



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 152 OF 2011

EQUITY BANK LTD.....APPELLANT

VERSUS

GERALD WANG'OMBE THUNI.....RESPONDENT

(Being an appeal against the judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 162 of 2008 (Hon. K.K. Cheruiyot, Resident Magistrate on 27th May, 2011))

JUDGMENT

The appellant was the defendant in a suit filed by the respondent in the Chief Magistrates' Court at Nyeri in which the respondent prayed for release of a motorcycle and damages for loss of user of the said motor-cycle, costs of the suit and interest thereof.

According to the plaint filed in court on 8th April, 2008, the plaintiff guaranteed to pay the defendant bank the sum of Kshs. 25,000/= which one **John Maina Wangari** (herein "the borrower") had borrowed from the bank if the borrower defaulted in repayment of the borrowed sum. As security for this guarantee, the plaintiff offered his motorcycle registration number **KAJ 738C** whose log book was deposited with the defendant bank. According to the plaintiff the motorcycle was worth Kshs 70,000/= at the time.

The plaintiff averred that the borrower repaid the loan and thus the plaintiff released from the guarantee and accordingly entitled to the release of the security from the defendant bank; however, rather than release the motorcycle's logbook to the plaintiff who was its rightful owner, the defendant handed it over to the borrower without the plaintiff's knowledge or consent.

The plaintiff also contended that after the release of the log book to the borrower, the latter colluded with the defendant and without the plaintiff's knowledge or consent offered the plaintiff's motor cycle as security for a second loan from the defendant; this arrangement was completed upon the borrower depositing the motorcycle's logbook with the defendant bank and in return the latter advancing the borrower further financial facilities.

The borrower defaulted in repayment of the second or subsequent loans and so sometimes in October, 2007 and April 2008 the defendant bank instructed its agents to seize and repossess the plaintiff's motorcycle in a purported realisation of its security.

It was the plaintiff's case that the seizure and repossession of his motorcycle was unlawful and ought to have been declared so by the magistrate's court.

The defendant, on its part, denied the claim and in particular denied that the plaintiff was ever the

borrower's guarantor; instead, so the defendant claimed, the plaintiff had surrendered ownership of his motorcycle to the borrower who in turn offered it as security for the loan he borrowed from the defendant. The defendant admitted, however, that the plaintiff was the registered owner of motorcycle.

The defendant also admitted that the borrower repaid the initial loan advanced to him on 12th November, 2003 and released the security documents including the motorcycle's log book to him on 26th April, 2004. It was the defendant's case that the release of the logbook to the borrower rather than to the motorcycle's owner was not unlawful and that the defendant had no obligation to advise the plaintiff that the logbook had been released to the borrower.

The defendant denied the plaintiff's contentions that he had no knowledge or had not consented to further advances being made to the borrower more particularly the subsequent loan on the strength of the security of the plaintiff's motorcycle. It averred that these further advances to the borrower were made in the honest belief that the plaintiff's consent for such facilities had been duly obtained. According to the defendant, the plaintiff had, by his conduct, impliedly acquiesced to the continuous use of the motorcycle as security for any other further loan advances to the borrower.

It was admitted by the defendant, however, that the motorcycle was repossessed as alleged in the plaint and further that by an agreement dated 25th November, 2007 the plaintiff acknowledged the borrower's debt and the defendant's lien over the security pending the repayment of the loan. Having so acknowledged, the defendant contended that the plaintiff was well aware that the motorcycle could be repossessed if the loan was not repaid and as at 18th April, 2008, the outstanding amount due from the borrower stood at Kshs. 106, 282.62/=.

The defendant's denial of the plaintiff's claim notwithstanding, it also denied having ever received any notice of the plaintiff's intention to sue; it asked the court to dismiss the plaintiff's suit.

Upon hearing the suit, the magistrates' court upheld the plaintiff's claim for release of his motorcycle and also allowed the prayer for loss of user which it estimated at Kshs. 500/= per day from 2nd April, 2008 to the date of the release of the motorcycle. The plaintiff was also awarded the costs of the suit.

It is against this magistrates' court decision that the appellant appealed against; in its memorandum of appeal the appellant raised the following grounds:-

1. The learned trial magistrate erred in law and fact when he held that the plaintiff had proved his case on a balance of probabilities when there was no such proof;
2. The learned trial magistrate erred in law and in fact in holding the appellant vicariously liable for the acts of John Maina Wangari whom the respondent failed to "enjoin" as a party whereas the said person was not acting under the direction or control of the appellant;
3. The learned trial magistrate erred in law and in fact in declaring the security to be released to the respondent before the borrower repaid the outstanding loan;
4. The learned trial magistrate erred in law and fact in awarding special damages for loss of user which damages were neither specifically pleaded, particularised nor proved;
5. The learned trial magistrate erred in law and in fact in awarding special damages for loss of user of his motorcycle from the date of filing suit when no filing fee had been paid on such a claim and despite the fact that loss of user of the said motorcycle was not an issue for determination;
6. The learned trial magistrate erred in law and fact in failing to take cognizance while awarding damages that the respondent was duty bound to mitigate his losses;
7. The learned trial magistrate erred in law and fact in failing to take cognizance that the respondent

could not recover any sum more than the value of the chattel under the head of special damages or in particular, loss of user; and,

8. The learned trial magistrate erred in law and fact in failing to take cognisance of the case law put to him in the submissions of the appellant.

With these grounds, the appellant asked this court to allow the appeal, set aside the magistrates' court judgment and award it the costs of the appeal.

As the first appellate court, it is mandatory for this court to consider the evidence at the trial and evaluate it afresh before coming to its own conclusions irrespective of the determinations by the trial court subject, of course, to the understanding that it is only the trial court that had the advantage of seeing and hearing the witnesses. (See **Selle v Associated Motor Boat Co. [1968] EA 123**). Dealing with same point, the Court of Appeal in **Kiruga v Kiruga & Another [1988] KLR 348**, observed that:-

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand....”

In his testimony at the hearing, the plaintiff reiterated the averments made in his pleadings. He testified that he accompanied the borrower to the bank and executed a guarantee instrument in favour of the borrower before the latter was advanced the first loan.

The plaintiff contended that on 2nd April, 2008, the defendant's agents repossessed his motorcycle yet he had been released from liability for payment of the initial loan since it had been repaid in full.

The plaintiff also testified that he was in passenger transport business out of which he earned a daily profit of Kshs. 500/=. It was his case that he had lost this daily income for the entire period that the defendant detained his motorcycle. Accordingly, the plaintiff asked for not only the release of the motorcycle but he also prayed for, what I understand to be damages for loss of user. He, however, did not produce any documentary evidence in support of his earnings.

Stephen Irungu testified on behalf of the defendant and admitted that the registered owner of the security was the plaintiff. He also gave evidence that the borrower was the bank's customer and that the bank had advanced him loan facilities at various times. The first of these occasions was in 2005 when he was advanced **Kshs. 25,000/=** which the plaintiff guaranteed to repay if the borrower defaulted. He admitted that this particular loan was repaid in full. The witness, however, denied that the bank owed the plaintiff any obligation to inform him as to when and to whom the plaintiff's motor-cycle's logbook would be released after the settlement of the debt. He also testified that he was not aware of how the borrower came into possession of the plaintiff's motorcycle ownership documents.

As noted earlier in this judgment, the court upheld the plaintiff's claim and allowed the prayer for loss of user which it estimated at **Kshs. 500/=** per day from 2nd April, 2008 to the date of the release of the motor cycle. The plaintiff was also awarded the costs of the suit.

From the pleadings and the evidence proffered at the trial, it is apparent that some facts, which in my view were material to the final determination of the dispute between the parties, are either indisputable or they have been proved or were otherwise admitted. For instance, evidence was led and it was also admitted that the plaintiff was the registered owner of the motorcycle registration number **KAJ 738C**.

It was also common ground that the plaintiff guaranteed payment of **Kshs. 25,000/=** to the defendant bank if the borrower defaulted in repaying this sum that had been advanced to him as a loan. This guarantee was secured by the plaintiff's motorcycle; the contestants were in agreement that the guaranteed sum was fully repaid and therefore the enforcement of the guarantee was not called into question.

It was also agreed that upon repayment of the guaranteed sum, the defendant bank returned the motorcycle's registration book to the borrower who used it to secure a subsequent loan or further advances from the same institution but which he defaulted in the repayments. In a bid to realise its security, the defendant bank seized and repossessed the motorcycle from the plaintiff when the borrower defaulted in repayment of the loan.

To my mind the vital questions whose answers would help in resolving the dispute between the parties were first, whether the plaintiff surrendered the ownership of his motorcycle to the borrower; whether the borrower could offer the plaintiff's motorcycle as security for subsequent loan facilities from the defendant bank; whether the plaintiff guaranteed the repayment of the borrowers loans other than the initial loan of **Kshs. 25,000/=**.

If the answers to these questions are in the negative, it would be necessary to consider whether the seizure and repossession of the plaintiff's motor cycle was lawful and if not whether the plaintiff was entitled to his claim as prayed for in the plaint.

The defendant bank admitted that the motorcycle belonged to the plaintiff and amongst the documents it relied upon was a copy of the log book of the motorcycle showing that it was registered in the name of the plaintiff. The bank's witness was also categorical that the motorcycle belonged to the plaintiff. With these admissions, the bank's contention that the plaintiff surrendered the ownership of this motorcycle to the borrower without any proof of such surrender could not be sustained either in fact or in law. **Section 8 of the Traffic Act Cap. 403** recognises the person in whose name the vehicle is registered as the owner of such vehicle unless there is evidence to the contrary. It says:

"8. Owner of vehicle

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

As noted the defendant did not provide any proof that the ownership of the plaintiff's motor cycle ever changed from the plaintiff to the borrower after the first loan of **Kshs. 25,000/=** was repaid or at any other time.

Having established that the plaintiff was the registered owner of the motorcycle in question, the borrower had no capacity to present it as security for the loan or loans that he was subsequently advanced by the defendant bank. On its part the bank had no reason to accept such security for the financial facilities it advanced to the borrower and to the extent that the two parties colluded to commit the plaintiff's property without his knowledge or consent, their agreement was illegal and in any event unenforceable against the plaintiff.

That the defendant bank was either reckless or negligent in its dealings with the borrower can be demonstrated clearly in an affidavit sworn in support of an ex parte application dated 28th July, 2008 and filed under **Order 1 Rule 14(1)** of the **Civil Procedure Rules** seeking leave to institute third party proceedings against the borrower. In that affidavit, the defendant's branch manager Patrick Kaburu Njeru stated, *inter alia*, as follows:-

2. "That in the year 2004 the plaintiff herein, gave our customer one John Maina Wangari the motor-cycle Reg. No. KAJ 738 C, to use as security against a loan facility granted to him by the defendant.

3. That the said loan was cleared and on 26.4.2005 the securities i.e. log book and transfer released to the said customer John Maina Wangari for onward transmission to the owner, the plaintiff herein. Annexed hereto is a copy of withdrawal of security dated 26.4.05 and marked PNK 1.

4. That on 29th November, 2005, the said customer returned to the bank, sought a loan with the

defendant and again deposited the log book of motor cycle KAJ 738C as security for the loan. Annexed hereto is a copy of loan application and letter of offer and acceptance and marked PNK 2.

5. That the said John Maina Wangari was granted a further loan on the strength of security of the said motor cycle on 14th June 2007 for Kshs. 100,000/= which he has defaulted payment. Annexed hereto is a copy of loan application and letter of offer and acceptance and marked PNK 3a & b.

6. That when the bank granted the subsequent loans to John Maina Wangari, it did so with the honest belief that the security had been given to him by the plaintiff herein.

7. That by the content of the plaint in this matter, the plaintiff has denounced furnishing security of motor cycle to John Maina Wangari for the subsequent loans granted.

8. That had the said John Maina Wangari not misrepresented to the defendant/bank on the status of the security of the said motor cycle, the subject matter herein, the defendant would not have granted the said loan and consequently would not have gone to repossess the said motor vehicle.

9. That I thus crave for leave to enable issue a Third Party Notice as prayed, that the defendant may claim indemnity from the said John Maina Wangari.

This affidavit was sworn on 28th July, 2008; in my humble view, the affidavit appears to be nothing less than the bank's unequivocal admission of liability towards the plaintiff. In it the bank acknowledges the plaintiff's ownership of the motorcycle; it was categorical that upon settlement of the loan which the plaintiff guaranteed, the ownership documents were given to the borrower for "onward transmission to the owner".

The bank also acknowledged that the borrower was later granted a further loan on the strength of the same documents despite the fact that he was not the registered owner of the security. This clearly demonstrated carelessness or negligence on the part of the bank and it appeared to admit its failures in this regard when its representative swore that the loan was purportedly advanced "in the honest belief that the security had been given to him (the borrower) by the plaintiff herein".

It is also clear from this affidavit that the bank appeared to blame the borrower whom it accused of obtaining financial facilities by making misrepresentations. More importantly for the plaintiff's claim, the bank acknowledged that it erroneously seized the plaintiff's motorcycle in the mistaken belief that it belonged to the borrower.

Apart from all the admissions made by the bank, it was apparent that the plaintiff was not privy to the contract between the defendant bank and the borrower. It followed that under the doctrine of privity of contract, the contract between the bank and the borrower could neither confer rights nor impose obligations on strangers to it and in this particular case, the plaintiff. The contract was simply unenforceable against him.

I would therefore agree with the learned magistrate that the plaintiff's cause of action against the defendant bank was not only viable but was also merited; the plaintiff was entitled to the prayer for release of his motor cycle.

If the plaintiff was legitimately aggrieved, as it has been proved to be the case, then the only other question vital in this appeal as it was at the trial was whether the plaintiff was entitled to damages for loss of user besides the order for release of the motorcycle. The learned magistrate thought he was and in his judgment he found that the plaintiff's loss under this head was 'sufficiently' pleaded and proved.

Going back to the plaintiff's pleadings, there were only two references to this claim of loss of user in the

plaintiff's claim the first of which, in my view is not that clear-cut, is found in paragraph 9 thereof where the plaintiff pleaded:-

“The plaintiff uses the motor cycle for commercial use.”

The only other reference to this claim was in the first prayer where he urged for judgment for:-

“(a) An order that the motor cycle reg. No. KAJ 738 C be released to the plaintiff and for loss of use.”

There is no doubt that any amount due to a claimant under the head of loss of user is ascertainable and quantifiable; it is in the nature of special damages which as always must be specifically pleaded and proved.

Order 2 rule 10 of the **Civil Procedure Rules** appears to refer to such claims that must be specifically pleaded or particularised; it says:-

10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a)...

(b)...

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

In **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288** at page 291 the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus:-

“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.”

A casual statement such as “*the plaintiff uses the motor cycle for commercial use*” without any particulars of how much the plaintiff earned and therefore lost as a result of the wrongful seizure and detention of his motorcycle does not appeal to me as a specific pleading upon which an award for loss of user would legitimately be made.

Closer to the point is the Court of Appeal's decision in **Civil Appeal No. 25 of 2013 Macharia Waiguru versus Murang'a Municipal Council & Another (2014) eKLR** in which the question of a claim for loss of user was addressed. In its judgment the Court (Visram, Koome and Odek JJ.A) expressed itself on this issue as follows:-

“ On the issue relating to the claim of Kshs. 300,000/= and loss of user, the appellant in his submission before this court admits that he never tendered any evidence to prove these claims since he believes that he still has a pending suit where he shall tender the evidence. Our reading of the claim in paragraphs 5, 8(c) and 9 of the amended plaint indicates that this is a claim for Kshs. 300,000/= and loss of user which is a claim for special damages.

The Court then cited with approval its earlier decision in the case of **Siree -v- Lake Turkana El Molo Lodges (2002) 2EA 521** where it had said:

“This court has said time and again that when damages can be calculated to a cent,

then they cease to be general damages and must be claimed as special damages”

It was the court’s view that damages for loss of user are quantifiable meaning that they can only be pleaded as special damages and failure to plead them as such is fatal to a claimant’s claim under this head; in this regard the court relied on its decision in *Maritim & Another –v- Anjere (1990-1994) EA 312 at 316*, where it was emphasised:

“In this regard, we can only refer to this court’s decision in Sande –v- Kenya Cooperative Creameries Limited Civil Appeal No. 154 where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

Having made references to its earlier decisions on the question of special damages and in particular damages for loss of user the Court came to the conclusion that:

“It is trite law that a party is bound by his pleadings. A claim for loss of user is a claim for special damages and claim must be pleaded and particulars given.”

With the foregoing explicit pronouncements on the law it is unnecessary to belabour the point that a claim for loss of user is a claim in special damages and it can only be awarded where the pleadings in which it is sought meet the threshold for such claims.

Coming back to the case before the magistrates’ court, it is noted that in his testimony in court, the plaintiff attempted to particularise his earnings and said:

“I used to get Kshs. 1,000/=. I would fuel with Kshs. 300/=:, however I hired a rider I would pay him Kshs. 200/=. My average income per day was Kshs. 500/=. I would pay Kshs. 10/= to the council per day. That is the average.”

These particulars were not pleaded and neither were they proved on a balance of probabilities. But the learned magistrate thought otherwise and upheld the plaintiff’s claim of loss of user based on this evidence. In his judgment, the learned magistrate held:

“My conclusion therefore is that the plaintiff has suffered loss. He estimated that the loss of use at Kshs.500/= per day. My view is that it is not possible to estimate the daily income for motor cycle taxi business. Therefore was it possible for the plaintiff to specifically plead the special damages. My view is that we (sic) would not. The plaintiff stated at the hearing that he would get Kshs. 500/= after paying the driver, the local council and paying for the fuel per day. He stated that that is the average and therefore as would be expected the income could vary from day to day and even season to season. Motor cycle taxi operators do not normally keep records in their business. To expect the plaintiff to strictly proof his claim by production of receipts and books of account would have been to require him to lie to court. The loss was continuing. I find that the loss was sufficiently pleaded and proved in the circumstances.”

If the plaintiff could particularise his loss at the hearing there is no reason, and none was given why such particulars were not pleaded in the first place. From his testimony in court, it was apparent that the plaintiff was clear in his mind of his daily earnings from the outset and therefore he could, as he was legally bound to, plead these earnings specifically. I would not therefore agree with the learned magistrate that it was not possible for the plaintiff to specifically plead special damages for loss of user.

Again, with due respect to the learned magistrate, it was not open for him to speculate on how the trade in which the plaintiff is said to have been engaged operates and conclude that motor cycle operators do not usually keep business records. The plaintiff himself never testified that they ordinarily do not keep such

records in their business. The learned magistrate's conclusion that the plaintiff could not specifically plead special damages because of what appears to have been his own opinion was far removed from the evidence before him; he simply misdirected himself.

It is also curious to note that although the learned magistrate held that the special damages could not be specifically pleaded he concluded that the plaintiff's claim for loss of user was sufficiently pleaded and proved. Here, the learned magistrate misdirected himself on the law because the test is not whether the claim was 'sufficiently' pleaded but rather whether it was 'specifically' pleaded. Be that as it may, the record would show the claim for loss of user was not pleaded 'sufficiently' or otherwise.

What this boils down to is that the learned magistrate's award for loss of user was based on speculation and his own hypothesis of the trade customs in the motorcycle transport business. By taking this path the learned magistrate erred in law and arrived at the wrong conclusion. Special damages, as noted, must be specifically pleaded and proved; they cannot be awarded on the basis of speculation and conjecture.

For the reasons I have given, I would set aside the award for loss of user and allow the appellant's appeal on this score. The appeal against the release of the motor cycle back to the respondent is rejected.

As for the costs of the appeal, parties will bear their respective costs since the appeal has only partly succeeded; however, the respondent shall have the costs of the suit as decreed by the trial court.

It is so ordered.

Signed, dated and delivered in open court this 2nd day of October 2015

Ngaah Jairus

JUDGE