

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**(CORAM: R. MWONGO, J.)**  
**CIVIL APPEAL NO. E074 OF 2024**

NEPHAT NJAGI GERALD.....1<sup>ST</sup> APPELLANT  
MUNENE MBARE.....2<sup>ND</sup> APPELLANT

**-VERSUS-**

COUNTY GOVERNMENT OF EMBU.....RESPONDENT  
*(Appeal arising from the decision of Hon. D. Endoo in Embu MC Civil Case No. E140 of  
2023 delivered on 16<sup>th</sup> July 2024)*

**JUDGMENT**

**The Appeal**

1. This is an appeal filed through a memorandum of appeal dated 15<sup>th</sup> August 2024. In it, the appellants seek that the appeal be allowed, the trial court's decision be set aside, and the judgment of the trial court, and award general damages of Kshs.1,500,000/= or any other amount that shall be deemed fit to them. The appeal is premised on the grounds that:
  - 1) That the learned magistrate erred in law and fact by delivering judgment against the weight of evidence;
  - 2) That the learned magistrate erred in law and fact by failing to find the mere facts that the appellant's motor vehicle was impounded forcing him to seek legal redress for its release had occasioned General damages to the applicant and was entitled to compensation;
  - 3) That the learned magistrate erred in law and fact by failing, ignoring applicant's evidence that he had paid cess at the point of origin of the fords and that the receipt had been confiscated by the respondent's agent;
  - 4) That the learned magistrate misdirected herself in fact by totally ignoring the cess payment extract produced by the appellant;
  - 5) That the learned magistrate erred in law and fact that there was admission by the respondent that the tire of the motor vehicle had been perforated unlawfully

while the appellant was not running away but was reversing to take the motor vehicle to the respondent's offices;

- 6) The learned magistrate erred by making a finding that the appellant was drunk and abusive without any evidence; and
- 7) That the learned magistrate erred by disregarding the testimony that despite the applicant taking the cess payment book excerpt to the respondent, the respondent failed to release the motor vehicle thus necessitating this suit.

### **The case in the lower court**

2. Through a plaint dated 29<sup>th</sup> August 2023, the appellants sought judgment against the respondent for an order compelling it to unconditionally release motor vehicle registration number KAU 047L, payment of the value of the damaged tyre, general damages for illegally impounding the said motor vehicle, damages for loss of user and costs of the suit with interest.
3. The 1<sup>st</sup> appellant is the registered owner of the said motor vehicle, and the 2<sup>nd</sup> appellant had leased it out for transportation of firewood. They claimed that on 28<sup>th</sup> August 2023, the vehicle was being driven to Nairobi when the respondent's employees stopped it at a road block in Embu town and demanded the relevant permits for transportation of firewood. The permits were presented, but the respondent's employees punctured one of the vehicle's tyres before impounding it and taking it to their offices where it was held. They stated that the actions of the respondent's employees are illegal and unlawful since the respondent refused to release the motor vehicle.
4. The respondent filed a statement of defense denying having deflated the motor vehicle's tyre. It stated that the vehicle was stopped at the cess roadblock in accordance with the County Finance Act and that the appellants' negligence led to the damage occasioned on the motor vehicle. It argued that there is no reasonable cause of action disclosed against it by the appellant.

### **Evidence in the trial court**

5. PW1 was the 1<sup>st</sup> appellant who was driving his motor vehicle on the day of the incident. He stated that the vehicle was loaded with firewood in Chuka and he acquired a transportation permit from Kenya Forest Service. He left for Nairobi and

when he reached Kiracha Cess point, he paid Kshs.1,000/= and proceeded to Embu where he was stopped by the respondent's employees at another cess point. He confirmed that he had paid cess but they blocked his way and so his tyres were deflated. He stated that the officers asked why he was going before buying them tea and they took his permit and cess receipt which were not returned to him.

6. The respondent's officers impounded his vehicle and towed it to the County offices under police supervision. He collected a copy of the cess receipt he had obtained and he presented it as evidence. he testified that the damage to the vehicle was assessed at Kshs.30,000/= but he did not have a receipt for this. For every day that the vehicle was out of use, he incurred a loss of Kshs.10,000/= since he could not deliver goods with it. On the day of the incident, he was carrying goods valued at Kshs.70,000/= yet he could not deliver them.
7. On cross-examination, he stated that he paid for the permits and cess and he had copies of the receipts for both. The original receipts were taken by the respondent's officers. When he was stopped, the officers verified the receipts and allowed him to go before another officer threw spikes on the road as he was making his way. He tried to stop the vehicle but one tyre was affected. He stated that eventually, his motor vehicle was released. He did not have a ledger to show the value of the goods he was carrying or a receipt for the tyre.
8. DW1 was Heriberitus Kineni, an employee of the respondent, in charge of revenue. He stated that when the 1<sup>st</sup> appellant was stopped at the cess point, he was insulting the county officers and telling them that their cess fees are higher than other counties. He tried to drive away before compliance was established and so the officers were forced to put the spikes on the road and he chose to drive over them perforating his vehicle's rear tyre. The 1<sup>st</sup> appellant tried to escape leaving the keys behind yet the 2<sup>nd</sup> appellant was not able to drive because he was as turn boy. The county officers called the police because the 1<sup>st</sup> appellant continued being unruly. The co-driver replaced the deflated tyre but the appellant couldn't drive and so the vehicle was towed to the respondent's yard.

### **The decision of the Trial Court**

9. The trial court found that the circumstances leading to the damage caused on the appellant's motor vehicle were caused by them, and so they bore the responsibility. It

stated that the special damages claimed were not proved by way of receipts hence they could not be awarded. The same was also found for loss of user. The court found that from the evidence adduced, the 1<sup>st</sup> appellant was unruly and drunk and when the police arrived at the scene, he ran away, leaving the 2<sup>nd</sup> appellant who was the turn boy. That the court ordered release of the motor vehicle on 29<sup>th</sup> August 2023 and it was therefore not impounded for 3 days as claimed by the appellants. The trial court failed to find any proof that the motor vehicle was leased to the 2<sup>nd</sup> appellant for purposes of delivering an order which was eventually cancelled. For those reasons, the appellants' claim was dismissed with no order as to costs.

### **Submissions on the appeal**

10. The court directed parties to file their written submissions but only the appellants complied.

11. The appellants submitted that there was enough evidence before the trial court to enable award of damages as prayed. They relied on the case of **Kipngeno Arap Ngeny v The Chief Land Registrar & Another (2018) eKLR**. They argued that the respondent's officials failed to show just cause for impounding the vehicle and so they should pay damages. They relied on the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] KEELC 2424 (KLR)** and **Bwana Mohamed Bwana v Registered Trustees, Kenya Ports Authority Pension Scheme [2022] KEELC 727 (KLR)**.

### **Issue for Determination**

12. The issue for determination is whether the appellants should have been awarded damages by the trial court.

### **Analysis and Determination**

13. The role of an appellate court is to re-evaluate the evidence adduced before the trial court and reach an independent finding. In the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

***"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles***

***upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."***

14. From the proceedings in the lower court file, the 1<sup>st</sup> appellant drove his vehicle which was carrying firewood from Chuka towards Nairobi. When testifying as PW1, he stated that he paid cess at Kiracha. When he reached Embu, he was stopped at another cess point where receipts were demanded from him. According to DW1, PW1 appeared drunk and when they asked if he had paid cess, he started insulting the officers and tried to drive away. It is then that one of the respondent's officers threw spikes on the road and PW1 drove over them, deflating one of his vehicle's tyres.
15. PW1 testified that when he was asked about the paperwork, he showed it and they verified that he had complied. When he wanted to drive off, the respondent's officers threw spikes on the road and demanded that he buys them tea before leaving. He said that at that point, the respondent's officers took away the original Kenya Forest Service Permit and cess payment receipt for the Kshs.1,000/= he had paid at Kiracha. He said that he went back to get copies of the receipts and his lorry was impounded. According to the trial court record, the respondent was ordered to unconditionally release the appellants' vehicle on 29<sup>th</sup> August 2023.
16. The appellants were transporting firewood. Section 2 of the Embu County Finance Act 2019 defines cess as tax or fees chargeable on goods under the second schedule of the Act. Under that schedule, there is a charge of Kshs.500/= per tonne for vehicles weighing more than 2 tonnes carrying firewood/poles and offcuts/manure. According to the Forest Produce Movement Permit, the appellants were permitted to carry 6.9 tonnes of eucalyptus firewood. This means that in Embu County, the appellants were required to pay Kshs.3,450/= as cess.
17. PW1 testified that he paid Kshs.1,000/= at Kiracha cess point as he left Chuka. When he was stopped at Embu town cess point, he was still owing cess and it appears that this is the noncompliance that the respondent's officials found. PW1 did not produce proof of payment of cess at Kiracha or Embu Town. He testified that the respondent's officials took away his original receipts for the money paid and he did not see them

again. The respondent denied this allegation. The only other person who was present and apparently witnessed the incident, was the 2<sup>nd</sup> appellant and he was not called to testify.

18. From the available evidence, it is clear on a balance of probabilities that the appellants had failed to comply with the requirements of cess payment in terms of the Embu County Finance Act 2019. Indeed, they had a permit to cut and transport the trees from Tharaka Nithi County to Nairobi but they did not prove that they paid the requisite amount of cess at the road block in Embu. Therefore, the respondent was forced to enforce this by impounding the appellants' motor vehicle, which was released the following day through a court order.

### **Conclusions and Disposition**

19. Ultimately, in the circumstances, the respondent cannot be held liable for the damages caused to the appellants' motor vehicle because it was as a result of the 1<sup>st</sup> appellant's action, that the tyre was deflated by spikes and/or damaged. Payment of cess is part of the requirements for facilitating the transportation and delivery of the goods carried in the motor vehicle. As such, loss of any profits from the sale cannot be blamed on the respondent, since the appellants failed to comply with the cess requirements. As for the issue of loss of user, the motor vehicle was promptly released the day after it was impounded. However, the impoundment cannot be said to have been unlawful given the non-payment of full cess. In light thereof, the respondent cannot be held liable for any loss of use of the motor vehicle.

20. Accordingly, I find that the appeal lacks merit and it is hereby dismissed. Each party shall bear its own costs.

21. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 15<sup>th</sup> day of October, 2025.**

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**R. MWONGO  
JUDGE**

#### **Delivered in the presence of:**

1. Mwinja holding brief for Mugambi for Appellants
2. No Representation for County Government

3. Francis Munyao - Court Assistant