

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL SUIT NO 5 OF 2017

ALEX ALUKWE SHIKUKU.....1st
PLAINTIFF

ESTHER OMUMIA OWILA.....2nd
PLAINTIFF

VERSUS

KENYA WOMEN FINANCE TRUST.....1st
DEFENDANT

BRITAM GENERAL INSURANCE LTD.....2nd
DEFENDANT

JEET MOTORS LIMITED.....3rd
DEFENDANT

JUDGMENT

Background

1. The Plaintiffs filed this suit dated 3rd March, 2017 against the 1st, 2nd, and 3rd Defendants seeking
 - I. Damages for the loss of use of vehicle at Kshs. 30,000/= per day from 24/8/2015 until restoration or alternatively, compensation for the insured sum.
 - II. General damages for loss of business.
 - III. Order restraining the 1st defendant from demanding loan payments.
 - IV. General damages for mental anguish and future medication.
 - V. Compensation for loss of goods in transit (Kshs. 720,000) by the 2nd defendant to compensate for the loss of goods in transit.
 - VI. Special damages:
 - Travelling.....Kshs. 60,000
 - Vehicle valuation..... Kshs. 5,000
 - Medication.....Kshs. 24,000

Interest and costs of suit.

Any other relief the Court deems fit.

2. The Defendants filed statements in defence .
3. The 1st Defendant filed a counterclaim against the Plaintiffs praying that Judgment be entered as against the Defendant in the counterclaim for:-
 - i. Payment of Ksh. 3,161,414.27/= being the principal loan amount as at 13.12.2018 plus the computation of the interest, late payment penalties, bank charges, collection charges, car track fees and auctioneer's fees.
 - ii. The payment in full of Kshs. 80,375 as arising from Mumias SPMCC No. 24 of 2016 at court's interest rate from the 2.9.2016.
 - iii. The payment in full of the appropriated principal loan amount as at 13.12.2018 plus computation of the interest, late payment penalties, bank charges, collection charges, car track fees and auctioneer's fees to the date of filing this counterclaim.
 - iv. Interest at courts rates of the appropriated principal Loan amount as at 13.12.2018 plus computation of the interest, late payment penalties, bank charges, collection charges, car track fees and auctioneer's fees from the date of filing this counterclaim.
 - v. Cost of this suit.
 - vi. Any other relief that this Honourable Court deems just and fit and grant.
4. The Plaintiffs denied the 1st defendant's counterclaim, asserting that no loan was advanced to them.
5. The Plaintiff case was heard by Judge Musyoka, a total of four witnesses testified , the defence case was heard by Judge Chirchir a total of 3 witnesses testified. Mine was to write the Judgment.

6. I have looked at the evidence as recorded by my colleagues, I have also analyzed the documents produced as exhibits, and I summarize the case as follows:-
7. The Plaintiffs from the documents on record obtained a loan of Ksh. 4,140,000/= from the first defendant to purchase a motor vehicle repayable within 5 years(60 months) vide a loan agreement dated 29th November, 2014. The motor vehicle KBX 385V bought using the loan was registered in the name of the Plaintiff and the 1st Defendant. The motor vehicle was to act as security for the loan.
8. On or about 24th August, 2015 the Plaintiff's motor vehicle registration number KBX 385V was involved in an accident at Kericho -Kisumu junction as a result of which it was damaged and the goods on board beans 10 tonnes valued at Kshs. 720,000 were allegedly destroyed.
9. The 2nd Defendant, the insurer of the motor vehicle/3rd Defendant to carry out repairs on the motor vehicle which repairs the Plaintiff dismissed to have been done shoddily and produced an inspection report by AA Kenya to show this.
10. It is the Plaintiff's case that, as a result of the shoddy repairs done they were not able to carry out the transportation business, thus were unable to service the loan, and also the shoddy repairs made them to incur losses.
11. On or about 15th April, 2016, the 1st Defendant re-possessed our motor vehicle KBX 385V and sold it to recover part of the unpaid loan.
12. From the evidence on record I isolate the following issues as uncontested.
 - i. The Plaintiffs were advanced loan by the 1st Defendant.
 - ii. The motor vehicle was registered in the name of the Plaintiff and the 1st Defendant.
 - iii. That the 2nd Defendant insured the motor vehicle.

- iv. That the motor vehicle was involved in a road traffic accident.
 - v. That the 3rd Defendant repaired the motor vehicle after it was involved in the accident.
 - vi. The Plaintiffs defaulted in payment of the loan.
 - vii. That the 1st Defendant repossessed and sold the motor vehicle .
13. The issues of determination which forms the contested issues to me are:-

- i. Whether the 1st and 2nd Defendant in anyway to be blamed for the alleged Shoddy repairs allegedly done by 3rd Defendant.
- ii. Whether the 3rd Defendant exercised due diligence in repairing the motor vehicle KBX 385V.
- iii. Whether the 1st Defendant was wrong to repossess and sell the motor vehicle.
- iv. Whether the 2nd Defendant was liable for the loss of goods in transit worth Ksh. 720,000/= which were allegedly in the motor vehicle at the time of the accident.
- v. Whether the Plaintiff is entitled to damages for loss of user of the motor vehicle at Ks. 30,000/= from 24th August, 2015 until restoration or alternatively compensation for the insured sum.
- vi. Whether the Plaintiff is entitled to general damages for loss of business.
- vii. Whether the Plaintiff is entitled for general damages for mental anguish and future medication.
- viii. Whether the Plaintiff is entitled to special damages.
- ix. Whether an order to stop the 1st Defendant from demanding any loan payment from the Plaintiffs can issue.
- x. Whether the 1st Defendant's counterclaim has merit.

Determination.

i. Whether the 1st and 2nd Defendant in anyway to be blamed for the alleged Shoddy repairs allegedly done by 3rd Defendant.

14. The Plaintiff alledged that the 3rd Defendant did shoddy repairs to the motor vehicle therefore he could not carry on his business for the motor vehicle was unroadworthy. He produced a report from AA Kenya undated Ref57/INS/KS20160420, showing that the motor vehicle was fitted with worn out spare parts.
15. Third defendant maintained that repairs carried on the motor vehicle were not shoddy. The Plaintiff signed satisfaction notes of Repair dated 28th October, 2015 and 4th November, 2015 before the motor vehicle was released to them. This shows that they were satisfied with the repairs done to the motor vehicle. Secondly, the report from AA Kenya is undated the court cannot tell when the assessment was done was it before signing of the satisfaction note or after, for if it was before then why did the Plaintiffs sign the satisfaction note. To me the assessment report does not aid the Plaintiffs in any way.
16. Its my view that the moment Plaintiffs signed the satisfaction notes, and in absence of any evidence of coercion or undue influence there precluded from turning back and alledge that the repairs were shoddy.
17. The 2nd Defendant cant be blamed for alleged shoddy repairs , theirs was only to instruct the 3rd Defendant to carry on the repairs.
18. The 1st Defendant had nothing to do with the repairs done for it was not on control of the motor vehicle , its role was to finance the purchase of the motor vehicle.

ii. Whether the 3rd Defendant exercised due diligence in repairing the motor vehicle KBX 385V.

19. The reasoning in paragraph 14 to 18 above also applies to this issue for if the 3rd Defendant did not exercise due diligence in repairing the motor vehicle, the Plaintiffs will not have collected it and would not have signed the satisfaction notes of repair dated 28.10.2015 and 4.11.2015.
20. The Plaintiff's signatures on these documents serve as clear evidence of acknowledgment and acceptance of the quality of repair.

iii. Whether the 1st Defendant was wrong to repossess and sell the motor vehicle.

21. The 1st Defendant case is that every action taken was consistent with the contractual obligations and the law. It contended that the Plaintiffs' default in loan repayment and failure to comply with agreed terms necessitated repossession and sale of the vehicle.
22. Clause 3 of the loan agreement expressly provided that the vehicle formed part of the security for the loan and could be used to recover the outstanding amount in the event of default. Therefore the repossession was legally permissible due to loan default.
23. Clause 5 further stipulated that the loan was to be repaid in monthly instalments of Kshs. 107,700/= plus interest, commencing one month after disbursement and continuing until full repayment.
24. These terms were clear and voluntarily agreed to by the Plaintiffs.
25. The 1st Defendant also produced the Chattels Mortgage Agreement executed with the Plaintiffs showing that a motor vehicle was taken as a security for the loan.
26. Clause 5(i) of the Chattel Mortgage empowered the 1st Defendant or its agents to enter any premises and repossess the chattels, and to sell them by public auction.

27. These clauses collectively authorized the 1st Defendant's subsequent actions in repossessing and auctioning the vehicle once the Plaintiffs defaulted.
28. The 1st Defendant, acting through Agunja Auctioneers, issued a Notification of Sale dated 26th April 2016, informing the Plaintiffs of the intended sale scheduled for 6th May 2016.
29. The notification indicated that the sum due was Kshs. 4,135,979.28/= and the Plaintiffs were invited to settle the arrears to avert the sale.
30. The Plaintiff refused to sign the affidavit of service, but evidence showed that the notice was duly sent to his recorded address. The Plaintiff's refusal to acknowledge service does not invalidate the notice.
31. The repossession and subsequent sale were, therefore, lawful and procedurally compliant with the loan and mortgage agreements.
32. The Registration Certificate No. K912869Q showed that the vehicle was jointly registered in the names of the 1st Defendant and the Plaintiffs. This dual registration confirmed that the 1st Defendant retained a proprietary interest until the full loan repayment.
33. Accordingly, upon default, the 1st Defendant was legally entitled to repossess and sell the vehicle to recover the debt.
34. The 1st Defendant produced a statement of account dated 13th December 2018, showing a total loan balance of Kshs. 3,161,414.27/= comprising:
Principal balance.....Kshs. 458,310.91/=
Arrears and interest..... Kshs. 2,685,771.73/=
Add (-) Drawdown A/C.....Kshs. 17,331.63/=
35. This account was shared with the Plaintiffs, who denied receipt but offered no credible evidence to disprove its authenticity or correctness.

36. The Court finds that the statement accurately reflected the loan balance and arrears as at that date.

iv. Whether the 2nd Defendant was liable for the loss of goods in transit worth Ksh. 720,000/= which were allegedly in the motor vehicle at the time of the accident.

37. The Plaintiffs hold that the 2nd Defendant is liable for the loss of goods in transit worth Ksh. 720,000/= which allegedly got damaged when the motor vehicle was involved in an accident. The 2nd Defendant deny.

38. I have looked at the policy documents signed between the 2nd Defendant and the Plaintiff's (*though the Plaintiffs said that the same was not produced as exhibit which is not true, the policy document is among the documents produced as exhibits by the 2nd Respondent*) Section 1 (titled loss of damage) clause 1 states:- **"The company will indemnify the insured against loss of or damage to the motor vehicle and its accessories and spare parts whilst thereon."**

39. Section II (Liability to third parties) states:- **"The company will be subject to the limits and the jurisdiction clause, indemnify the insured against all sums, including claimants cost's and expenses which the insured shall become legally liable to pay in respect of**

a.

b. Damage to property.

40. From the above two clauses, it is clear that the 2nd Defendant did not insure the Plaintiffs' property/goods carried/in transit by the motor vehicle; it only insured the motor vehicle itself from loss/damage and any injury /damage caused by the motor vehicle to a third party in person or to a third party's property.

41. Therefore, there is no way the 2nd Defendant will be held liable for the damage caused to the property in transit. There is no evidence the goods belonged to a third party. There is no evidence produced before the court to show that a third-party claim was lodged against the Plaintiffs.

v. Whether the Plaintiff is entitled to damages for loss of user of the motor vehicle at Ks. 30,000/= from 24th August, 2015 until restoration or alternatively compensation for the insured sum.

42. It is not in dispute that the motor vehicle was involved in a road traffic accident on 4th August, 2015 the accident rendered the motor vehicle unusable. It was taken for repairs. The Defendant repaired the motor vehicle, it was released to the Plaintiffs upon signing satisfactory notes dated 28.10.2015 and 4.11.2015.

43. I have looked at the Policy clause 16 provided:

Loss of use/Courtesy Car Extension;

It is hereby declared and agree that this policy is extended to cover the costs of hiring alternative transport following a road traffic accident.

Payment will be made on receipt of the hire charged incurred from the date of assessment to the time the motor vehicle has been satisfactorily repaired and re-inspected subject to the insured's satisfactory note at a limit of Ksh. 3,000/= per day upto a maximum of Ksh. 30,000/= any one accident excluding the first 3 days after full documentation provided and claim deemed admissible.

44. The Plaintiff's were entitled to be reimbursed costs of hiring alternative transport following the road traffic accident at a rate of Ksh

3,000/= per day upto to a maximum of Ksh 30,000/= beginning 3 days after the accident upto to the day the motor vehicle is released back.

45. The Accident was on 4th August, 2015 so three runs upto 8th August, 2015 so, from 8th August, 2015 to 4th November, 2015 making a total of 86 days but the clause sets a limit of Kshs. 30,000/= regardless of the number of days. I therefore find that the Plaintiffs are entitled to reimbursement of Kshs. 30,000/= for there is no evidence that the 2nd Defendant provided alternative transport to the Plaintiffs or paid in cash.

vi. Whether the Plaintiff is entitled to general damages for loss of business

46. Having found that the Defendants were not to blame for causing the accident and the repairs of the motor vehicle were done to the satisfaction of the Plaintiffs as evident from the signed satisfactory notes, and having found that the repossession of the motor vehicle was lawfully done by the 1st Defendant, then similarly no Defendant can be held liable for loss of business allegedly suffered by the Plaintiffs. This claim fails.

vii. Whether the Plaintiff is entitled for general damages for mental anguish and future medication.

47. The same reasoning in paragraph 46 herein above applies to this issue so the Plaintiffs claim fail.

viii. Whether the Plaintiff is entitled to special damages.

48. The Plaintiff's sought for special damages.

Travelling.....Kshs. 60,000

Vehicle valuation..... Kshs. 5,000

Medication.....Kshs. 24,000

49. I have seen receipts produced by the Plaintiffs to support the special damages, but since the Defendant's were not liable for whatever befell them, then they cannot be liable for special damages incurred by the Plaintiff. The claim also fails.

ix. Whether an order to stop the 1st Defendant from demanding any loan payment from the Plaintiffs can issue.

x. Whether the 1st Defendant's counterclaim has merit

50. Issues No. ix and x are intertwined and therefore I address them together.

51. In Prayer (a) of the counterclaim , the 1st Defendant seeks Payment of Ksh. 3,161,414.27/= being the principal loan amount as at 13.12.2018 plus the computation of the interest, late payment penalties, bank charges, collection charges, car track fees and auctioneer's fees.

52. It is clear from the statement of Account produced as exhibit by the 1st defendant shows that the Plaintiffs defaulted and at the time of generating the statement, the outstanding loan balance was Kshs. 3,161,414.27/= that is as at 13.12.2018.

53. The Plaintiff's have no choice other than to pay the outstanding loan balance and arrears. The Plaintiff's has not adduced any evidence to rebut the 1st defendant's evidence as to the outstanding balance when 1st defendant produced the statement of Accounts. The evidential burden of proof shifted to the Plaintiffs.

54. I have looked at the loan agreement, there is nowhere stated that the payment of the loan was pegged on the motor vehicle being roadworthy and generating income. So it was incumbent upon the Plaintiffs to pay the loan from whatever sources.

55. Having said that the Plaintiff's have no choice other than to pay the outstanding loan plus the arrears, it follows that their prayer for an order stopping the 1st Defendant from demanding further payments from them cannot stand. It should be appreciated that the banks have no money of their own, the money they hold belongs to the public and when a borrower fails to pay, it is not the bank which suffers alone but the entire public thus crippling the economy of the country.
56. When a borrower defaults the default comes with other consequences like penalties for late payment, bank charges and when there is a lawful repossession of a chattel other charges also follow like collection charges, car track fees and Auctioneers fees all these eventualities are clearly addressed in the loan agreement between the Plaintiff and the 1st Defendant. So when they fall due lawfully as I have found elsewhere in this judgment, it is the defaulting party who is supposed to shoulder the burden and in this case it's the Plaintiffs.
57. The penalties are levied on every date of default just as the bank charges meaning that the specific figures cannot be fully ascertained until the date the full loan is settled. I will therefore allow the Plaintiffs' claim and order that the penalties and the bank charges shall be computed from 13.12.2018 and as when they fall due until full settlement of the loan. The collection charges are known, car track fees are known and auctioneer fees are known. These are special damages which should have been specifically pleaded and strictly proved as required by the law. The Plaintiff in the counterclaim has not proved this therefore, I dismiss the claim on collection charges, car track fees and Auctioneers' fees.
58. On prayer (b) that is a request to be paid Kshs. 80,375/= arising from Mumias SPMCC No. 24 of 2016 at court interest rate from the 2.9.2016. It is my take that the Plaintiff should follow this issue in the

Lower Court which ordered the payment through the proper channels of execution. Prayer (b) is dismissed.

59. On prayer (c) has been covered on prayer (a) save that the interest on loan will also be computed from 13.12.2018 to the date of full payment. The rate of interest will be computed as per the loan agreement signed between the borrower and the lender.
60. On prayer (d) interest at court rates of the appropriated principal loan amount as at 13.12.2018 will be computed from the date of filing the counterclaim.
61. Prayer (e) is on cost of the suit. The Plaintiffs' suit partially succeeded and also the counterclaim partially succeeded. I therefore order that each party to bear its own cost of the suit.
62. In a nutshell, I enter the judgment as follows
 - a. The Plaintiffs case fails save for the prayer on damages for the loss of use of the motor vehicle at a maximum of Kshs. 30,000/= as provided for in the loan agreement it is the 2nd Defendant to pay.
 - b. The Kshs. 30,000/= shall accrue interest at the court rate three days from the date of the Accident which will be from 28.8.2015.
 - c. The counterclaim succeeds as follows:
 - i. The Plaintiffs shall pay the 1st Defendant Kshs. 3,161,414.27/= being the principal loan amount as at 13.12.2018.
 - ii. The Plaintiffs shall also pay due interest on loan as from 13.12.2018 as well as late payment penalties and bank charges as they fell due taking into account the relevant banking law on computation of interest, penalties and bank charges.
 - iii. The Plaintiffs in the counterclaim shall have Interest at court rates of the appropriated principal loan amount as at 13.12.2018. From the date of filing the counterclaim.
 - iv. Each party to bear its own cost of the suit.

v. Right of Appeal within 30 days explained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS
28th DAY OF NOVEMBER, 2025.**

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

1st Plaintiff present.

Ms. Cherono holding brief for Mr. Nandwa for the Plaintiffs present.

Ms. Atundo for the 2nd Defendant, present online.

Mr. Abok for the 1st Defendant absent.

Mr. Keter for 3rd Defendant, absent.