



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 21 OF 1998**

**SAID HEMED SHAMSI .....PLAINTIFF**

**-V E R S U S-**

**1. MUSTAFA MOHAMED ATHUMANI MJAHI  
2. COACHLINE LIMITED  
3. DIAMOND TRUST KENYA LTD ..... DEFENDANTS**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff filed this claim against three Defendants. At the hearing before me however, the Plaintiff had obtained judgment against the first and second Defendants. The case proceeded only against the third Defendant.
2. The Third Defendant (the Defendant) is a limited liability company and carries out banking business.
3. The claim against the Defendant is for conversion of two buses, that is KAG 088P and KAG 062T; claim for loss of use and income of those buses and claim for the return of those buses or the payment of their market value.
4. Plaintiff pleaded that he agreed by an oral agreement to sell the buses to the 1<sup>st</sup> Defendant. Further to that agreement he released the buses to the 1<sup>st</sup> Defendant but later found that the buses had been transferred to the Aziz Heri and 2<sup>nd</sup> in their joint names with the 3<sup>rd</sup> Defendants. He alleged that such transfer was fraudulent.
5. The Defendant by its defence pleaded that Plaintiff as a dealer offered the buses for sale to Aziz Heri and 2<sup>nd</sup> Defendant and the Defendant thereby provided the purchase price through Hire Purchase. The Defendant therefore denied Plaintiff's claim.

**EVIDENCE**

6. Plaintiff stated that on 1<sup>st</sup> February 1997 he agreed to sell to the 1<sup>st</sup> Defendant buses KAG 088P and KAG 062T. He was selling each bus at Kshs. 5 million. The agreement was oral. 1<sup>st</sup> Defendant paid him Kshs. 500,000/- by two cheques, one for Kshs. 100,000/- and another for Kshs. 400,000/-. By then 1<sup>st</sup> Defendant had already taken possession of the buses and the Logbook for the purpose of obtaining valuation. The cheques were dishonoured. He instructed

his Advocates who wrote to the three Defendants a letter dated 6<sup>th</sup> January 1998 demanding the return of the buses or payments of Kshs. 10 million. He wrote to those parties because the log book of bus KAG 088P, sent to his address indicated that the said bus was registered in the joint names of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That bus was in his name prior to that registration. That the registration into the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants names was without him executing the transfer. That although he knew that the Defendant was to finance the purchase price he did not however sign nor authorize 1<sup>st</sup> Defendant to receive that payment. He referred to hire purchase agreement in respect of bus KAG 088P between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. He said he was unaware of that hire purchase agreement and denied he executed the dealers invoice. He denied that that invoice bore his signature and denied having agreed to sell it to the 2<sup>nd</sup> Defendant. That todate he has not been paid the agreed purchase price for that bus.

7. In respect of bus KAG 062T he said that he was made aware by the 1<sup>st</sup> Defendant that the Defendant was to finance the transaction. He referred to hire purchase agreement, in respect to that bus between Aziz Heri and the Defendant. He did not know nor did he deal with Aziz Heri. Also the dealers invoice in respect of that bus he denied executing it. That Aziz Heri and the Defendant have todate not paid him for that bus.
8. Plaintiff on being cross examined stated that he purchased the buses through a loan given to him by Premier Savings Company which loan he had fully paid. That he released the buses and Log book to 1<sup>st</sup> Defendant after the 1<sup>st</sup> Defendant issued him with cheque of Kshs. 500,000/-. Subsequently on inquiring from 1<sup>st</sup> Defendant about the balance of purchase price he told him that he would follow up the matter with the Defendant. That he sued the Defendants after seeing the log book of KAG 088P. He again requested the 1<sup>st</sup> Defendant for payment and 1<sup>st</sup> Defendant told him that he had not received it from the Defendant. It was thereafter that he instructed an Advocate and hence why he did not refer the matter to the Defendant. He again reiterated that he did not sign the transfer of the buses. That he had previously sold other buses to the 1<sup>st</sup> Defendant.
9. Defendant's evidence was adduced by its Legal Officer Edwin Okuta. Okuta confirmed that the Defendant is a Financial Institution carrying out the business of banking which includes offering hire purchase facilities and loans. He set out the procedure followed when hire purchase facility is sought. Firstly the person seeking the facility makes an application. Secondly the bank determines the suitability of the application and thirdly if the bank accepts the application the hire purchase agreement is signed.
10. In February 1997 Aziz Heri Mohamed and the 2<sup>nd</sup> Defendant approached the Defendant seeking hire purchase facility in respect of KAG 088P and KAG 062T. The application in respect of KAG 062T was made by Aziz Heri on 28<sup>th</sup> January 1997. The application was accepted by the Defendant and a hire purchase agreement dated 13<sup>th</sup> February 1997 was entered into. The Defendant never dealt with the dealer. That the Defendant ordinarily does not deal with the dealer. The Defendant obtained a valuation and the original log book. Defendant confirmed Aziz Heri had possession of the bus. That there were no complaints either from Heri or the Plaintiff in regard to that agreement.
11. In respect of KAG 088P the borrower was the 2<sup>nd</sup> Defendant. The application for hire purchase facility was dated 24<sup>th</sup> February 1997. The dealer in that case was the Plaintiff. The hire purchase agreement was dated 27<sup>th</sup> February 1997. That the Defendant had not received complaint.
12. The Plaintiff was paid for bus KAG 062T on 13<sup>th</sup> February 1997 through cheque for Kshs. 5 million which was paid in favour of the 1<sup>st</sup> Defendant and further cash payment of Kshs. 800,000/- paid to Anur Suleman Ahmed. That those payments to those two persons were made after the Plaintiff so instructed the Defendant by the letter dated 13<sup>th</sup> February 1997. That letter

was produced in evidence. In respect of bus KAG 088P a cheque of Kshs. 800,000/- was paid to Mohamed Ali Hamis and another cheque for Kshs. 4,700,000/- was paid to Twafiq Bus Services. That those payments were made under the instructions of Plaintiff by letter dated 27<sup>th</sup> February 1997. That letter was not produced in evidence.

13. Okuta denied the Defendant colluded to defraud Plaintiff and stated that the Defendant was not a party to the agreement between Plaintiff and the other Defendants. That the Defendant followed the due process of a hire purchase facility. Okuta denied the Defendant forged Plaintiff's signature or that it deprived Plaintiff of the buses. That the first time the Defendant got to know of Plaintiff's claim was when there was execution in the year 2003 against it of an *ex parte* judgment which was later set aside. He denied the Defendant received Plaintiff's demand letter, Plaintiff's Exh. No. 2. He further stated that the hirers defaulted in their repayment of hire purchase facility and had been sued by Defendant in **HCC Nrb 494 of 1998** whereby Defendant obtained judgment for Kshs. 41 million against the hirers which amount has not yet been paid.
14. On being cross examined Okuta stated that the Defendant before entering into hire purchase agreement carries out due diligence. That the Defendant confirmed it was the Plaintiff who was selling the vehicles. That the payment of vehicles is made to the dealer and where upon the owner should give Defendant a signed transfer. Okuta confirmed he had not produced a transfer signed by the Plaintiff in this case. In respect of bus KAG 088P Okuta confirmed that the bank failed to produce in this case documents relating to the payment to the Plaintiff. He confirmed that the Defendant defence at paragraph 8 stated that payment for the buses was made to the Plaintiff and not to third parties.
15. On being re examined Okuta said that the Defendant relies on the hirer to provide the original log book.

#### **PLAINTIFF'S SUBMISSIONS**

16. Plaintiff's learned Counsel Ms Ngigi through written submissions submitted that it was not denied that Plaintiff was the registered owner of the two buses. That being so, it was the Plaintiff only who could sign the transfer of those buses; and since the Defendant failed to produce transfers signed by Plaintiff the Defendant had failed to shift the burden of proof and the evidence of Plaintiff in that regard sufficed. In that regard Plaintiff relied on the case **JENNIFER NYAMBURA KAMAU -Vs- HUMPHREY MBAKA NANDI [2013]eKLR** where the Court of Appeal stated-

**“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”**

17. Plaintiff further submitted that the Defendant failed to conduct due diligence because it sent documents for Plaintiff's signature through the hirers without confirming that the Plaintiff had signed and then proceeded to make payment of Kshs. 11,300,000/- to third parties on the strength of a letter allegedly signed by Plaintiff. That in any case the Defendant did not plead that the said money was paid to 3<sup>rd</sup> parties in its defence. That the Defendant was bound by its pleading.
18. Further it was submitted Defendant failed in cross examination of Plaintiff to put the documents that allegedly authorized payments to third parties to the Plaintiff. That such failure denied

Plaintiff an opportunity to comment on those documents. Plaintiff sought the Court to disregard those documents. In so doing Plaintiff relied on the case P. N. OGOLA ONYANGO T/A PITTCONSULT CONSULTING ENGINEERS –Vs- DANIEL GATHEGI T/A QUANTALYSIS [2005]eKLR. The Court therein stated-

**“The Defendant filed his defence in January, 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party is to be permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.”**

19. On the claim in conversion it was submitted that Plaintiff released the buses and log books to 1<sup>st</sup> Defendant for purpose of obtaining valuation. That accordingly property in those buses had not passed on delivery. Plaintiff cited Section 19 of the Sale of Goods Act Cap 31 in support. That Section provides-

**“19(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.**

2. **For the purposes of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.”**

Plaintiff relied on the case Mbsa HCCA No. 15 of 2004 N. W. REALITE LTD & ANOTHER – Vs- MOSES OCHIENG SAKWA where the Court on quoting the above Section stated-

**“These clauses require no elaboration. They make it quite clear that the intention of the parties was that the property in the goods was to be transferred to the Respondent upon payment of the full purchase price. As full payment has not been made the property in the goods still remains with the seller who is the Tenant.”**

Plaintiff concluded on this by stating that the Defendant in transferring Plaintiff vehicles *“intentionally exercised dominion over the subject buses and hence converted them to its own use.”*

20. Plaintiff therefore sought the Court to award him Kshs. 10 million which was the value of the buses.

### **DEFENDANT’S SUBMISSIONS**

21. Defendant was of view that Plaintiff had failed to particularize his allegation of fraud as required by Order 2 Rule 10(1) (a) of the Civil Procedure Rules. That Rule provides-

**“Subject to sub-rule (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. **particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies.”**

Defendant relied on the case VIJAY MORJARIA –Vs- NANSIGH MADHOSINGH DARBAR & ANOTHER (2000)eKLR where C. A. Judge M. Keiwua (as he then was) stated-

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must be set out,**

**and then it should be stated that the acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”**

I wish to however state in respect of that case that the Defendant’s learned Counsel Mr. Rimui failed to supply the Court with the judgments of the other two Judges who heard that appeal together with Keiwua J.A. Learned Counsel only supplied the judgment of Keiwua J.A. from which the Defendant relied upon as above. That is not the proper way of citing a case.

22. Defendant citing Section 19 of Cap 31 as reproduced above submitted that the property in the buses had passed from the Plaintiff to the 1<sup>st</sup> Defendant. Defendant relied on the case **SILVESTER MOMANYI MARUBE –VS- GULZAR AHMED MOTORS & ANOTHER [2012]eKLR** to advance that submission. Defendant relied on the following portion of that case-

**“Section 19 of the said Act provides ....**

**Section 20 of the said Act on the other hand provides ....**

**It follows that property in goods where the contract falls under the foregoing provisions passes when the contract is made unless the contract is conditional or unless a contrary intention is manifested by the parties to the contract. See Anwar vs. Kenya Bearing Co. [1973] ea 352 and Osumo Apima Nyaundi vs. Charles Isaboke Onyancha Kibondori & 3 Others Civil Appeal No. 46 of 1996.** [Emphasis added]

Defendant submitted that the property in the buses passed to the 1<sup>st</sup> Defendant when Plaintiff and 1<sup>st</sup> Defendant entered into the oral agreement about the purchase of the buses. That accordingly the Plaintiff ought to only have sued 1<sup>st</sup> Defendant for failure to tender the purchase price.

23. That the act of willingly handing over the buses and log book by Plaintiff to 1<sup>st</sup> Defendant as provided under Section 26 of Cap 31 was evidence 1<sup>st</sup> Defendant had Plaintiff’s authority to subject the buses to hire purchase transaction. Section 26 of the Sale of Goods Act Cap 31 provides-

**“26. Resale of goods in certain cases**

1. **Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it.**
2. **Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer of that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.**
3. **In this section, “mercantile agent” means a mercantile agent having, in the customary course of his business as agent, authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.”** [emphasis added]

24. Defendant submitted that there are exceptions to the rule that innocent mistake is no defence to a claim of conversion. Defendant in support of that submission relied on the book of Winfield and Jolowicz on Torts (16<sup>th</sup> Edition). Defendant in so relying on that book and quoting from paragraph 17.22 was actually quoting the U.K. Hire Purchase Act 1964, U.K – Sale of Goods Act 1979 and U.K. Factors Act 1889 which statutes are not applicable to the Kenyan Systems of Law.

### ANALYSIS

25. I do not wish to repeat the evidence which is clearly set out above. It is important however to consider the parties' exhibits.

26. The first application for hire purchase related to vehicle KAG 062T. The application for that facility for that vehicle (Defence Exhibit No. 1(a)) was made by Aziz Heri Mohamed. The application at first indicated the dealer was Tahfif Bus Services Ltd which was crossed over and the name of the Plaintiff written to indicate that he was the dealer.

27. It is important to note that Aziz indicated in his application that he had previously obtained hire purchase facility from the Defendant. It is presumed that the Defendant received either a copy or the original log book of KAG 062T. From that moment therefore Defendant knew Plaintiff was the registered owner. That log book bore the Plaintiff's signature, and in this regard, as an example I refer to Plaintiff's Exhibit No. 3. Defendants are bankers. Day in and day out they are involved in verification of their customer's signatures. It would therefore be expected that the Defendant would have verified that the Plaintiff's signature on the documents presented to them in respect of the hire purchase transaction corresponded with each other or with the signature in the log book. I have examined Defendant's Exhibits No. 3(a) (dealers invoice), No. 3(b) (dealers invoice), No. 4 Plaintiff's alleged letter and No. 5 invoice. In all those documents I find that neither of the signatures are similar to the other. Granted, there is an obvious attempt to make them look alike but they are not in my view. They also fail to resemble Plaintiff's signature on Plaintiff's Exhibit No. 3, the log book of KAG 088P.

28. It is important to also note in respect of KAG 088P the hirer was the 2<sup>nd</sup> Defendant and 2<sup>nd</sup> Defendant in its application for hire purchase stated it had dealt with the Defendant in previous hire purchase transactions.

29. The other important pointer is that the application for hire purchase in respect of KAG 062T was made by Aziz on 28<sup>th</sup> January 1997. It was approved and hire purchase agreement signed on 13<sup>th</sup> February 1997, 16 days later. On the day the Plaintiff allegedly issued an invoice, that very day payments were made to 1<sup>st</sup> Defendant who received Kshs. 5 million and to Anwar Suleman who received Kshs. 800,000/-. Those payments were made as per the Plaintiff's alleged letter, Defendant's Exhibit 4, dated 13<sup>th</sup> February 1997.

30. In respect of KAG 088P the application was made on 24<sup>th</sup> February 1997. The agreement of hire purchase was signed on 27<sup>th</sup> February 1997. That was three days later. The dealers invoice was dated 27<sup>th</sup> February 1997 and on that same day payments in respect to that transaction were made to Ali Hamis Kshs. 800,000/- and Kshs. 4,700,000/- to Tahfif Bus Services. There was no letter or authority produced in evidence authorizing the Defendant to make those payments to third parties other than the Plaintiff whom they knew was the owner of that vehicle.

31. Plaintiff's Counsels sent a letter of demand to all the Defendants dated 6<sup>th</sup> January 1998. The Defendant's address in that letter is reflected as P.O. BOX 90564, MOMBASA. That is the address indicated in the Defendant's Exhibit No. 1(a), amongst other Exhibits as being Defendant's address. The burden therefor was upon the Defendant to disprove receipt of that demand letter. In that regard Section 107 of the Evidence Act is applicable.

32. I wish to respond to the Defendant's submissions.

33. I reject Defendant's submissions that Plaintiff failed to particularize the claim of fraud. To the contrary the Plaintiff paragraph 13(a) to (c) sets out those particulars. That paragraph is as follows-

**“13. The Plaintiff further avers that the said fraudulent transfer was jointly done by the first Defendant who is a director of the second Defendant and the third Defendant by representing to the Registrar of motor vehicles that the Plaintiff had executed a motor vehicle transfer form in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.**

**PARTICULARS OF FRAUD OF THE 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> DEFENDANTS**

- a. **The first Defendant acting as a Director of the second Defendant dishonestly received from the Plaintiff the log books of motor vehicles registration numbers KAG 088P and KAG 062T by representing to the Plaintiff that he was willing to purchase for value the said motor vehicles.**
- b. **The first Defendant acted dishonestly by representing to the Plaintiff that he required the said motor vehicles' log books for valuation.**
- c. **The first Defendant acting as a Director of the second Defendant and in conjunction with the third Defendant illegally executed and/or presented to the Registrar of motor vehicles, Transfer of ownership of motor vehicle forms knowing very well that the Plaintiff had not executed the said forms by appending his signature.”**

Looking at those particulars one wonders how much more the Plaintiff ought to have particularized his claim. Contrary to what Defendant submitted the particulars satisfy the requirements of Order 2 Rule 10(1)(a) of the Civil Procedure Rules. Those particulars show the act that Plaintiff attributes to the Defendant as being fraudulent. In my view the Defendant on that submission is *'splitting hairs.'*

34. Do the provisions of Sections 19 and 26 of Cap 31 prove that property of the buses passed to the 1<sup>st</sup> Defendant or that Plaintiff gave 1<sup>st</sup> Defendant authority to resell the buses? Section 19 is reproduced above. The parties intention in a transaction is paramount in determining when property passed. Plaintiff's evidence, and it was not contradicted, was that he released the buses and log book for the sole purpose of the 1<sup>st</sup> Defendant obtaining valuation which would have been followed by a financial facility being obtained. That being the parties intention the property in both buses remained in the Plaintiff.

35. Underlying provision of Section 26 is that authority to sell or pledge a property is assumed where the person who receives, so receives in good faith and without notice of previous sale. I took time to analyze the documents relied upon by the Defendant and I began by stating the Defendant ought to have confirmed if the signatures on the documents delivered by the hirers were signed by the Plaintiff. The Defendant is a financial institution. It is not an ordinary company. It is obligated to ensure that it does not facilitate any fraud. Defendant has a duty to act with skill and care. Indeed I carefully set out the chronology of the transaction to show that there seem to have been acts that were untoward. That fact Plaintiff supposed signatures bear no resemblance to the Plaintiff signature and the fact payments were made to third parties on the strength of those questionable signatures will lead this Court to find that the Defendant had notice of the illegality of the 1<sup>st</sup> Defendant or that it was a party through its employees. Section 26 of Cap 31 does not therefore shield the Defendant.

36. Defendant did not plead that it made payments to Third Parties on instructions of the Plaintiff. Defendant in its defence pleaded that it made payment to the Plaintiff. It is not permissible for party to depart from its pleadings. This was discussed by the Court of Appeal in the case **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER -Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR** when the said

Court cited with approval the case ADETOUN OLADEJI (NIG) LTD –Vs- NIGERIA BREWERIES PLC S.C.91/2002 as follows-

**“... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”**

The Defendant’s attempt to depart from its pleadings by giving evidence that payment was made to Third Parties is therefore rejected. The Court of Appeal also cited the case MALAWI RAILWAYS LTD –Vs- NYASULU [1998] MWSC 3 which is useful to consider as follows-

**“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice ....”**

37. More importantly is that those documents about Plaintiff’s authority for Defendant to pay third parties were not put to the Plaintiff and accordingly the Defendant submitting them in evidence can only be termed as an afterthought.

38. It is for the above reason the Defendant evidence of payments made to Third Parties on the ostensible authority of the Plaintiff is rejected. The fact that those documents were permitted to be submitted did not determine the weight they would be given by the Court in its judgment. The Defendant was therefore wrong to submit that the issue of whether the Court could rely on them was resjudicata.

39. I do find that Plaintiff has proved the claim of conversion against the Defendant. In that regard I will refer to the case KUWAIT AIRWAYS CORPORATION –Vs- IRAQ AIRWAYS COMPANY (2002) UKHL19 where the House of Lords was considering a claim by Kuwait Airways that Iraq Airways had taken ten of its aircrafts in 1990 when Iraq forcibly invaded Kuwait. The House of Lords stated in that case-

**“Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant’s conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion .... This is not to be understood as meaning that the wrongdoer must himself actually take the goods from the possession of the owner. This will often be the case, but not always. It is not so in a case of successive conversions. For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession, or possession is withheld from him by the wrongdoer.”**

40. From the discussion above in this judgment I find Plaintiff has proved Conversion against

the Defendant. The author of Winfield and Jolowicz on Tort had this to say on damages where conversion is proved-

**“First, if there is a conversion the claimant’s damages are prima facie measurable by the value of the goods, in other words the judgment is a sort of forced sale.”**

Having the above in mind Plaintiff is entitled to judgment of Kshs. 10 million which was the price agreed for both buses between him and 1<sup>st</sup> Defendant.

41. Before concluding this judgment I wish to state that I could not trace the Defendant’s filed Defence. I have, for the purpose of this judgment, relied on unfiled copy of the Defendant’s defence attached to his application by way of Chamber Summons dated 17<sup>th</sup> June 2003. I have chosen to give the Defendant the benefit of doubt in considering the unfiled Defence because due to the long time it has taken to conclude this case, which was filed in 1998, the Court file has grown in size and the documents in it are disarray. If indeed the Defendant had not filed its defence, then there is no contest to the Plaintiff’s case and the Plaintiff would be entitled to judgment in default of a Defence.

42. In the end there shall be judgment for the Plaintiff against the 3<sup>rd</sup> Defendant for-

- i. **Kshs. 10 million with interest at Court rates from the date of filing suit until payment in full.**
- ii. **The Plaintiff’s costs shall be paid by 3<sup>rd</sup> Defendant.**

**DATED and DELIVERED at MOMBASA this 15<sup>TH</sup> day of MAY, 2014.**

**MARY KASANGO**

**JUDGE**