**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 23 OF 2018**

**DICKSON MIRICHO KEHAGI.....................................APPELLANT**

**-VERSUS-**

**1. PURITY WARIARA KANGETHE....................1ST RESPONDENT**

**2. SAMUEL KIBUE MAINA.................................2ND RESPONDENT**

***(Appeal from judgment delivered in Chief Magistrates Court Civil Case No. 10 of 2013 (Hon. Wendy Kagendo, Chief Magistrate) on 23 March 2018)***

**JUDGMENT**

By a plaint dated 17 January 2013 and amended on 25 September 2013, the appellant sued the respondents for what was stated to be special damages and '*general damages for loss of user of a motor vehicle, emotional and mental anguish*'.

According to this plaint, the appellant was at all times material to his suit the legal owner of motor vehicle registration number KAU 416 B (herein the vehicle); he averred that he purchased the vehicle from one David Wachira Kiongo at a consideration of Kshs. 450,000/=.

On 15 September 2012, the vehicle was stolen while parked and Kabiruini show ground in Nyeri town. On the material date, the vehicle was in possession of the 1st respondent.

The plaintiff's efforts for compensation from the insurance company failed because he could not get the title documents; he later learnt that these documents which included the registration book, the transfer documents and the sale agreement were in custody of the 2nd respondent.

The appellant pleaded that the respondents' actions amounted to conversion and it is for this reason that he prayed for the special and general damages.

The respondents denied the claim and filed their respective statements of defence.

While the 1st respondent admitted that the vehicle was stolen as alleged by the appellant, she contended that contrary to his assertions, she was the owner of the vehicle. She pleaded further that the appellant was not only her husband but also that he had been advanced a loan by the 2nd respondent with the vehicle being offered as security.

The 2nd respondent admitted that he held the log-book of the vehicle in question but as a security to secure payment of Kshs. 388,000/= which he had advanced to the 1st respondent.

The learned trial magistrate dismissed the appellant's claim noting that the appellant did not prove ownership of the vehicle; she further ordered the appellant and the 1st respondent to pay the 2nd respondent costs of the suit.

The appellant has appealed against this decision and in the memorandum of appeal dated 19 April 2018 he has raised the following grounds:

1. The learned magistrate erred in law and fact by concluding that the 1st respondent was related to the appellant or was his wife when there was no evidence to proof this fact;

2. The learned magistrate erred in law and fact in dismissing the appellant's claim when there was overwhelming evidence that the vehicle belonged to the appellant.

3. The learned magistrate erred in law and fact by failing to appreciate that the respondents had admitted being in possession of the log-book of the vehicle.

4. The learned magistrate erred in law and fact for not considering evidence of ownership as presented by the appellant.

5. The learned magistrate erred in law and in fact in taking into consideration matters that ought not to have been taken into account.

As the first appeal court, I have the obligation to consider and evaluate the evidence afresh and I arrive at my own conclusions; in doing so, I have to bear in mind that the court below had the advantage of seeing and hearing the witness. (**See Selle Vs. Associated Motor Boat Co. [1968] EA 123 and Kiruga Vs. Kiruga & Another [1988] KLR 348).**

The appellant testified that he purchased the vehicle on 3 October 2008 from one David Wachira Kiongo who in turn had purchased it from one Joyce Muthoni. He used to the vehicle until October 2008.

The vehicle had been insured and the insured sum was Kshs. 420,000/=. On 15 September 2012 the vehicle disappeared while in the custody of the 1st respondent. He couldn't, however, trace the logbook when he lodged a claim for compensation from the insurance company. Later he learnt that the 2nd respondent had this document all along.

The appellant admitted that he lived with the 1st respondent but that she was not his wife.

He produced documents showing that Joyce Muthoni Gacheru had transferred the vehicle to the 1st respondent on 13 October 2008. He produced yet another exhibit showing that in fact Joyce Muthoni sold the vehicle to David Kiongo on 21 June 2005 who in turn sold the vehicle to him. He further denied that he had used the vehicle as security for a loan.

In her evidence the 1st respondent admitted that indeed she was in possession of the vehicle when it disappeared. Contrary to her pleadings, she testified that she, and not the appellant, had taken a loan which was secured by the vehicle.

She testified that the appellant was her husband but that he became hostile and chased her away after the vehicle disappeared.

The 1st respondent also insisted that indeed the vehicle belonged to her and that she paid Kshs 450,000/= for it. She alleged that she purchased the vehicle from one John in 2008. The agreement for the sale of the vehicle was allegedly signed by her husband, David Kiongo. She later said that the said Joyce Muthoni transferred the vehicle to her. She later changed her testimony and said that it was David Kiongo who sold the vehicle to her.

Samuel Kibue Kigwa (DW2) testified that on 20 July 2012 the 1st respondent presented him with the documents of the vehicle seeking for a loan to be secured by the vehicle. The 2nd respondent gave her Kshs. 388,000/= which they both agreed would be paid by 22 August 2012. However, she only paid back Kshs. 40,000/=. Before his money was repaid in full, the vehicle disappeared. He confirmed that he held the log-book of the vehicle. The other documents that the 1st respondent gave her were the signed transfer form for the vehicle; she was the transferee while Joyce Muthoni was the transferor. He was also given the personal identification number of Joyce Muthoni and a copy of her identification card.

Although the appellant asked for special damages, he neither pleaded and particularised them nor proved them as required. The closest he came to pleading special damages was his averment that he purchased the vehicle for a particular sum.

The evidence given in support of this claim was a sale agreement executed between one Joyce Muthoni and David Kiongo Wachira. The consideration is indicated to have been Kshs. 460,000/=. There is no evidence that the said David Kiongo Wachira sold the vehicle to the appellant at the same amount; what was produced as evidence was a statutory declaration by the said Wachira declaring that he sold the vehicle to the appellant; neither the date when the vehicle is purportedly have been sold nor the consideration are given in the statutory declaration. The declarant himself did not testify and therefore whatever declarations he made were not tested by way of cross-examination. It is also worth noting that the purported declaration was made on 13 September 2013 long after the appellant's suit had been filed.

It is trite that special damages must not only be specifically pleaded but must also be proved. **See Kampala City Council versus Nakaye (1972) EA 446; Ouma versus Nairobi City Council (1976) KLR 297**.

In **Ratcliffe versus Evans (1892) 2QB 524** Bowen L.J. said of these damages:

> ***The character of the acts themselves which produce the damage, and the circumstances under which those acts are done ought to be stated and proved. As much as certainty and particularity must be insisted upon, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.***

This did not happen in the appellant's case; the special damages he prayed for were neither pleaded nor proved.

In his prayers, the appellant also asked for judgment for 'loss of user, emotional and mental anguish' which he lumped together as general damages. This sort of prayer is a misapprehension of the law and obviously misconceived because loss of user is in the nature of special damages and being damages of that category, they have, as already noted, to be not only pleaded but proved as well.

In his evidence I did not find any suggestion or proof that the appellant suffered ‘emotional and mental anguish’ of any sort and therefore even if this particular prayer was properly covered under the head of general damages it could not have succeeded.

Be that as it may, I have already made reference to the question of the ownership of the vehicle in question and for reasons I have given I am inclined to come to the conclusion that the appellant did not demonstrate that he had a better title to the vehicle than the 1$^{st}$ respondent in whose possession it was before it was stolen or disappeared. Since the 1$^{st}$ respondent had a competing claim over the same vehicle as the appellant, it was incumbent upon the latter to prove that he had a better claim to the vehicle than the 1$^{st}$ respondent.

Again, there is no evidence that, as the owner of the vehicle, he ever made any claim for compensation from the insurance company and if he did, the company failed to honour the insurance policy and pay the insured sum merely because the appellant could secure the registration or the log-book of the vehicle. It follows that the claim of ownership based on the allegation that a claim had been lodged at the insurance company is also not tenable.

I am persuaded that the appellant’s claim was not well founded both in fact and in law and for these reasons I would dimiss the appeal. It is so dismissed with costs to the respondents.

**Signed, dated and delivered in open court this 17$^{th}$ day of January, 2020**

**Ngaah Jairus**

**JUDGE**