a party that they will not exercise their right to treat a contract as repudiated, which if proven, then leads the other party to rely on waiver as a defence to any purported termination of a contract. Affirmation will lead to the application of the defence of waiver by election, while waiver by estoppel is also raised as an application of the principle of equitable estoppel. The only difference between the two waivers is that unlike in a waiver by election, no knowledge of the facts giving rise to the exercise of the right to waiver and of its effects is required in a waiver by estoppel. See in this regard Chitty on Contracts - Volume I, paragraphs 24-003 to 24-008.”

30. The court has reviewed the terms of the consent order, a copy of which was tendered as D. Exhibit 8 by the 2nd Defendant. The consent which is dated 15.08.1994 and filed on 24.08.1994 was entered into between the Plaintiffs and four (4) persons who were described as the purchasers of the subject motor vehicles and who had previously applied to be enjoined in the suit as interested parties.
31. Nevertheless, the matter was resolved by way of the consent order to the effect inter alia that, the purchasers would receive all missing parts in respect to the said vehicles from the Plaintiffs, and that the purchasers would pay to the Plaintiffs a sum of Kshs.300,000/- in respect of the purchase of the said vehicles by auction, upon which ownership thereof would vest in the purchasers, thereby settling the claim between the parties to the consent. It was also a clear term of the consent order that the consent would in no way prejudice the Plaintiffs’ claim against any other person in or outside of the suit. Consequently, the claim between the Plaintiffs and the purchasers was marked as settled in full.
32. From the foregoing, it is evident that the Defendants were not parties to the above consent and that the consent order did not preclude the Plaintiffs from proceeding with the suit against the Defendants. In view of this, the court finds that the estoppel defence is unavailable to the Defendants.
33. Moving on to the question whether the Plaintiffs have established their case against the Defendants, it is admitted that the attachment of the subject vehicles by the 2nd Defendant arose from the judgment entered in the primary suit in favour of the 1st Defendant and against Lari Bus Carriers and the AG, in the sum of Kshs. 782,588.80. This is evidenced by copies of the pleadings and decree tendered as D. 1 Exhibit 1, and copies of the application for execution and warrants of attachment and sale tendered as D. 2 Exhibits 1 and 2.
34. The warrants of execution were issued against the abovestated judgment debtors. As part of his evidence, the 2nd Defendant tendered as D2. Exhibit 5 being newspaper cuttings dated 12.02.1994 and 15.02.1994 carrying advertisements in respect of the sale of the subject vehicles by public auction. The Plaintiffs tendered documentation being correspondence with the 3rd Defendant, acceptance cards in



respect of the receipt of the subject vehicles and respective invoices from the said Defendant in support of testimony by the 2nd Plaintiff that the 3rd Defendant had agreed to store the subject motor vehicles at its yard on behalf of the 1st Plaintiff, at all material times and at a consideration.

35. The key issue is whether the attachment and sale was proper/lawful. On his part, the 2nd Plaintiff restated the pleadings to the effect that the 1st Plaintiff and Lari Bus Carriers were separate entities, that the Plaintiffs not being defendants in the primary suit could not be liable to satisfy the decree arising therein, and hence there was no legal justification for the 2nd Defendant's action of attaching the subject motor vehicles in execution of the warrants issued in the primary suit.
36. In firming up his oral evidence, PW1 produced a copy of the Certificate of Incorporation (found at page 18 of P.Exh. 1) in respect of the 1st Plaintiff. Indicating that the 1st Plaintiff was a limited company incorporated on 26.03.1987 as further confirmed by letter from the Registrar of Companies indicating the directors of the 1st Plaintiff (See pages 58-59 of P.Exh. 1). The 2nd Plaintiff also tendered logbook copies and copies of records pertaining to the subject motor vehicle as found on pages 1-12 of P.Exh. 1, in proof that the subject motor vehicles were at all material times registered in the names of the 1st and/or the 2nd Plaintiffs.
37. The 2nd Plaintiff testified that the Plaintiffs were neither notified of the intended sale nor informed by the 3rd Defendant concerning the attachment of the subject vehicles by the 2nd Defendant. The 2nd and 3rd Defendants did not tender any credible evidence to controvert the foregoing evidence by the Plaintiffs. Besides, the 2nd Defendant, in his testimony, admitted to not having carried out any searches as to the ownership of the subject of motor vehicles prior to the attachment and sale, stating that he had solely relied on the instructions of the 1st Defendant's advocate. He pointed out that no objection or claim was raised in respect of the attachment and intended auction by any party even after the same was advertised in the local newspaper.
38. Based on the foregoing, it is evident that while the attachment and sale was advertised in a national daily in advance by the 2nd Defendant, the said Defendant failed to carry out due diligence to ascertain the ownership of the attached goods by the judgment debtor in the primary suit. The mere instructions by the 1st Defendant's advocate did not suffice, especially because the vehicles were at the time lying in the premises of a third party. Claims that he made attempts to obtain ownership details from the Registrar of motor vehicles but were unsuccessful were not supported by any documentation.
39. As earlier observed, no credible evidence was tendered by the Defendants to shore up claims that the 1st Plaintiff and Lari Bus Carriers were associated or that they were one and the same entity, and that execution against the former was proper. The 3rd Defendant on its part did not tender any evidence at all to refute the claims made by the Plaintiffs against it concerning its breach of duty as a bailee.
40. Black's Law Dictionary Tenth Edn. defines a bailee as:-

“ 1. Someone who receives personal property from another and has possession of but not title to the property. A bailee is responsible for keeping the property safe until it is returned to the owner. 2. Someone who by warehouse receipt, bill of lading, or other document of title acknowledges possession of goods and contracts to deliver them”.

See also the definition adopted by Gikonyo J. from *Chitty on Contracts in Surgipharm Limited v Express Kenya Limited & Another* (2015) eKLR.



41. As for the term bailment, the same Dictionary defines it as:

“1. A delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, usu. under an express or implied-in-fact contract. Unlike a sale or gift of personal property, a bailment involves a change in possession but not in title.”

42. Similarly, Halsbury’s Laws of England, Fourth Edition 3(1) (2005) states that:

1. Under modern law a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The legal relationship of bailor and bailee can exist independently of any contract and is created by voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding.
2. The element common to all types of bailments is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods. A claim against a bailee can be regarded as a claim on its own sui generis, arising out of the possession had by the bailee of the goods.

Note: By design bailment is distinguishable from a sale, a relationship of mutuum, a relationship of licensor and licensee.

3. To constitute a bailment (which derives its name from the old French word *bailer*, to deliver or put into the hands of), the actual or constructive possession of a specific chattel must be vacated by its owner or possessor (the bailor), or his agent duly authorized for that purpose, in favor of another person (the bailee) in order that the latter may keep the same or perform some act in connection with it, for which such actual or constructive possession of the chattel is necessary, thereafter returning the identical subject matter in its original or an altered form.
4. Thus, a bailment may arise by attornment involving a constructive delivery of possession, as where, for example, a warehouseman holding goods as agent for an owner agreed to hold them for another person pursuant to the owner’s instructions. There can be bailment by an owner without ever having taken possession of the chattel concerned, so long as the title to it or the right to possess it has passed to him”.

There can be no doubt, based on the uncontroverted evidence by the Plaintiffs that a legal relationship of bailor and bailee has been demonstrated to exist in the material period between the Plaintiffs and the 3rd Defendant, respectively. The Court of Appeal in *Equator Distributors v Joel Muriu & 3 Others* [2018] eKLR observed as follows on the relationship between a bailor and bailee:

“The basic rule is that the bailee is expected to return to its owner the bailed goods when the bailee’s time for possession of them is over, and he is presumed liable if the goods are not returned”.

43. The inescapable conclusion is that in all probability, the warrants of attachment properly issued against the judgment debtors sued in the primary suit were executed against the wrong parties, namely, the Plaintiffs herein. Hence the attachment was unlawful and in delivering up possession of the Plaintiffs’ vehicles to the 2nd Defendant, the 3rd Defendant breached its duty as a bailee, thereby facilitating the 2nd Defendant’s wrongful auction of the goods.



44. In what appeared to be a self-serving statement, the 1st Defendant asserted in his evidence that he did not know the Plaintiffs prior to the present suit. Suffice to say that, whereas the 1st Defendant was the plaintiff and decree holder in the primary suit, no sufficient nexus was established between him, and the actions of his co-Defendants, and his role appeared limited to the pursuit of the fruits of his judgment through the execution process driven primarily by his advocate, as the 2nd Defendant's testimony also confirmed. The Plaintiffs' claim against the 1st Defendant is therefore tenuous, at best.

45. The unlawful actions pleaded and proved on a balance of probability against the 2nd and 3rd Defendants amount to conversion, which is defined in Black's Law Dictionary, 9th Edn, as the "act of appropriating the property of another to one's own benefit or to the benefit of another". Three forms of conversion are described in Halsbury's Laws of England, 4th Edition Pg 355 Para 548, namely: -

"To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in doing so to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. Liability in conversion is strict and fraud or other dishonesty is not a necessary ingredient in the action.

A second form of conversion is committed where the goods are detained by the Defendant. A wrongful detention gave rise to an action for detinue before detinue was abolished (by the Torts (Interference with Goods) Act 1977) and now gives rise to an action in conversion. The normal method of establishing a wrongful detention is to show that the claimant made a demand for the return of the goods and that the Defendant refused after a reasonable time to comply with the demand.

The third form of conversion lies for the loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor."

46. According to Winfield and Jolowicz on Tort 15th Edn, Pg 588 conversion may be committed by wrongfully taking possession of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded. While the mere taking of possession of another's chattels may amount to trespass, it is not conversion unless the act is accompanied by the intention to assert rights over the goods that are inconsistent with the rights of the owner of the goods. In this case, actions and intentions inconsistent with the Plaintiffs' rights to the subject vehicles are clearly demonstrated against the 2nd and 3rd Defendants. Thus, both the 2nd and 3rd Defendants are liable for the loss thereof as incurred by the Plaintiffs.

47. Having so found, the next issue for determination is whether the Plaintiffs are entitled to the reliefs sought, namely, the value of the subject vehicles and loss of user as well as damages for the unlawful attachment. In the case of W.N. Kimani t/a Kencity Auctioneers v The Chief City Inspectorates Superintendent and Another (1998) eKLR, Githinji J (as he then was) affirmed the right of a plaintiff in a claim for conversion to recover the value of goods taken from his possession, but held that "on the principle of restituo integram (such plaintiff) is entitled to be compensated for the financial loss he has actually suffered".



48. Emukule J, (as he then was) while dealing with a claim for conversion set out the damages available to the claimant as follows:

“ 40. The issue that then follows for determination is the question of damages to be awarded to the Plaintiff. In determining this question, I am guided by the passage in Halsbury's Laws of England (supra) at Pg 389 Para 616 on the measure of damages. The authors state: -

615. Nominal measure of damages. ... In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss.

616. Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation, and the goods are not returned later”.

41. The Plaintiffs are therefore entitled to compensation for the value of the property as at the time of the conversion. In addition to reimbursement of the cost of the goods, they are also entitled to an award for the profit they could have made save for the unlawful acts of the Defendant”.

49. This court readily associates itself with the foregoing pronouncements and finds that the Plaintiffs herein would be entitled, subject to proof, to be compensated for the value of the subject vehicles and consequential loss that is not too remote. Regarding the value of the subject vehicles, the evidence by PW1 and PW2, the latter who produced P. Exh.2, being a report prepared by his firm, appeared to vary from the pleadings which were also inherently contradictory.

50. While paragraph 5(a) of the Further amended plaint stated the value of the first and second vehicle together to be Kes.6million, and the third vehicle as Kes. 6million, the particulars of loss under paragraph 5(e) indicated the value of each vehicle to be Kes.6million, total value being Kes.18million. However, in PW1's written statement and report by PW2 the value was stated to be Kes. 2,230,000/-; Kes. 2,150,000/-; and Kes. 2,300,000/- for the vehicles KAA 387 H, KAA 467F and KAA 201Z, respectively. PW2 stated under cross-examination that he derived the values from the bank documents in his report and applied interest allegedly paid for loans obtained by PW1 in acquiring the buses but that the specific interest sums were not detailed or demonstrated in his report.

51. While PW2 claimed in his report that the vehicles were “well serviced buses in good working condition”, he admitted during cross-examination that he was not a motor vehicle assessor and did not engage one for purposes of the loss assessment, that he did not physically see the vehicles and that, although the vehicles were purchased in or around 1989-1990 for use as commercial vehicles, and had been in storage for about a year at the time as of 1994, he did not factor depreciation in his valuation.

52. The court notes that the description of these vehicles, as contained in the Plaintiffs' records at page 23-25 of PExh. 1 documenting the handing over of the vehicles to the 3rd Defendants for storage, hardly matches the condition painted by PW2 in his report. Not even copies of recent reports of statutory examination of the vehicles by relevant authorities such as the National Transport and Safety Authority (NTSA) were tendered by the Plaintiffs.



53. Equally, the 2nd Defendant's evidence that the vehicles were immobile and were towed from the premises of the 3rd Defendant is supported by the fact that under the consent herein, the Plaintiff handed over missing parts thereof to the purchasers and was ready to accept the measly sum of Kes. 300,000/- as settlement from the said purchasers in respect of the vehicles. On all accounts, the Plaintiffs appear to have exaggerated the value of the vehicles both in the pleadings and evidence.
54. Reviewing the material tendered by the Plaintiff, this court is prepared to accept, based on the bank and other records contained in P. Exh.1 at pages 42-46 (in respect of 1st vehicle), pages 47,50,51 (in respect of 2nd vehicle), pages 54-57 (in respect of 3rd vehicle) that the value of the three vehicles at purchase was Kes. 1,515,370/-, Kes.1,515,370/-, and Kes.1, 530,000/- respectively. Thus, the total value at purchase of the vehicles would be Kes.4,560 740/-.
55. To that value, and given the documented age, particular usage, and apparent state of the subject vehicles on attachment, the court will apply a reasonable aggregate depreciation of 60 per cent since purchase. Thus Kes. 4,560, 740/- x 40 % = Kes. Kes.1,824,296/- (One Million Eight Hundred and Twenty-four Thousand Two hundred and Ninety six shillings). Notwithstanding the notorious fact that prices of goods sold at public auctions are ordinarily below optimum, the above figure appears realistic and approximates to the total sum of Kes. 1,230,000/- realized at the public auction herein.
56. For loss of use of the subject motor vehicles, the Plaintiffs sought a sum of Kshs.60,000,000/- although the report by PW2 estimates the loss at over one hundred million shillings. In his evidence, the 2nd Plaintiff testified that the subject motor vehicles had been stored at the 3rd Defendant's yard at all material times and therefore had not been generating income for some time.
57. PW2's Valuation and Loss Assessment Report at pages 35-41 of PExh. 2 indicated that each of the said vehicles generated a minimum income of Kshs.283,916/- every month. PW2 testified that he calculated the loss based on 10 years being the expected lifecycle of the vehicles, hence arriving at the total lost income sum of Kshs. 102,210,000/-. First, the witness was not an expert motor vehicle assessor and his estimation as to the expected life cycle of commercial buses he had never seen sounds speculative.
58. Moreover, neither PW2 nor the Plaintiffs tendered any primary documents of past income earned from the vehicles, such as books of accounts, tax returns, audited accounts, banking records or other credible material to support the tabulations. Indeed, there was no evidence that as of the material dates the vehicles were licensed or insured to ply any routes as public service vehicles.
59. The fact that at the material time the vehicles appear to have been in the custody of the 3rd Defendant, according to the letter by the 3rd Defendant at page 26 of P. EXh.1 for between six months and a year, and that as per acceptance cards at pp. 23 and 25 of PExh. 1, two of the vehicles were accepted at the 3rd Defendant's yard for sale at a commission, puts to doubt the claims by PW1 that he had intended to collect the vehicles in February 1994 or that the vehicles had been recently used for business.
60. If indeed the vehicles earned the kind of incomes asserted by the Plaintiffs and were as profitable as claimed by PW2 in his evidently colorful report, no explanation was given by the Plaintiffs for foregoing such handsome profits by keeping the vehicles stationary at a yard and off the road for a period between six months and a year. It is the court's considered view therefore that PW2's assessment of loss was based on no more than conjecture and sounds fanciful and implausible. To my mind, the alleged loss is too remote, or alternatively it has not been proved. The claim must fail.
61. In the result, the Court will dismiss the Plaintiffs' suit against the 1st Defendant with costs. Judgment is however entered for the Plaintiffs against the 2nd and 3rd Defendants jointly and severally in the sum of Kes. 1,824, 296/- (One Million Eight Hundred and Twenty-Four Two Hundred and Ninety-Six).



The Plaintiffs are also awarded the costs of the suit, with interest from the date of this judgment until full payment.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: N/A

For the 1st Defendant: Ms. Akinyi h/b for Ms. Kariuki

For the 2nd Defendant: Ms. Kerubo h/b for Mr. Wainaina

C/A: Carol

