REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMDIRALTY DIVISION

HIGH COURT CIVIL CASE NO. 248 OF 1997

S.M THIGA T/A NEWSPAPER SERVICES .....PLAINTIFF

VERSUS

PHOENIX E.A ASSURANCE CO. LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff, through his amended Plaint dated 23rd April, 2007, seeks the following orders ;

a. ***Special Damages of Kshs. 3,952, 765/- as per paragraph 9 of the Amended Plaint***
b. ***General Damages***
c. ***Cost of the Suit***
d. ***Interest on (a) from the time the same fell due till payment in full and (b) at court rates***
e. ***Any other or further relief that this Court may deem fit and just to grant.***

2. The Plaintiff's case is that the Defendant through an insurance contract, insured the motor vehicle **Registration Number KUW 164** under a comprehensive cover. It was averred that the said motor vehicle, while so insured, was involved in a motor accident on **18th November, 1985,** whereupon the Plaintiff reported the details of the accident to the Defendant and also paid the amount referred to in insurance parlance as "excess" pursuant to the terms of the policy. According to the Plaintiff, the Defendant, in breach of the insurance contract refused and/or declined to honour the claim and failed to repair the motor vehicle, alleging that the vehicle was not maintained in the proper mechanical condition. That following Arbitration proceedings, the Arbitrator found in favour of the Plaintiff and the Defendant was directed to pay the amounts due and owing to the Plaintiff under the insurance contract. Payment of the motor vehicle repair charges was thus not made until the **16th December, 1998**. It is therefore the Plaintiff's claim that he suffered consequential loss as a result of loss of user of the said motor vehicle, legal arbitration fees, investigations fees etc due to the Defendant's delay in making the payments towards the claim under the insurance contract. For these reasons, the Plaintiff sought the prayers as enumerated in paragraph 1 herein above.

3. The Defendant through its Amended Statement of Defence dated **11th June, 2007,** denied the Plaintiff's claim. According to the Defendant, the Plaintiff's claim is time barred both under **the Limitation of Actions Act, Chapter 22 of the Laws of Kenya** and under the **Policy of Insurance** entered into by the parties. The Defendant further contended that the under the contact of insurance, the Defendant was merely supposed to indemnify the Plaintiff for loss and damage of the subject motor

vehicle and no more. It was the Defendant's position that after the motor vehicle was involved in an accident, the Defendant exercised its rights to repudiate the insurance contract. That thereafter the Plaintiff should have taken steps to repair the vehicle. The Defendant further asserted that consequential loss and loss of user were specifically excluded under the insurance contract and therefore the Plaintiff cannot make a claim on the same. Moreover, the Defendant pleaded that the present dispute as framed should have been raised in the arbitration proceedings which were alluded to in the Plaint. The Defendant therefore claims that the Plaintiff has not proved his claim for breach of contract and therefore the suit herein should be dismissed with costs to the Defendant. The plaintiff had two witnesses whilst the defendant did not lead any evidence at the hearing.

4. The Plaintiff, Simeon Muruchi Thiga, testified as PW1 herein and stated that he was, at all times material to this suit, the registered owner of the motor vehicle registration **KUW 164 Datsun Pick Up** (hereinafter cited as "the vehicle"). The material time in this instance is the period immediately preceding, the time of and the period immediately after accident involving the vehicle, which accident is said to have occurred on **18th November, 1985**. According to **PW1,** the vehicle was insured for commercial use purposes under a comprehensive cover with the Defendant Company, and that the policy which was in force at the time of the accident was valid, as far as he was concerned, since all premiums due and owing were paid and up to date. To prove that the vehicle was covered by a policy of insurance which was issued by the defendant, the witness produced the insurance certificate number **444719** marked as Exhibit **PD 3** in the Plaintiff's bundle of documents. It was PW1's testimony that the subject motor vehicle was involved in an accident at a **Naivasha** on its way to **Kisumu** on **18th November, 1985**, as it ferried newspapers for sale and distribution in line with the Plaintiff's business.

5. PW1 further stated that the vehicle was thereafter inspected by the Kenya Police Vehicle Inspection Unit in compliance with the law and a Certificate of Examination and Test of the vehicle issued in line with the Traffic Act, Chapter 408 of the Laws of Kenya. Subsequently, the vehicle was towed to **M/S REGAL GARAGE** in Nairobi, where the he was required to fill an Accident Claim Form in respect of the accident. **PW1** stated that the defendant acknowledged the receipt of the Accident Claim Form, whereupon he was instructed to pay the excess of **Kshs. 4500** as per the terms of the Policy. The payment was thus made and duly receipted and the vehicle was subsequently repaired within a month, and was ready for collection by **29th January, 1986.** It was further the evidence of **PW1** that what followed was the Defendant's refusal to pay for the costs of repairs under the guise that the vehicle had not been well maintained and was not roadworthy at the time of the accident. Thereupon the Defendant purported to repudiate the contract by issuing him with a cheque of **Kshs. 4,500** in refund of the excess paid, which he resisted by returning the same to the Defendant Company.

6. PW1 testified that following the Defendant's refusal to pay for the repairs, he instructed his advocate to participate in the Arbitral Proceedings initiated by the Defendant, which lasted from **July 1986 to 19th July, 1988**. That at the conclusion of the said proceedings, the Defendant was directed to pay for the repairs as per the insurance contract, which payment was only made by the Defendant six months after the arbitral award. By then, **PW1** testified, the Motor vehicle had accumulated storage charges of about 1281 days at Regal Garage. Again, the Defendant declined to settle the storage charges prompting the aforesaid Garage to retain the vehicle as it insisted that both the repair and storage charges of **Kshs. 3,040/=** per day had to be cleared before the release of the vehicle.

7. It was **PW1's** further testimony that on **26th April, 1989**, he visited **Regal Garage** and requested the Garage to allow him see the subject motor vehicle. According to him, he noticed that the body had rusted and the chassis had been vandalized. He added that despite numerous communications between himself, the Garage and the Defendant Company, no solution was ever found. Consequently, he hired a private investigator **Petkins Investigations,** to carry out the inspection and examination of all the vandalized body parts of the motor vehicle. The vandalized parts were assessed to be worth **Kshs. 48,920/=**. PW1 concluded his testimony by stating that ultimately, he was harassed by the Regal Garage Management who had allegedly enlisted the help of the Police to force him to taking the vandalized motor vehicle without further claims. Thus, on **22th May, 1989,** the said Garage towed the motor vehicle outside its premises and **PW1** was required to sign a release form that he had no more claim against the Garage.

Thus, it was **PW1's** evidence that, as a result of the foregoing, he had suffered loss of user, as well as loss of income due to the Defendant's actions. He urged the court to grant him the prayers as sought.

8. Upon cross examination, the witness largely confirmed the events in lodging his claim with the defendant. **PW1** admitted that he did not produce the Insurance Contract to the court. He however insisted that the vehicle was covered under a comprehensive cover by the Defendant. The witness further contended that storage charges were traditionally meant to be paid by the Insurer. PW1 further stated that the Defendant did not issue a letter for release of the motor vehicle when it issued the cheque for repairs and this led to accumulated storage charges. He was firm that the Defendant should pay for loss of user and other consequential loss that he suffered when the Defendant failed to repair the vehicle within time. The witness confirmed that he was in the business of bulk distribution and transportation of several leading daily publications and magazines. The witness told the court that he was in business with another partner and therefore his business was not a sole proprietorship. He conceded that he did not have any documentation to show that the vehicle was headed to Kisumu at the time of the accident. The witness detailed his earnings from the distributorship as detailed in his bundle of documents. Upon re-examination, the witness clarified that his business largely operated between Nairobi and Kisumu. He insisted that the invoices presented in his bundle of documents were genuine. **PW1** stated that he is claiming for loss of user of the vehicle for the subsequent years after the accident as the Defendant's rejection of his claim was unjustifiable.

9. The Plaintiff's second witness was **Boniface Kaguo Mwangi**, a tour operator with **Contratours Limited**. He told the court that around **1985 – 1992**, the company offered car rental services to **Simeon Muruchi Thiga**, the Plaintiff. The witness stated that during the aforesaid period invoices and payment receipts were issued to the Plaintiff by the Company totaling to **Kshs. 3, 889,440/=.** The witness confirmed that the documents as listed in exhibit marked as **"PD97"** to **"PD139"** were authentic and emanated from the company. In cross examination **PW2** testified that the cost for hire of a motor vehicle was **Kshs. 3,000** plus **Kshs. 4/=** per kilometer. He conceded that he never prepared the invoices appearing from **PD97** to **PD139** as that was the duty of other officers of the company. The witness clarified that the charges in those receipts were in respect of unlimited mileage.

10. **PW2** further told the court that **PW1** was a good client who promptly made his payments. He stated that it was not surprising that the Plaintiff would make bulk payments of up to **Kshs. 94,000/-** in a month. The witness maintained that the receipts in the Plaintiff's bundle of documents were not fictitious, contending that his company and the Plaintiff entered into a contract because the Plaintiff's car was in the garage and he did not know how long the repairs would take. He further maintained that at the time the receipts were issued, it was not mandatory for one to affix a revenue stamp for purposes of the Stamp Duty Act, Chapter 480 of the Laws of Kenya.

11. The Defendant did not call any witness, however, there is on record the undated witness statement of **George Kibura**. The averments therein were thus not tested through cross examination of the aforesaid witness.

12. After the conclusion of the hearing, the parties put in their respective submission. The Plaintiff filed this written submissions and reply to the defendants submissions on **13th May, 2016** and **1st June, 2016,** respectively. The Defendant filed its submissions and supplementary submissions on **25th February, 2015, 30th June, 2015** and **3rd June, 2016** respectively.

13. It was the Plaintiff's submission that it was not in contest that the Defendant Company had insured the subject motor vehicle, even though the Policy document to the same was not availed to the court. That in any case the Plaintiff had proved beyond peradventure that the Defendant was liable for the damages and the other prayers sought in the Plaint. With regard to the issue of what the terms of the contract were and whether or not the Defendant was liable to pay for any consequential loss and loss of user; the Plaintiff submitted that the same had been corroborated by the **PW1**, who stated that the vehicle was under comprehensive cover. That as such, the Defendant was supposed to compensate the Plaintiff for loss of user until the vehicle was returned to him. That in any case, if the Defendant denied this, it was its responsibility as the maker of the Insurance Policy document to avail the policy document in court to

controvert the Plaintiff's evidence. The Plaintiff also blamed the Defendant for being lethargic in meeting its contractual duty. That the defendant was liable to pay for loss of user because the Plaintiff met his part of the bargain by ensuring that that the vehicle had been repaired satisfactorily. According to the Plaintiff the Defendant failed to meet its end of the bargain when it declined to pay for the repairs thereby exposing the car to vandalism and the Plaintiff to avoidable storage charges. As such, it was the Plaintiff's case that he has shown on a balance of probabilities that the defendant is liable to him as outlined in the Plaint. He therefore urged for relief and appropriate orders as prayed for in the Plaint.

14. In rebuttal of the Plaintiff's submissions, it was the Defendant's argument that the Plaintiff failed to prove its case on a balance of probabilities. That in this case the Plaintiff has not successfully shown that the Defendant was in breach of the insurance contract and therefore liable to pay the sums claimed. Further to this, the Defendant submitted that the Plaintiff failed to produce the insurance contract in respect of the subject motor vehicle and therefore the terms and conditions of their engagement have not been proved to enable the Court make a decision as to whether or not the Defendant is in breach thereof. The Defendant claimed that the Plaintiff cannot shift the evidentiary proof to itself since it was always the duty of the Plaintiff to produce the Contract of Insurance.

15. With regard to consequential loss and loss of user, it was the Defendant's case that the same are irrecoverable under a general Insurance Contract unless the same has been specifically provided for under the insurance contract. The Defendant cited the case of **Madison Insurance Company Limited –v- Solomon Kinara t/a Kiii Physiotherapy Clinic (2004) eKLR** in support of this position. It was also the Defendant's defence that after the payment for the repairs of the vehicle were made on **16th December, 1988**, which payment was acknowledged, the Plaintiff was fully indemnified. In view of the foregoing, the Defendant argued that the Plaintiff has failed to prove its claim for loss of user and consequential losses amounting to **Kshs. 3,952,756/=** and therefore the claim should be dismissed.

16. In its submissions, the Defendant further accused the Plaintiff for failing to mitigate his losses. That the plaintiff ought to have purchased a new car of equivalent value to the subject motor vehicle, instead of hiring cars from PW2 which would set him back by a sum of **Kshs. 94,000/=** a month, but failed to do so, and that it could be surmised therefrom that the Plaintiff failed to mitigate his losses and opted instead to pay unreasonable hire charges. The Defendant further submitted that the Plaintiff was not entitled to any general damages for breach of contract as sought. That in the foregoing circumstances, the court should dismiss the Plaintiffs' case with costs.

17. I have considered the pleadings and the evidence adduced in this case as well as the submissions. I have to state from the outset that the issue of the Plaintiff's claim being time barred under the provisions of the **Limitations of Actions Act, Chapter 22 of the Laws of Kenya** appears not to have been pursued at hearing level nor at the submissions stage. Accordingly, by dint of **Article 159(2)(d) of the Constitution** and the **Overriding Objective** of the Civil Procedure Act, I propose to proceed on the basis that the suit is competently before the Court.

18.Having looked at the list of agreed issues filed by the parties, I would summarize the same as follows;

a. ***Was there a binding insurance contract? and if so what was the nature of the Defendant's liability to the Plaintiff, if any?***
b. ***Is the defendant liable for consequential loss or loss of use of the vehicle amounting to the special damages claimed in the suit of Kshs. 3,952,765/=?***
c. ***Is the Plaintiff entitled to damages for breach of contract?***

I shall now proceed to consider these issues in turn**.**

a. ***Was there a binding insurance contract? and if so what was the nature of the Defendant's liability to the Plaintiff, if any?***

19. It is not in contest that this is a claim under a policy of insurance. The liability of the insurer to indemnify the Plaintiff for damage or loss of the vehicle is essentially contained in the Policy document

that was signed between the parties. In this case, it was claimed that the suit motor vehicle was insured by the Defendant Company for the period between **3rd July 1985** and **12th February, 1986** and was therefore under cover as at **18th November 1985** when the accident occurred. The fact that there was a binding contract of insurance between the parties is not in contest. Consideration under the policy had passed and was not contested by the defendant. No rebuttal was made to the Plaintiff's averment that he had been paying the premiums to the Defendant in respect of the suit motor vehicle as and when they fell due.

20. Turning to the issue of **liability**, production of the Insurance policy by either party would have put to rest any questions that would arise with regard to the exact terms and scope of the cover. It is to be expected that both the insured and insurer would be in possession of the Insurance Policy, however, none of the Parties provided this vital document for the court's scrutiny. The Plaintiff contended that he did not have the document as the Defendant did not favour him with a copy. This prompted the Plaintiff to issue a Notice to Produce to the Defendant during the pendency of this case. The Defendant however did not comply with this Notice. Reasons for non-compliance were not proffered by the Defendant, and the inference to be drawn by that omission is that had it been produced, the document would have provided evidence adverse to the Defence case. That is not to say however, that the Plaintiff is blameless; had he moved to this court to compel the compliance of the Notice to produce, then the Court would have ordered for the production of the Document as it was relevant and necessary to the case. As held in the Case of **Concord Insurance Co Limited Vs Nic Bank Limited Nairobi, High Court case 175 of 2011 [2013] eKLR** pre-trial discovery is central to litigation. Thus, parties are required to file and serve documentary evidence with their pleadings well ahead of the hearing. **Order 14 of the Civil Procedure Rules** empowers the court to order for production, impounding and return of documents. Having failed to exercise his rights, the Plaintiff cannot thus pass the blame to the Defendant. Being his case, the Plaintiff should have pursued all means lawfully available to him to have the insurance contract produced in court.

21. Consequently, without having the benefit of examining the Insurance contract between the parties, this court is unable to determine the scope of the cover, and the extent of Defendant's liability to the Plaintiff. As such, I find that any claims that the subject motor vehicle was insured under a **comprehensive cover** is wholly unsupported and that the Plaintiff has failed to meet the onus of proving this aspect of his case to the requisite standard. Besides, I find that the Defendant's argument that it was not liable for consequential loss was equally unsupported. Simply stating that the Contract of Insurance between the parties a General Indemnity Insurance will not do. The Defendant should have equally provided proof of its assertions and what better way to do this, than providing the contract document that governed its relationship with the Plaintiff.

22. Granted the foregoing state of affairs, I find that from the evidence led herein by both parties, the defendant was liable to pay for repairs or reinstatement of the suit vehicle to its state before the accident. I say so because, in paragraph 7 of the Amended Plaint, the Plaintiff confirmed that the Defendant did make a payment of **Kshs. 34,500/=** on **16th December, 1998** in favour of **Regal Garage** for the repairs of the suit Motor Vehicle. Though the payment was delayed, it is proof that the Defendant was liable for the repairs of the motor vehicle.

b. ***Is the defendant liable for consequential loss or loss of use of the vehicle amounting to the special damages claimed in the suit of Kshs. 3,952,765/=?***

23. PW1 and **PW2** testified to the effect that due to the delay in the repairs of the suit motor vehicle and payment therefor, **PW1** was constrained to utilize rented cars from the year **1985-1992** at a cost of **Kshs. 3,040/-** per day. **PW1** further testified that due to the delay in the payment of the storage charges by the Defendant, the suit vehicle was vandalized. A separate claim of **Kshs. 42,075,** being the value of the vandalized parts was raised by the Plaintiff. Other costs included in the claim include investigations costs, towing charges, arbitration fees and assessor's fees. In rebuttal, the Defendant stated that that the policy did not cover such consequential loss. In ***Madison Insurance Company Limited Vs Solomon Kinara t/a Kisii Physiotherapy clinic, [2004] eKLR*** the Court of Appeal stated thus;

"…..ordinary or standard form policies or contracts of insurance do not cover consequential loss

unless the parties specifically contract that such loss would be covered...The policy of insurance between the Appellant and Respondent was an ordinary or standard form contract and as such there was nothing to import into that policy the element of consequential loss. The Respondent's claim was that the loss was occasioned by the Appellant's wrongful repudiation or refusal to pay for the loss of the items the policy covered, but we do not think this takes the matter any further. The parties could have covered such an eventuality in their policy of insurance and in the absence of such a provision, the Respondent was not entitled to claim consequential loss of profits. That was what this Court rejected in the case of Corporate Ins Co Ltd Vs Loise Wanjiru Wachira to which we have already referred." (emphasis mine)

24. From the above quoted passage, it is clear that the consequential loss can only be awarded by the court if parties to the contract specifically contract that such loss would be covered. The rationale is simple: insurance contracts are not entered into with the intention of profit-making. As pointed out herein above, the Defendant failed to produce the insurance contract to support the claim that consequential loss was specifically excluded from the insurance contract between the parties. Conversely, the Plaintiff did not demonstrate either that such consequential loss as he now claims were included in the policy.

25. Further to the foregoing, the aforesaid sum of **Kshs. 3,952,765** is claimed as a special damage item. It is trite that special damages must be strictly itemized in the pleadings and proved by evidence. As was stated in **Virani t/a Kisumu Beach Resort Vs Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269** where the court held as follows;

"Finally we agree with Mr. Menezes, as it is the law, that a claim for special damages should not only be pleaded but strictly proved. There is a long line of authorities on that principle but we only cite Eldama Ravine Distributors Ltd & Anor Vs Samson Kipruto Chebon CA No 22/1991 (ur) where the Court stated:

"It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma Vs Nairobi City Council (1976) KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J quoted in support the following passage from Bowen, LJ's judgment on page 532, 533, in Ratcliffe Vs Evans (1892) 2QB 524, an English leading case on pleading and proof of damage:

"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to 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".

26. Has the Plaintiff proved his claim of special damages? There was cogent evidence that the Plaintiff incurred actual costs on the days he claims. According to his evidence, the Plaintiff was paying **Contratours Limited Kshs. 3,040/=** per day from the year **1985-1992**. Both **PW1** and **PW2** stuck to their contention that the receipts and invoices produced in support of the car rental claim were genuine, and issued in the ordinary course of business. That evidence was not rebutted by the Defendant, though it had contended that the receipts were not authentic. I found the explanations of the Plaintiff's witnesses plausible.

27. Be that as it may, the Plaintiff claimed to have incurred a total of **Kshs. 3,889,440/=** on the car rental. It is a fundamental principal that loss of use should be claimed for a limited period. The reason is obvious. The amounts claimed now by the Plaintiff would exceed not just the pre-accident value of the vehicle but even the insured sum. The plaintiff would then be deemed blameworthy for failing to mitigate his losses. (See the case of **County Council of Nakuru Vs John Macharia Hinga Nakuru, High Court Appeal No 209 of 2003, [2006] eKLR; African Highlands Produce Limited Vs Kisono Court of Appeal, Civil Appeal 264 of 1999,** and **E.A. Timsales Limited Vs Up and Down Saw Mills**

(K) Ltd, Court of Appeal Civil Appeal 46 of 1984 (unreported).

28. In this case, it is clear that the Plaintiff failed to mitigate his own loss based on the evidence given. From the evidence adduced, a car of comparable specifications as the suit vehicle, was estimated to cost around **Kshs. 30,000- 35,000/=.** This was the testimony given by **PW2 Boniface Kaguo Mwangi**. Yet, the Plaintiff as shown in the various receipts and invoices in the Plaintiff's Bundle of documents could pay the **Contratour Company** as much as **Kshs. 94,000/=** a month for hire of a motor vehicle. This clearly shows that the Plaintiff, though he claimed he did not have the ability to purchase another vehicle, certainly had the means to do so. The conclusion that I come to in the circumstances is that the Plaintiff incurred unreasonable hire charges that far exceeded the value of the suit vehicle or the sum insured, and thus failed to mitigate his own loss, and would not be entitled to the sum of **Kshs. 3,952, 765/-** as claimed in paragraph 9 of the Amended Plaint.

c. ***Is the Plaintiff entitled to damages for breach of contract?***

29. The accident herein occurred on **18th November, 1985** in **Naivasha** while the vehicle was on its way to **Kisumu**. According to the testimony of **PW1**, the same was reported on the same date. After the mandatory inspection by the police, the suit motor vehicle was towed to **Regal Garage** in Nairobi on **10th December, 1985.** Receipt of the claim form was duly acknowledged by the Defendant. The defendant thereafter approved the garage for repairs. The Plaintiff stated that within a month, the said garage had repaired the suit motor vehicle to the satisfaction of the Plaintiff. However, upon asking for the release of the motor vehicle, the Defendant became uncooperative and dithered about processing the release.

30. Thus, the Defendant blatantly refused to indemnify the Plaintiff on the costs of repairs stating that the vehicle was un-roadworthy at the time of the accident. This was a clear breach of the terms of the insurance policy as the Plaintiff had a valid claim as would be held later on. The stalemate led to an arbitration process in the year **1986** whereby the Defendant was directed to pay for the cost of repairs of the suit vehicle in or around **19th June, 1988**. By the time the Defendant settled the claim with the garage, six months had lapsed after the arbitral award was issued. That was not all, the vehicle had already accumulated the **storage costs** for over the 3 ½ years that had elapsed since it was towed to Regal Garage. Even after the Defendant Insurer paid for the repairs, the Garage in question refused to release the vehicle until the storage charges were paid. It was right in doing so. To the extent that the plaintiff delivered his damaged vehicle, on the Defendant's instructions, to Regal Garage and the Garage accepted it, there was one element of a contract for bailment, and from the evidence adduced herein, it was the responsibility of the Defendant to pay the repair charges. It gave its approval for the repairs to be undertaken in the aforesaid garage on the clear understanding that it would pay for the repairs. It reneged on this duty for three years. By then, the subject vehicle had accumulated storage charges and had also been vandalized. Parts were missing, the said vehicle was a pale shadow of its former self. The Defendant owed him a duty under the policy to indemnify him for the loss and damage in a timely fashion. By the time the payment of the repairs was made, the state of the motor vehicle was deplorable. In the end, the Plaintiff received a car that was of no use.

31. In sum, it is my finding that given these circumstances the Plaintiff is entitled to some relief and he has asked for an award in general damages for his loss; and though, the Defendant, on the authority of **Dharamshi v Karsan (1974) EA 41**, submitted that no general damages may be awarded for breach of contract, in ***MacGillivray on Insurance Law*, 11th Edition, Sweet & Maxwell,** the authors expressed the view that damages can be awarded in suitable cases. They observed thus:

> ***"One possible obligation was the insurer's post-contractual duty to observe the utmost good faith towards the assured, but the opportunity to give it the status of an implied condition affording damages for its breach was missed in The Star Sea and the only remedy for a breach of the duty in itself is avoidance. It is not the basis of damages for breach of a contractual duty of good faith that the Supreme Court of Canada has recently allowed a claim by an assured for punitive damages when an unjustifiable defence of arson was persisted in for several years".***

32. Thus, the Supreme Court of Canada has since arrived at a similar holding for an insurer's bad faith in

meeting a fire damage claim. **(See *Whitten Vs Pilot Insurance* Company [2002] 1 S.C.R 595, [2002] S.C.C 18)** confirming that general and punitive damages in contract, though rare, are obtainable. The plaintiff has presented cogent evidence demonstrating loss and culpability of the defendant for acting in bad faith. This court has a sound basis, from the circumstances of this case, to grant general damages that the Plaintiff prayed for herein. I would assess those damages at **Kshs. 1,000,000.** These shall cover the costs of the Plaintiff with regard to towing charges incurred, costs of parts vandalized as a result of the delayed payment of the vehicle as well as loss of use between the period leading to the payment of the repair charges by the Defendant. In my assessment, the same is a reasonable figure in the circumstances.

33. In the result, it is my finding that the plaintiff has proved his case against the defendant on a balance of probabilities in respect of his claim for general damages for consequential loss only to the extent aforestated. I thus enter judgment in his favour against the 1st defendant as follows;

a. **THAT** the defendant shall pay the plaintiff **Kshs 1,000,000** being general damages together with **interest** from the date of the decree till full payment.
b. **THAT** the defendant shall pay the plaintiff **costs** of the suit together with interest from the date of the decree till full payment.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2016

OLGA SEWE

JUDGE