



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 341 OF 2017**

**THOMAS OJANGA..... PLAINTIFF**

**VERSUS**

**TOYOTSU AUTO MART KENYA LTD.....DEFENDANT**

**JUDGMENT**

1. **Thomas Ojanga** (Thomas) has sued **Toyotsu Auto Mart Kenya Limited** (Toyotsu) seeking special damages for **Ksh 40,437,892** and for general damages for loss, suffering, mental anguish, torment, torture, inconvenience and pain following his purchase of motor vehicle KCD 422 U (the vehicle) from Toyotsu.

2. It is not denied that Thomas on or about 29<sup>th</sup> June 2015 purchase the vehicle from Toyotsu's show room at Ksh 2,905,555. The vehicle in question was a Toyota double cabin Hilux Vigo Pick-up. At the time it was sold it had not been registered. On being registered the vehicle was assigned registration number KCD 422 U.

3. Thomas pleaded that on receiving the vehicle, after its registration on 21<sup>st</sup> July 2016, he travelled to Homa-Bay. On travelling 60 kilometers from Nairobi, at Mai Mahiu, the vehicles tyre burst. Thomas said he found out that there was no removal kits for the spare tyre in the vehicle. After he changed the wheel and continued on his journey the engine kept going off. He also discovered that the battery holders of the vehicle were missing. The exhaust was loud and the exterior window rubbers started to fall off. Thomas said that he also noticed that adometer reading had not changed from the reading it had earlier on. The radio and CD system were not working.

4. On 27<sup>th</sup> July 2016 Thomas returned the vehicle to Toyotsu's show room. He said the Managing director proposed that Thomas be given a refund of the purchase price and another manager suggested that Thomas be given exchange of another vehicle. However because Toyotsu's mechanic assured him the repairs of the vehicle could be successfully undertaken and because Thomas had fitted the vehicle with car-tracking system and had insured it Thomas agreed to the repairs being done.

5. The vehicle was repaired and was delivered, by a driver of Toyotsu, to Homa-Bay. Thomas said on his tracking of the movement of the vehicle, as it was driven to Homa-Bay, he noted that it was travelling 40-60km.

6. On the first trip of the vehicle, while it took Thomas' mother to church, on 22<sup>nd</sup> August 2015 that vehicle had an accident and rolled which resulted in injuries to his mother, niece and the driver. His mother passed away 5 days later. It is not clear if her death was related to that accident.

7. The vehicle was taken to a garage, for repairs, by the insurer and at that garage it was reported to the insurance that the vehicle had fake spare parts, consequently the insurance declined to carry out the repairs.

8. Thomas then pleaded:

**“The plaintiff avers that the entire sale transaction was fraudulent, deceitful, connish, negligent, dishonest, malicious and the plaintiff has suffered damage, loss, psychological and physical torment and torture arising from the defendant's dishonesty.”**

9. Thomas pleaded the particulars of fraud, deceit, malice and dishonesty as; Toyotsu misrepresentation that they were dealers of genuine Toyota vehicle; misleading Thomas into purchasing a vehicle which he believed was mechanically sound; pretending to repair the vehicle; selling and delivering to Thomas a vehicle without a log book; misleading Thomas to take a vehicle that was not roadworthy; and causing

death of his mother.

10. Thomas pleaded that Toyotsu had not informed him that the vehicle was registered or imported by a third party.

11. Thomas said these occurrences led him to travel from Switzerland, where he resides and works, to come and follow up the issues of the vehicle with Toyotsu. He said he travelled in August, September, October and December 2016 from Switzerland.

12. The insurance company did eventually repair the vehicle and Thomas tried, unsuccessfully, to persuade Toyotsu to permit him to do a trade-in. Further that because Toyotsu had not obtained and have not given him to date the log book, That he was unable to sell the vehicle.

13. Thomas therefore claims, amongst other prayers, Ksh 40,437,892, as special damages. That amount is made up of the purchase price Ksh 2,905,555 plus travel, accommodation cost and car hire costs for the times when he had to travel from Switzerland to follow the matter of the vehicle with Toyotsu.

14. Thomas' claim is denied by Toyotsu.

15. Toyotsu stated that the vehicle could not be released to Thomas immediately he paid for it because it had not been registered.

16. Toyotsu also stated that the vehicle, being a used unit, it was sold "as is, where is" basis. That Thomas was provided with an inspection report which report brought to the attention of Thomas the condition of the vehicle.

17. Toyotsu pleaded that it acted in good faith and agreed to carry out repairs on the vehicle. That Thomas fully knew the condition of the vehicle when he purchased it.

18. Further that the accident that occurred, it was not due to default of Toyotsu.

19. That because the vehicle was pre-owned it need to be transferred into Thomas' name and that Toyotsu undertook the transfer in good faith and the said registration was an after sale customer care service.

20. That although Toyotsu followed up with Kenya Revenue Authority (KRA) on the release of the log book there was delay caused by the initial registration. The log book was eventually released by KRA. Thomas was informed but he failed to collect it from Toyotsu.

### **ANALYSIS**

21. Thomas in his witness statement simply stated that he reiterated the plaint as drawn. He further stated that Toyotsu intention was to swindle him. He therefore sought judgment in his favour. The above is the long and short of the evidence is support of Thomas' case. There was, as can be seen, really no evidence offered by Thomas. Pleading, in this case the plaint, is not evidence. Thomas had an obligation to adduce evidence. This was the clear holding in the case **ALFRED KIOKO MUTETI V TIMOTHY MIHESO & ANOTHER [2015] eKLR** thus:

"Black's Law Dictionary 8th Edition defines a pleading as:

**"A formal document in which a party to a legal proceeding especially a civil law suit sets forth or responds to allegations, claims denials or defenses."**

It therefore follows, and I reiterate, that a pleading is not evidence. Further, Section 3 of the Evidence Act Cap 80 Laws of Kenya defines evidence as:

**"Evidence denotes the means by which an alleged matter of fact the truth of which is submitted to investigation is proved or disproved; and without prejudice to the foregoing generally includes statements by accused persons, admission and observation by the court in its judicial capacity."**

..... "Madan JA in **CMC Aviation Ltd V Cruis Air Ltd (1) [1978] KLR 103** observed:

**"Pleadings contain the averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation if evidence."**

22. Pleadings are not evidence, and to repeat the statement of Madan JA above, no decision can be founded just on the pleadings where the claim is denied. That is the dilemma Thomas finds himself. In his witness statement, which he adopted as his evidence in chief, he did not adduce evidence to support his pleadings. He simply relied on his pleadings, the plaint.

23. That reliance did not satisfy section 107 of the Evidence Act which provides

**"(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.”**

24. Thomas had the burden to prove the facts pleaded in his plaint. He did not and on that ground alone his case will fail.

25. Even if Thomas case does not fail as stated above I do find that he failed to prove his case, even if his plaint is taken to be his evidence.

28. What issues does Thomas raise for consideration? There four broad issues, that is:

**a. That Toyotsu misrepresented him which led him to buy the vehicle which was not genuine Toyota vehicle and was unroad worthy;**

**b. That Toyotsu Mis-led him to buy the vehicle which he believed was genuine;**

**c. Toyotsu pretended to repair the vehicle; and**

**d. Causing the death of his mother.**

Thomas therefore claimed for damages for fraud, deceit, negligence, malice and dishonesty. He also sought special damages for travel, accommodation costs and costs of vehicle hire.

27. The issues (a) to (d) can be dealt together.

28. The evidence adduced by Ibrahim Kiptoo Hussein the Toyotsu’s Sales Manager, was that Toyotsu conducted an inspection, mechanical check and pre-delivery services, which was a mandatory procedure of the company. That report was used by KRA to effect transfer and registration of the logbook. That inspection was exhibited in evidence. That on the vehicle being delivered to Thomas he requested for repairs to be undertaken by Toyotsu. They were done.

29. That evidence by Toyotsu’s witness is supported by emails exhibited by Thomas before court at page 1, 2 and 3 of the plaintiff’s documents. The employee of Toyotsu on 5<sup>th</sup> August 2015 wrote to Thomas an email saying:

**“Repairs on your Hilux Vigo**

**Edward Nderitu [e.nderitu@toyotsuautomart.co.ke](mailto:e.nderitu@toyotsuautomart.co.ke)**

**To: [ojanga@gmail.com](mailto:ojanga@gmail.com)**

**Good morning Tom,**

**I hope this finds you well.**

**We would like to commence with the repairs on your Toyota Hilux Vigo. Here is what we agreed on fixing:**

**1. Odometer**

**2. Tyre punctures**

**3. Radio (to ensure CD works well)**

**4. Loosely fitted dashboard covers**

**5. Loosely hanging cable under the passenger seat**

**Kindly confirm for us to proceed**

**Thank you and kind regards**

**Edward Nderitu**

**Assistant Sales Manager**

Thomas responded with the following email:

**To: Edward Nderitu [e.nderitu@toyotsuautomart.co.ke](mailto:e.nderitu@toyotsuautomart.co.ke)**

Hi Edward

1. The odometer should reflect the true mileage of the car (or at least almost near to it). This has legal consequences especially in terms of its value and insurance

2. On top of the issues listed by yourself please add the following

1. Wheel alignment. The steering-wheel and the tyres are not aligned. At high speed, it is very difficult to drive the car

2. Fixing of the car battery holder (I did a jua kali one)

3. Spare tyre removal tools are not for the vehicle. Please change tyre and tools and TEST if the tools work

4. The exhaust sounds like the engine is defective. Sounds like a bodaboda piki piki. Please verify that the engine is original. It seems slanted and not upright like the ones I saw in other Vigo's. Make sure the body belongs to the engine and vice versa. The car shakes and vibrates when you speed over 60km/hr. This should not be the case (even a vitz does not shake)

5. There are loose rubbers on the exterior windows (stella knows)

6. Loosely hanging USB cable. Fix this to work

7. Loosely hanging cable under the seat. Please find out what it is for and why before you remove.

8. Replace tyres with punctures. The car was delivered with patched tyres with punctures. Please MAKE SURE the tyres have no fixes on them and have an acceptable profile the 20 shilling coin MUST sink in at least half-way otherwise it is not road-worthy by law)

9. Take to Sai Raj for Canopy fixing. This had been paid long time ago.

10. Let me know when you can deliver the car to Homa Bay. My mother needs to go to church on Sunday.

Thomas Ojangojanga@gmail.com

To: Edward Nderitue.nderitu@toyotsuautomart.co.ke

Edward

Also make sure there is an indication that the car runs on Petrol. Mark the lid that opens the tank accordingly.

Regards

30. Do the emails exhibited by Thomas give an impression of one who has been misled to buy a car that is not genuine? In my view there is no such intimation at all that Thomas was misled. The emails give an impression of one who knew that the vehicle needed repairs. This is obvious from Thomas' email above item No 5 where he states: (Stella knows). Stella is an employee of Toyotsu and for her to be said to "know" means Thomas also knew. Otherwise why would he say "Stella knows".

31. There is no evidence before court that there was any default on the part of Toyotsu in carrying out the repairs. There is no evidence that any default on the part of Toyotsu led to the alleged accident. There is indeed no evidence before court that there was any accident with the vehicle or that it was repaired when it was found to have spare part which Thomas alleges were fake. There is no mechanical report before court to prove the same.

32. More seriously is that there is no evidence that Thomas lost his mother and if he did that it was due to default on the part of Toyotsu. It follows that issues (a) to (d) above failed to be proved by Thomas.

33. Thomas has pleaded fraud, deceit, negligence and malice. It is trite that fraud must be strictly pleaded and strictly proved. See the case **Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR**

"As regards standard of proof of fraud, the law is quite clear. In *R.G. Patel v. Lalji Makanji (supra)*, the former Court of Appeal for Eastern Africa stated thus:

**"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."**

34. Thomas failed to prove his allegation of fraud or malice on the part of Toyotsu or at all.

35. Similarly Thomas needed to specifically plead special damage and to prove the same. Apart from stating generally that he was claiming for travel expenses accommodation and car hire expenses Thomas did not state, in his plaint, what amount was for accommodation, what amount was for travel or what amount was for car hire. The claims in that regard fail for failure to be specifically plead. See the Court of Appeal Case **CAPITAL FISH KENYA LIMITED VS THE KENYA POWER & LIGHTING COMPANY LIMITED (2016) eKLR** thus:

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR**, **Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR** and **Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)**. In the latter case this Court was emphatic that

**“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.**

36. I need to state that Thomas most certainly did not prove, by receipts or otherwise that he travelled from Switzerland, and if he did, that he travelled because of the issues of the vehicle. He also failed to provide proof by receipt or otherwise of the costs of accommodation or car hire.

37. On the whole this case was frivolous. It should not have been filed if the evidence to prove the claim was not there. The plaintiff in filing this case abused the process of court. The case therefore fails.

38. The case having failed I will order the plaintiff to bear the costs.

**CONCLUSION**

39. This case is dismissed with costs to the defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 17<sup>th</sup> day of October, 2019.**

**M. KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Sophie ..... Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT