



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. E105 OF 2024**

SAMUEL KIRIMI KARIGI.....  
.....APPELLANT

VERSUS

EXPLICO INSURANCE CO. LTD.....1<sup>ST</sup>  
RESPONDENT

DEEM AUTO GARAGE.....2<sup>ND</sup>  
RESPONDENT

***(Being an Appeal from the Judgement by Hon. E.Ndegwa  
(SRM) delivered on 9<sup>th</sup> July 2024 in Meru Chief Magistrate's  
Civil Cause No. 97 of 2017)***

**JUDGEMENT**

1. This appeal arises from the judgment delivered by Hon. E.Ndegwa in Meru CMCC No.97 of 2017 rendered on 9<sup>th</sup> July, 2024, wherein the learned Magistrate dismissed the Appellant's suit and entered judgment in favour of the 2<sup>nd</sup>

Respondent against the 1<sup>st</sup> Respondent in the sum of Kshs. 247,660/- plus costs and interest from the date of filing the counterclaim.

2. Dissatisfied with the said judgment, the Appellant filed a Memorandum of Appeal dated 7<sup>th</sup> August, 2024 raising 10 grounds of appeal, reproduced verbatim as follows: -

- a) That the Learned Magistrate erred in law and in fact by failing to consider relevant matters thereby arriving at an erroneous decision.
- b) That the Learned Magistrate erred in law and in fact by failing to acknowledge the breach of contract between the Appellant and the 1<sup>st</sup> Respondent demanding remedy in the nature of damages and dismissing the Appellant's claim thereby arriving at an erroneous decision.
- c) That the Learned Magistrate erred in law and in fact by only considering the contract between the Respondents and disregarding the one between the

1<sup>st</sup> Respondent and the Appellant thereby arriving at an erroneous decision.

d) That the Learned Magistrate erred in law and in fact by failing to note that the Appellant's Motor Vehicle was released not by the 2<sup>nd</sup> Respondent's willful conduct but pursuant to a Court Order emanating from a ruling dated 1<sup>st</sup> March, 2018 directing the OCS to effect release of the Motor Vehicle pending the hearing and determination of the suit.

e) That the Learned Magistrate erred in law and in fact by insisting that the Appellant was required to sign the satisfaction note for the release of the Appellant's Motor vehicle, noting that the Appellant was not privy to the contract between the Respondents.

f) That the Learned Magistrate misdirected herself by attempting to rewrite a contract between the Appellant and the 2<sup>nd</sup> Respondent noting that the repair and release of the Appellant's Motor Vehicle was an agreement between the Respondents to the

exclusion of the Appellant, thereby arriving at an erroneous decision.

g) That the Learned Magistrate erred in law and in fact by recognizing the 2<sup>nd</sup> Respondent's counter claim against the 1<sup>st</sup> Respondent's for repair works carried out with respect to Motor Vehicle Registration No. KBP 463 Z belonging to the Appellant and awarding an amount in Ksh. 247,660/= and failing to consider that the Appellant's claim for loss of user in fact arose from the dispute between the Respondents to the detriment of the Appellant, thereby arriving at an erroneous decision.

h) That the Learned Magistrate erred in law and in fact by selectively dealing with the issues in dispute to the isolation of the others, thereby arriving at an erroneous decision.

i) That the Learned Magistrate erred in law and in fact by failing to consider that the 1<sup>st</sup> Respondent neither challenged the Appellant's evidence wherein the Appellant's testimony remained uncontroverted yet

proceeded to dismiss the claim by the Appellant against the 1<sup>st</sup> Respondent despite the overwhelming evidence against the 1<sup>st</sup> Respondent.

j) That the judgment of the learned magistrate is manifestly a miscarriage of justice.

3. The Appellant thus prayed that the Appeal be allowed and he be awarded costs both in the Appeal and in the lower court.
4. The background to this matter is that the Appellant through its further amended plaint claimed that his motor vehicle registration No. KBP 463 Z was involved in an accident on 17<sup>th</sup> December, 2016 at Kiguchwa along Mikinduri- Maua Road and the 1<sup>st</sup> Respondent who was its insurer instructed him to deposit the Motor Vehicle to the 2<sup>nd</sup> Respondent's garage for repair and the same was done on 22<sup>nd</sup> December, 2016.
5. He averred that subsequently he got a release order from the 1<sup>st</sup> Respondent to collect his motor vehicle from the 2<sup>nd</sup> Respondent but the 2<sup>nd</sup> Respondent refused to release the same despite completion of repairs claiming that the 1<sup>st</sup>

Respondent owed it a lot of money and will only release the motor vehicle after settlement of the sum.

6. The Appellant pleaded that he is a stranger to any dealings between the 2<sup>nd</sup> Respondents and that he had suffered damages as a result of willful detention of his motor vehicle. He therefore prayed for a declaration that the 2<sup>nd</sup> Respondent should have unconditionally released his Motor vehicle into his custody upon receipt of the release order; General damages for loss of user from 26<sup>th</sup> February, 2017 to 1<sup>st</sup> March, 2018 assessed at Ksh. 3000 per day totaling to Ksh. 1,107,000; an order restraining the Respondents, its agents and assigns acting under their instruction from selling or in any way interfering with his quiet possession and usage of the said Motor Vehicle; costs of the suit; and any other relief that the Honourable Court deemed just and fit to grant.
7. The 1<sup>st</sup> Respondent filed a defence dated 9<sup>th</sup> December, 2017, in which it denied issuing or extending insurance cover to the aforesaid Motor vehicle. It further stated that the instructions and the release letter issued to the Appellant was without its

knowledge and authority, and prayed that the Appellant's suit be dismissed.

8. The 2<sup>nd</sup> Respondent through its further amended statement of defence and amended counterclaim dated 9<sup>th</sup> October, 2023 stated that the Appellant demanded the release of the motor vehicle in issue without executing the satisfaction note, exhibited high handedness by refusing to execute the same threatening to go to court.
9. The 2<sup>nd</sup> Respondent averred that the Appellant acquiesced to the detention of his motor vehicle by refusing to execute the satisfaction note and that the claim for loss of user is exaggerated and could be avoided.
10. In its counterclaim, the 2<sup>nd</sup> Respondent averred that on various occasions it conducted repair works for various motor vehicle to wit, KBZ 488W, KBT 203E, KBE 819 M and KBP 463 Z all totaling to Ksh.1,169,326/- at the behest of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent therefore prayed that the Appellant's suit be dismissed and the judgement against the 1<sup>st</sup> Respondent in the counterclaim be entered in its favour in the sum of Ksh.1,169,326/- plus interests at court rates from

November 2025 until payment in full, and any further relief that the court may deem fit and proper to grant.

11. The appeal was canvassed through written submissions, and only the Appellant and the 2<sup>nd</sup> Respondent complied by filing their respective submissions.

### **Appellant's Submissions**

12. The Appellant submitted that he executed the policy document with the 1<sup>st</sup> Respondent which covered loss or damage to the motor vehicle or its accessories and spare parts.

13. He argued that parties are bound by their contracts and therefore, the 1<sup>st</sup> Respondent was duty bound to pay the repair costs of his motor vehicle and prevent lien by the 2<sup>nd</sup> Respondent over the same.

14. He posited that his compensation depended on the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and that if the 1<sup>st</sup> Respondent had fulfilled its obligations to the 2<sup>nd</sup> Respondent, his motor vehicle would have been released on

time and he would not have suffered loss of use or been necessitated to file this suit.

**15.** He argued that his case against the 1<sup>st</sup> Respondent was uncontroverted and thus the trial court erred by declining to grant general damages for breach of contract. To buttress his submissions, the Appellant placed reliance on the cases of **Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR; Dormakaba Limited v Arcitectural Supplies Kenya Limited [2021] KEHC 210 (KLR); Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) [2022] KEHC 282 (KLR)**

**16.** The Appellant submitted that he suffered loss due to the Respondents' actions, arguing that the 1<sup>st</sup> Respondent's failure to indemnify him in accordance with the policy, coupled with the 2<sup>nd</sup> Respondent's refusal to release his motor vehicle, resulted in loss of user.

**17.** The Appellant contended that the Respondents deliberate detention of his motor vehicle from 26<sup>th</sup> February 2017 to 1<sup>st</sup>

March 2018 led to car hire expenses of Kshs 1,107,000/- which he proved through receipts and evidence of his ability to pay.

18. The Appellant argued that according to the evidence, the loss of use resulted from the 2<sup>nd</sup> Respondent enforcing a lien on his motor vehicle and not from his failure to sign a release letter.

19. He faulted the trial magistrate for treating loss of user as a special damage, arguing that the Court in ***Jackson Mwabili v Peterson Mateli [2020] eKLR*** held that such a claim does not require strict proof and is in the nature of general damages.

20. He submitted that he proved his loss on a balance of probabilities and he was therefore entitled to the damages sought.

### **2<sup>nd</sup> Respondent's Submissions**

21. The 2<sup>nd</sup> Respondent submitted that the Appellant sought to enforce a contract to which he was not a party, stating that the agreement was solely between it and the 1<sup>st</sup> Respondent.

22. The 2<sup>nd</sup> Respondent argued that the trial court rightly dismissed the Appellant's claim for loss of use as he failed to prove the same and urged this Court to uphold the lower court's judgement with costs to it.

### **Analysis & Determination**

23. A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* {1958} E.A. page 424: -

***“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage***

***of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”***

24. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in **Mkube v Nyamuro [1983] KLR** at 403, where Kneller JA & Hancox Ag JJA held that-

***“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”***

25. Having perused the record of appeal and submissions filed, I discern the pertinent issues for determination are as follows: -

**a) Whether the Appellant proved his case against the Respondents on a balance of probabilities.**

**b) Whether the Appellant was entitled to the award of loss of use.**

26. On the first issue, trite that he who 'alleges must prove'. The Appellant therefore needed to call sufficient evidence to prove his claim against the Respondents as alleged in his pleading. (See Section 107 and 108 of the Evidence Act).

27. In the case of **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** the court stated as follows: -

***“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108***

***of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”***

28. The Appellant therefore ought to have satisfied the above onerous task of proving his allegations on the balance of probabilities.

29. It was the Appellant's case that he had taken out an insurance policy with the 1<sup>st</sup> Respondent, valid from 20.10.2016 to 13.04.2017. He stated that his motor vehicle was involved in an accident on 17.12.2016 at Kiguchwa along the Mikinduri-Maua Road, following which the 1<sup>st</sup> Respondent instructed him to take the vehicle to the 2<sup>nd</sup> Respondent's garage, its authorized agent, for repairs. The repairs were duly carried out.

30. He further stated that the 1<sup>st</sup> Respondent issued him with a release letter, which he presented to the 2<sup>d</sup> Respondent, but the latter refused to release the motor vehicle on the ground that the 1<sup>st</sup> Respondent owed it money. In support of his case, he produced the policy document (Exh. 1), certificate of insurance (Exh. 2), receipts for payment of the policy (Exh. 3a-

b), certificate of inspection showing no pre-accident defects (Exh. 4), requisition form dated 22.12.2016 (Exh. 5) and the release letter (Exh. 6).

31. The 1<sup>st</sup> Respondent did not lead any evidence to controvert the Appellant's case. The 2<sup>nd</sup> Respondent on its part asserted that it declined to release the Appellant's motor vehicle because he allegedly failed to execute the satisfaction note.

32. The trial court citing paragraph 8 of the Policy document in issue held that the Appellant was supposed to present a written complaint if at all he had not been presented with any satisfaction note for his execution.

33. I have looked at the said paragraph. It basically provides a two-step process for complaining about the insurer's service. First to the insurer, and then, if still dissatisfied, to the Insurance Regulatory Authority.

34. The problem arose when the 2<sup>nd</sup> Respondent refused to release his motor vehicle after finishing the repairs. On the part of the 2<sup>nd</sup> Respondent, he had a legal right of lien, to retain the appellant's motor vehicle after completing the

repairs. His contract was with the 1<sup>st</sup> respondent and not the appellant.

35. In light of the above and considering the existence of a valid policy, the 1<sup>st</sup> Respondent was obliged to indemnify the appellant and it failed to settle the debt with the 2<sup>nd</sup> Respondent in time. The trial court therefore erred in shifting the burden of proof to the appellant to show that he was not provided with a satisfaction note. He had complied with the terms of the policy when he took the vehicle to the 2<sup>nd</sup> respondent.

36. In the premises, I find that the Appellant proved his case against the 1<sup>st</sup> Respondent only, on a balance of probabilities.

### **Issue No.2**

37. Loss of user is in the nature of general damages and is proved on a balance of probabilities.

38. In **Peter Njuguna Joseph & Another v Anna Moraa (Civil Appeal No. 23 of 1991)**, the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced.

(see also *Jebroek Sugarcane Growers Co. Limited v. Jackson Chege Busia, (Civil Appeal No. 10 of 1991)*).

39. In *Samuel Kariuki Nyangoti v Johaan Distelberger (2017) eKLR*, where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

***“(16)The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases.”***

40. The Court of Appeal also cited with approval the decision by Apaloo, J. (as he then was) in *Wambua v Patel & Another*

**[1986] KLR 336**, where the court had found the plaintiff had not kept proper records of what he earned but stated:

***“Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method” .... But a victim does not lose his remedy in damages because the quantification is difficult.”***

41. In the instant case, the Appellant submitted that by reason of the Respondents’ actions, he was deprived of the use of his motor vehicle and consequently incurred expenses in hiring alternative transport.
42. I find that the Appellant was entitled to the loss of use since the unwarranted acts by the 1<sup>st</sup> Respondent amounted to violation of his property rights.
43. The appellant presented receipts to verify the expenses he incurred on transport. The 2<sup>nd</sup> Respondent challenged the admissibility of the receipts for reasons that they were not revenue-stamped.

44. Section 19 of the Stamp Duty Act provides as follows as regards receipts and stamp duty;

**Non-admissibility of unstamped instruments in evidence; and penalty**

**(1) Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except—**

**(a) in criminal proceedings; and**

**(b) in civil proceedings by a collector to recover stamp duty,**

**unless it is duly stamped.**

**(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.**

45. Although under Section 88 of the Stamp Duty Act, the obligation to affix a revenue stamp on a receipt is in law placed upon the person issuing the receipt and not the person to whom it is issued, the appellant ought to have known that

his claim would require the said documents and should have obtained the proper receipts.

**46.** In my view the appellant ought to have presented receipts that complied with the law. In the event that there was non-compliance, the court ought to have given him time to comply, as provided for under section 19(3) of the said Act. This include the stamping of the said document out of time, which would have entitled the appellant to rely on the said receipts. This was the case in In **Abok James Odera t/a A.L. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR 2013** where the Court of Appeal considered the effect of sections 19(3)(a), (b) and (c), 20 and 21 on stamping of agreements in the Stamp Duty Act. The Court ordered that; the *"respondent be and is hereby directed to submit the agreement of 4th March, 1996 to the stamp duty collector for assessment of the duty payable, which should be paid in the normal manner."* The Court held as follows:-

**"...We are in agreement that the agreement of 4th March, 1996 though subject to the stamp duty act (supra) and that duty is payable on it, it**

**does not fully comply with the above provision, but such noncompliance is not however ..... to the enforcement of the agreement.....**

**...the court is enjoined under section 19(3) (a)(b) and (c) not to reject such an agreement in totality, but to receive and either assess the stamp duty itself and direct that it be paid. ... alternatively the court can impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment. There is also provision for payment for waiver penalties on late payment of duty as the stamp duty collector may direct ..... The stamp duty collector also has a discretion to extend time with which the stamp duty assessed should be paid where he is satisfied that the omission or neglect to pay stamp duty was not form intention to evade payment of stamp duty or otherwise to defraud the Authority concerned. The stamp duty**

**collector also has a discretion to charge additional stamp duty on top of what may have been assessed as stamp duty payable on the such agreement. There also a safety value vide which the defaulter has a right of appeal to the relevant minister against the collection directive on the payment of the stamp duty assessed additional stamp duty assessed and penalties imposed.... What the learned trial Judge should have done and which we are also mandated to do ..... a first appellate court, is simply to impound the said agreement, either assessed duty ourselves, collect it, and then forward the duty collected to the stamp duty collector for purposes of assessment and payment of the resulting duty payable."**

47. The compliance with the said provision did not happen so the receipts cannot now be admitted as a basis for the claim for loss of user, which is a claim that must be specifically

pleaded and strictly proven. The giver of the receipt did not confirm that he was actually paid.

48. Therefore without the receipts' admission as exhibits then the claim for loss of user was not proper. Nevertheless the court is aware that the appellant suffered loss as a result of the accident by seeking alternative transport. There ought not to be a wrong without a remedy. The appellant was not at fault as he had fully complied with his obligations under the contract of insurance between it and the 1<sup>st</sup> respondent.

49. In **Jackson Mwabili v Peterson Mateli (supra)** the court acknowledged that the claimant had been forced to seek alternative transport means. It proceeded to make an award for loss of use.

50. In my view the appellant, despite not availing proper documentation would still be entitled to reasonable compensation.

51. In this regard I find that the claim at the daily rate of Ksh. 3000/- to be reasonable.

52. The 2<sup>nd</sup> Respondent further contended that the Appellant failed to mitigate his loss. The vehicle was detained on 21<sup>st</sup>

February 2017 and although the Appellant sent a demand notice on 7<sup>th</sup> March 2017, he did not file suit to recover the motor vehicle until 23<sup>rd</sup> May 2017.

53. In my view, the Appellant ought to have acted promptly to mitigate his loss. He has not explained why he proceeded to spend over Ksh.1,000,000/- when the repairs cost only a fraction of the said figure. The prudent thing was to pay the sum due on his vehicle and then seek compensation from the insurer.

54. In such circumstances I would limit his claim period from the time the repairs were completed and the vehicle detained, on 21<sup>st</sup> February,2017 to the time he moved the court on 23<sup>rd</sup> May 2017. That makes a total of 60 days. Applying a rate of ksh. 3000/- a day the total amount comes to Ksh. 180,000/-.

55. The next question is who is liable. As I stated earlier, the 2<sup>nd</sup> respondent was justified in exercising a lien over the vehicle for non- payment of the work done. As such it cannot be held liable for the claim by the appellant. It is the 1<sup>st</sup> respondent who was the cause of all the problems and for that reason, it ought to be held accountable.

56. Having considered the evidence, I find that the trial court was right to dismiss the claim against the 2<sup>nd</sup> respondent, but it should have found the 1<sup>st</sup> respondent liable.

57. Consequently, the appeal partly succeeds. I set aside the judgment of the lower court and substitute it with the following orders;

**a. Judgment is entered for the appellant against the 1<sup>st</sup> respondent for Ksh. 180,000/- together with costs and interest.**

**b. The suit against the 2<sup>nd</sup> respondent is dismissed with costs, but the costs to borne by the 1<sup>st</sup> respondent.**

**c. The appellant shall have costs of this appeal, to borne by the 1<sup>st</sup> respondent.**

**d. The 2<sup>nd</sup> respondent's costs shall also be borne by the 1<sup>st</sup> respondent.**

58. Orders accordingly.

**Dated, Signed and Delivered at Meru this 7<sup>th</sup> day of May, 2026.**

**H. M. NYAGA,  
JUDGE.**