

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
THE CIVIL APPELLATE DIVISION
Coram: A.C. Mrima, J.
CIVIL APPEAL NO. E081 OF 2025

-between-

QAIZEN (E.A) LIMITED
T/A QAIZEN CAR RENTAL.....
.....APPELLANT

-versus-

JEREMY ONG'ECH ODERO.....
.....RESPONDENT

(Being an appeal against the Judgment of Hon. V. Momanyi (Adjudicator) in Nairobi Milimani Small Claims Commercial Case No. E2402 of 2022 delivered on 22nd May 2024)

JUDGMENT

Background:

1. The appeal before this Court emanates from the judgment of the *Nairobi Milimani Small Claims Court Case No. E2402 of 2022* [hereinafter referred to as '**the suit**'] where *Qaizen (E.A) Limited*, the Appellant herein, was found in breach of a motor vehicle lease agreement for allowing the vehicle to be used for illegal purposes and by making unauthorized alterations.
2. In the impugned judgment, the trial Court awarded *Jeremy Ong'ech Odero*, the Respondent herein, special damages for repairs, apportioned at 50% liability, and loss of profits restricted to three months, totalling Kshs. 328,750/-, plus costs. This decision aggrieved the Appellant, hence, this appeal.

The Appeal:

3. Through a Memorandum of Appeal dated 26th May 2024, the Appellant urged the following grounds of appeal: -
 1. *THAT the learned Adjudicator erred in law in interpreting the Motor Vehicle Management Agreement dated 9th day*

of February 2023, hence arriving at an erroneous conclusion, by; -

- a) *failing to ascertain the meaning that the agreement conveyed to a reasonable person having all the background knowledge that would have been available to the parties.*
 - b) *failing to find that in order to determine the relevant context of the agreement, the wider context (outside of the contractual document itself) was admissible.*
 - c) *interpreting the ambiguous clauses of the agreement in a manner that did not ensure the validity of the same, rendering the said agreement uncertain.*
 - d) *interpreting clauses of the agreement, in favour of the Respondent who drafted the agreement contrary to the contra proferentem rule.*
2. *THAT the learned Adjudicator erred in law in finding that the Appellant was in breach of the Motor Vehicle Management Agreement dated 9th day of February 2023, contrary to her correct definition of what consists of a breach of contract and an accurate finding of the facts that were deemed as breach of contract, hence arriving at an erroneous conclusion.*
 3. *THAT the learned Adjudicator erred in law in finding that Respondent was entitled to the remedy of damages contrary to the mandatory provisions of section 107 of the Evidence Act and the guiding principle of restitution, hence arriving at an erroneous conclusion.*
 4. *THAT the learned Adjudicator erred in law in analysing and determining loss of profits by using criteria contrary to that established by law of establishing the expectations to make profits by the Claimant, the foreseeability by parties of the claim for loss of profits, that such foreseeability would be based on evidence of what the parties knew during the contract making process and lastly the ordinary knowledge of parties, hence arriving at an erroneous decision.*
 5. *THAT the learned Adjudicator erred in law in failing to quantify the consequential loss using well established rules of law, hence arriving at a quantification that was not devoid of speculation or conjecture.*

6. *THAT the learned Adjudicator erred in law in its appreciation of the principles laid down in the case of Nkuene Dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiya [2010] eKLR by rightly pointing that the case provided that estimated costs are admissible in proving special damage but failing to find the extent of damage has specifically proved.*
7. *THAT the learned Adjudicator misdirected herself in law in failing to find that the Respondent failed to demonstrate whether the damage(s) on the suit motor vehicle were as a result of normal wear and tear or an accident hence arriving at an erroneous decision.*

The Submissions

4. The Appellant embellished his grounds of appeal through written submissions dated 4th October 2024. It was its case that the Learned Adjudicator erred by finding them in breach of Clause 4.2 of the motor vehicle management agreement. It argued that the interpretation of this clause, which required ensuring the vehicle was not used for illegal purposes, was misapplied regarding the incident where a client, *Felix Njenga*, used the vehicle to transport *bhang*. The Appellant submitted that they had performed all necessary due diligence to vet the customer and that the agreement did not anticipate them monitoring the specific cargo being carried, beyond the constant tracking of the vehicle's location.
5. Regarding the alleged mechanical damage, the Appellant disputed the Respondent's claim that the gearbox failure was caused by the vehicle carrying "1 tonne" of *bhang*. They argued this was physically impossible given the vehicle's space and pointed to the police report, which recorded the actual weight of the impounded substance as 255 kgs. The Appellant further submitted that the Respondent failed to strictly prove the cause of the gearbox damage. They noted that the Respondent refused a proposal to conduct an '*open-heart surgery*' on the gearbox to ascertain whether the fault resulted from normal wear and tear or an accident. The Appellant argued that the expert witness admitted to not performing this procedure, which they asserted was an affront to the provisions of Section 107 of the Evidence Act.

6. The Appellant referred to the authority of *Nkuene Dairy Farmers Co-op Society Ltd & Another -vs- Ngacha Ndeiya* [2010] eKLR to front the argument that the trial Court decision contradicted the holding that liability attribution must be distinct from cost estimation. Consequently, it was its case that because the actual cause and nature of the damage were not demonstrated, the trial Court's decision to award damages was erroneous, unjust, and speculative. To that end, the Appellant prayed that the appeal be allowed as prayed.

The Respondent's case:

7. The Respondent challenged the appeal through written submissions dated 28th February 2025. It was its case that the trial Court's decision was sound since the contract was clear and that the Appellant had not pleaded coercion, fraud, or undue influence.
8. The Respondent argued that the Court could not rewrite the contract for the parties. To that end, it referred to various decision including the one of the Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR, where it was observed that "*it is not the business of Courts to rewrite contracts between parties...*". On the Court's finding regarding breach, the Respondent submitted that the Appellant admitted that the car was used to carry *bhang*, which constituted a clear violation of the agreement. On the question of special damages, the Respondent rebutted the Appellants claim by pointing to valuation reports alongside an initial report from 8th February 2023, which showed the car was in good condition at handover.
9. Regarding the standard of proof for special damages, the Respondent argued that a claimant need only show the extent of damage and the cost to restore it, even if the repairs had not yet been effected. It drew support from the case of *Nkuene Dairy Farmers Co-op Society Ltd & Another v Ngacha Ndeiva* (Civil Appeal 154 of 2005) [2010] KECA 20 (KLR), where the Court of Appeal held

.... special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item...

10. The Respondent justified loss of profit by arguing that it was a direct consequence of the impoundment and damage caused by the breach. He submitted that because the vehicle was a profit-earning chattel, the loss of user profit was compensable as was observed in the case of *Samuel Kariuki Nyangoti -vs- Johaan Distelberger* [2017] KECA 691 (KLR), where it was observed;

.... Loss of user profit for a period until a replacement could be obtained may also be awarded...

11. The Respondent concluded that the appeal was merely a delaying tactic to obstruct the execution of a valid judgment. He prayed that the appeal be dismissed with costs to the Respondent.

Analysis:

12. Having appreciated the dispute as presented at the trial Court, the grounds of appeal and the parties' respective submissions, the issues that emerge for determination are as follows: -

- i. Whether the Adjudicator's interpretation of the contract regarding the breach (Illegal Use and Unauthorized Alterations) was proper.*
- ii. Whether the Adjudicator applied the correct legal principles regarding the standard of proof for Special Damages and the apportionment of liability.*
- iii. Whether the award for Loss of Profits was grounded in law or speculative.*

13. Before addressing the foregoing issues, this Court must delineate its jurisdiction as per the dictates of Section 38 of the Small Claims Court Act which provides as follows: -

38. Appeals

- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.

14. On matters of law, the Court of Appeal in **Charles Kipkoech Leting -vs- Express (K) Ltd & another** [2018] eKLR observed as follows: -

... Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina -vs- Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, **on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters, they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse.** See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

15. Further, in **Bashir Haji Abdullahi -vs- Adan Mohammed Nooru & 3 others** [2014] eKLR, the Court of Appeal, while making reference to the English decision in *Bracegirdle -vs- Oxley (2)* [1947] 1 ALL E.R, observed thus;

... One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of *BRACEGIRDLE Vs. OXLEY (2)* [1947] 1 ALL E.R. 126 at p 130;

The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely,

the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

16. Drawing from the foregoing, this Court is not a forum for the re-litigation of facts. An appeal to this Court involves determining whether the Adjudicator applied the correct legal principles to the facts as found. Essentially, therefore, where an Appellant challenges the Adjudicator's factual findings including credibility of witnesses or weight of evidence, such grounds must fail unless the findings are so perverse that no reasonable tribunal could have arrived at them based on the evidence.
17. This Court, with the above guidance, will hence consider the issues.

[a] Whether the Adjudicator's interpretation of the contract regarding the breach (Illegal Use and Unauthorized Alterations) was proper:

18. The Appellant argued that the Adjudicator misinterpreted Clause 4.2 of the agreement. They contended that they performed due diligence on their client, Felix Njenga, and that the agreement did not anticipate them monitoring specific cargo.
19. The construction of a contract is a matter of law. In ***Sun Sand Dunes Limited -vs- Raiya Construction Limited*** KECA 548

(KLR) the Court cited *Lord Reid in Modern Engineering (Bristol) Ltd. -vs- Gilbert-Ash (Northern) Ltd AC 689*, where it was observed:

.... When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contract.

20. Sourcing their inspiration from the foregoing, the learned Court of Appeal Judges observed thus;

...The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean

21. It is discernible from the above passage that the construction of a contract is a legal question, determined on the objective assessment of the parties' communications and the contract language, rather than subjective individual views. The Adjudicator found as a fact, based on the admission of RW1, the Appellant's Director, that the vehicle was used to transport *bhang* and was impounded. Clause 4.2 prohibited using the vehicle for illegal purposes. Contractual liability is strict. The Appellant's argument regarding due diligence is an attempt to import a negligence standard, that of reasonable care, into a strict contractual obligation. The Appellant, having leased the vehicle to a third party, remained liable to the Respondent for the use of that vehicle.

22. As regards the unauthorized battery swap, the trial Court accepted the Respondent's testimony as it was not controverted. The Appellant's failure to explain the variance in serial numbers left the trial Court with uncontested evidence.

23. Therefore, the Adjudicator did not err in law. The admission of illegal use by the Appellant's agent and swap of batteries constituted breach of the express terms of the contract.

[b] Whether the Adjudicator applied the correct legal principles regarding the standard of proof for Special Damages and the apportionment of liability:

24. The Appellant posited that the Respondent failed to strictly prove the cause of the mechanical damage namely, the wear and tear and the accident.

25. The legal standard for Special damages is that they must be specifically pleaded and proved. In the case of **Swalleh C. Kariuki & another -vs- Violet Owiso Okuyu** [2021] eKLR, the Court of Appeal observed as follows;

.... In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

26. The Adjudicator relied on two assessment reports from *Regent Automobile Valuers*. The Respondent satisfactorily established the estimated the cost of restoration. Therefore, the Appellant's contention that the vehicle needed an *open-heart surgery* on the gearbox to prove the special damages was a stretched construction of the standard needed for special damages.⁸ It is, therefore, this Court's finding that the Adjudicator correctly applied the principle in *Nkuene Dairy Farmers Co-op Society Ltd*

v. Ngacha Ndeiya [2010] eKLR in respect of proof of estimated cost of repair.

27. Regarding the cause of damage, the trial Court found the Appellant offered no tangible evidence to challenge the defects observed by George Kimani, who testified as CW2. In the absence of rebuttal evidence from the Appellant, the Adjudicator was entitled to rely on the Respondent's expert reports.
28. The Adjudicator's decision to apportion liability equally was a judicial exercise of discretion to account for fair wear and tear in the absence of a specific accident report. That finding benefitted the Appellant. Since it could not demonstrate that the Adjudicator applied the wrong burden of proof, the ground fails.

[c] Whether the award for Loss of Profits was grounded in law or speculative:

29. The Appellant contended the award for loss of profits was speculative and unforeseeable. On his part, the Respondent argued the vehicle was a profit-earning chattel. In settling the issue, the trial Court acknowledged the duty to mitigate losses. The Adjudicator declined to award the full 7 months claimed, reducing it to a reasonable period of 3 months to allow for repairs and finding a new lessee.
30. In Civil Appeal 264 of 1999, ***African Highland Produce Limited -vs- John Kisorio*** [2001] eKLR, the Court of Appeal crystallized the concept of mitigation of losses as follows;

... The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant.

31. In this Courts' view, the Adjudicator correctly applied the common law doctrine of mitigation of losses. The loss of income was a direct and foreseeable consequence of the vehicle being impounded and returned in a damaged state. The computation (3 months x Kshs. 70,000/-) was mathematical and based on the contract rate, not conjecture. Therefore, the Learned Adjudicator did not err.

Disposition:

32. Despite the constriction of section 38 of the Small Claims Court Act, the Appellant's predominant quest was to re-open factual inquiries regarding the weight of the *bhang* and the mechanical cause of the gearbox failure. These were issues of fact settled by the Trial Court based on the evidence on record. The Adjudicator correctly interpreted the contract, properly applied the standard of proof regarding estimated repair costs and correctly applied the principle of mitigation regarding loss of profits.
33. As I come to the end of this decision, I wish to sincerely apologize for the late delivery of this decision. The delay was largely caused by my engagement at the Judicial Service Commission where I sit as a Commissioner.
34. Consequently, this Court finds no merit in this appeal and the following final orders hereby issue: -

[a] The Appeal is hereby dismissed in its entirety.

[b] The Judgment and Decree of the Small Claims Court delivered on 22nd May 2024 is hereby upheld.

[c] The Appellant shall bear the costs of this appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 29th day of January, 2026.

**A. C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

No appearance for parties.

Michael/Amina - Court Assistants.