



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI, P.C.A., KOOME & SICHALE, J.J.A.)**

**CIVIL APPEAL NO.99 OF 2008**

**BETWEEN**

**DIAMOND TRUST BANK KENYA LTD.....APPELLANT**

**AND**

**EVANS NYAUNCHO OSINDE..... RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiemo, J.) dated 30<sup>th</sup> June, 2013*

*in*

*H.C.C.C. No. 61 of 1999)*

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**JUDGMENT OF THE COURT**

[1] This is an appeal from the judgment and decree of Osiemo, J., issued on 30<sup>th</sup> June, 2003 in High Court Civil Suit No. 61 of 1999. By the said decree, the appellant's suit was dismissed with costs and judgment was entered in favour of the respondent against the appellant in respect of his counterclaim in the sum of Kshs. 1,700,000/= together with costs and interest. Aggrieved by the aforesaid orders, the appellant who was the plaintiff before the High Court, filed this appeal which is predicated on 9 substantial grounds of appeal to wit:-

- 1. That the learned Judge erred in fact and in law and misapprehended the material evidence which was adduced.***
- 2. That the learned Judge erred in fact and in law in failing to consider the evidence relating to the security offered in terms of a lien over the fixed deposit account for the sum of Kshs.900,000/=.***
- 3. That the learned Judge erred in fact and in law and misapprehended the evidence tendered relating to the repossession rights of motor vehicle registration number KAC 165B.***
- 4. That the learned Judge erred in fact and in law and misdirected himself in failing to consider as a whole the documentary evidence adduced relating to security documents of the Hire Purchase Agreement and transaction.***

**5. That the learned Judge erred in fact and in law and misdirected himself in taking into account irrelevant considerations.**

**6. That the learned Judge erred in fact and in law in finding that the Plaintiff was engaged or was actively involved in fraudulent dealings in absence of any evidence.**

**7. That the learned Judge erred in fact and in law in awarding damages in respect of motor vehicle registration number KZH 165B contrary to the agreed terms as obtained in the Hire Purchase Agreement and notwithstanding the fact that the same was not proved.**

**8. That the learned Judge erred in fact and in law in failing to make specific findings on the issues agreed between the parties.**

**9. That the learned Judge erred in fact and in law in awarding the Defendant damages in the sum of Kshs.900,000/- in respect of money which the Defendant had deposited with the Plaintiff despite evidence that the Defendant had expressly instructed the Plaintiff to uplift and apply the same towards the loan repayment.**

[2] Both Mr. Rimui, learned counsel for the appellant, and Mr. Bw'Omote, learned counsel for the respondent, filed very elaborate written submissions and lists of authorities in support of their respective positions. They highlighted the submissions during the hearing of this appeal. According to the appellant, the respondent was introduced to the bank by an Agent called MAQ's Motor Sales Limited (*hereinafter referred to as the agents*) by a letter dated 16<sup>th</sup> December, 1994 to be considered as a borrower who desired to be financed to purchase a motor vehicle. Subsequently, on the 16<sup>th</sup> January 1995, the agents forwarded several documents on behalf of the respondent which included transfer forms of motor vehicle, a lien over a fixed deposit account of Kshs. 900,000/=, the agents' invoice for Kshs. 3.5 million and a hire purchase agreement all signed by the respondent. It is important to state here that the respondent contended that, and it was not denied by the appellant that all the security documents he signed with the agents, were blank.

[3] The respondent was given a loan of Kshs. 4,943,340/- which was payable in 36 monthly installments of Kshs.137, 315/=. The respondent took possession of motor vehicle KZH 452 that was financed through the said loan by the appellant on the same day, 11<sup>th</sup> January, 1995 and the sum of Kshs. 3,500,000/= was paid by the appellant to the agents on 19<sup>th</sup> January, 1995. The cost of the motor vehicle was Kshs. 3,500,000/= while the sum of Kshs.1, 443,340/= was in respect of other charges. It would appear things started going wrong immediately thereafter because in March, 1995, Kenindia Assurance Company cancelled the insurance cover of motor vehicle KZH 452 due to the respondent's failure to pay for the premiums and this was brought to the attention of the appellant. The respondent wrote to the appellant indicating that the entire insurance cover for the year was supposed to be settled by the agents out of the loan proceeds of Kshs.3.5 Million.

[4] The respondent faced difficulties in servicing the loan installments and by a letter dated 13<sup>th</sup> September, 1995, he directed the appellant to utilize the fixed deposit amount of Kshs. 900,000/- to clear the outstanding balance. The appellant claimed that the amount that was outstanding was more than the fixed deposit; therefore, they instructed M/s Rangi Mbili Auto Spares to repossess the motor vehicle KAC 165 B which was done. It was valued for Kshs. 223,600/= and eventually sold on 2<sup>nd</sup> March, 1998, for Kshs.61,707/=. Sometime in February, 1998 the appellant instructed Standard Commercial Investigators to recover a sum of about Kshs. 5.9 Million or repossess motor vehicle KZH 452. The vehicle was traced in a terrible mechanical condition in a yard belonging to the former director of the agent. Since no money could be recovered from the sale of the salvage of motor vehicle KZH 425, the appellant sued the appellant for a sum of Kshs. 7,954,350.30 being the outstanding loan with costs and interest.

[5] In defence, the respondent alleged that he was desirous of acquiring a new lorry and deposited a sum of Kshs. 900,000/= with the appellants' agents in Kisumu who in turn issued a cheque to the appellant on the understanding that he would get the financial facility to purchase a new lorry. The respondent signed

blank hire purchase agreement for a loan of Kshs.4,943,340/= as he contended the figures and all details which are filled by hand were done after his signature. The same case was in respect of the chattels mortgage over his other motor vehicle KAC 165B which was taken as a further security. The respondent maintained that he had purchased KZH 452 under separate arrangements from the agents as a salvage, for Ksh.200,000/=. He overhauled its engine and carried out several repairs and it was not part of the financing. Further it was the respondent's case that the agents with the connivance of the appellant misrepresented that the vehicle which was financed was KZH 452 which the appellant knew or ought to have known was a salvage that was previously financed through the appellant 7 years before for another customer.

[6] The respondent therefore alleged misrepresentation by the appellant and their agent and counterclaimed for damages he suffered as a result of loss of his deposit of Kshs. 900,000/=: his two vehicles that were repossessed by the appellant and loss of profit as his business closed down. The respondent alleged that the appellant were culpable for appointing a fraudulent dealer, failing to ensure that the loan proceeds were remitted for the intended purposes and for being aware that the respondent was given an accident salvage vehicle which was passed for a new vehicle out of which the appellant expected him to pay the loan claimed.

[7] Upon hearing the parties, the learned trial judge dismissed the appellants' case on the grounds that the appellant did not prove the loan proceeds was advanced to the respondent to purchase an old vehicle which was registered in the name of the appellant and one Joseph Kimilige. On the other hand the judge was satisfied with the respondent's case that he was defrauded through hire purchase arrangement and thereby lost his fixed deposit of Kshs. 900,000/= and the value of his motor vehicle KAC 165B which was repossessed and sold in recovery of the loan.

[8] Mr. Rimui, learned counsel for the appellant arguing in supported of the appeal submitted that there is sufficient evidence by Elizabeth Hinya, PW1 and Florence Mbugua PW3 that the appellant did apply for a hire purchase facility. The application was received through the respondent's agent duly executed and the appellant remitted a sum of Kshs. 3.5 Million to the agents on account of the respondent. It was further demonstrated that the respondent through the agent made payments to Kenindia Insurance Company for insurance of the said motor vehicle. It was only after the appellant got into difficulties of payment that he turned around to disown the hire purchase agreement. Counsel made reference to the case of ***Credit Finance Corporation Limited vs Harry Mwakazanga, [1959] EA*** where it was held that the payment of a deposit coupled with an acceptance of the motor vehicle by the hirer was a clear and undisputed demonstration that the hirer executed the loan and was to be bound by the agreement.

[9] Counsel for the appellant also faulted the learned trial judge for failing to consider that the hire purchase agreements were executed by the respondent and that the agreement was binding. Moreover, there is no evidence that the respondent objected to the repossession of the vehicles and that he was in possession of the vehicle KZH 452 but did not pay the monthly installments as per the agreements. The appellant was able to prove that they were entitled to the claim being the loan advanced to the respondent with the interest at the rate of 41% p.a. according to Clause No. 7 of the hire purchase agreement which also clearly spelt out the consequences of default.

[10] Further, Mr. Rimui told us that the trial judge did not consider the defence by the respondent, although alleging that he was misled to sign blank printed bank forms, the same did not have a plea of *Non Est Factum* and also for ignoring that the burden of proof fell on the respondent to prove that he was not party to the document as he would have taken reasonable care before signing the document. In this regard the case of ***Dominion Trust Ltd. Vs Western&Anor. [1975] 3 All ER 1017***, was cited. This was a case where it was held that no valid distinction could be drawn between a party who signed a form contract without even the contents and a person signed a blank one leaving the details to be filled by a third party. As the respondent admits that he intended to execute a 3.5 million loan and he intended to use his fixed deposit amount of Kshs.900,000/= and a motor vehicle KAC 165B as a collateral and that evidence was not challenged, it was wrong for the judge to dismiss the appellant's case.

[11] According to counsel for the appellant, their case was proved as the allegations that the appellant

intended to acquire a new vehicle was introduced in the defence whereas, the respondent was negligent in the manner in which he dealt with the agent even after taking possession of the motor vehicle which he said was a salvage. MAQ's Motor Sale Limited was an agent of the respondent as well and the judge failed to take that into consideration that they introduced him to the appellant and the said MAQ's were not acting as agents of the appellant. It is clear the agent filled the forms for the respondent and that is where the agency relationship was created. The appellant never dealt directly with the agent in sourcing the vehicle and if the agents were fraudulent, there was no evidence to show the appellant was party to the fraud.

[12] On the claim of the sum of Kshs.900,000/- being the fixed deposit by the respondent as security, the learned judge failed to consider a letter written by the respondent directing the same amount be used to clear the outstanding arrears.

Counsel made reference to the provision of **Section 120** of the **Evidence Act** which provides:

***“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing”.***

Further, counsel for the appellant argued that under the doctrine of estoppel, by instructing the appellant to utilize the money held in fixed deposit, the respondent was stopped from claiming the refund of the same money. Lastly, counsel submitted that the respondent was not entitled to damages as a result of repossession of motor vehicles KAC 165B and KZH 452 as at the time the two vehicles were repossessed, the respondent had fallen into arrears of loan payment. Counsel urged us to allow the appeal and set aside the judgment and decree by the High Court.

[13] This appeal was opposed by Mr. Bw'Omote, learned counsel for the respondent who poked holes on the documents purportedly signed by the respondent for hire purchase agreement and also the evidence adduced to support the claim. Counsel submitted that there was no evidence that motor vehicle registration KZH 452 belonged to the agents who were issued with the cheque of Kshs.3,500,000/- being the purchase price and the loan that was purportedly granted to the respondent. The agents merely presented an invoice to the appellant and the cheque for the purchase price being the loan proceeds was issued to them which according to counsel smacked of either negligence or collusion as the appellants knew or ought to have known that was not a prize of a new lorry and could not possibly have been the prize for KZH 452 which was an accident salvage vehicle that the appellants had financed about 7 years earlier.

[14] According to counsel for the respondent, his client's evidence that he was misled to believe that he was applying for financing to enable him purchase a new lorry was not challenged; so was the evidence that he signed all the documents for the loan in blank and all the letters he wrote to the appellant when he fell in arrears of the loan repayment were dictated by the agents with the knowledge of the appellant; also the evidence of fraud was apparent as it was clear that vehicle registration KZH 452 was first registered on 31<sup>st</sup> August, 1989 in the names of Joseph Kimelet Samukut and the appellant; it was not clear how the same vehicle was represented as new 7 years later and as belonging to MAQ's Motor Sales; the appellant's own witnesses admitted that the respondent had a fixed deposit of Kshs.900,000/- and that he made payment of Kshs.137,000/= twice. Thus, the respondent's contention in his pleadings and evidence that the appellants misrepresented by themselves and their agents that they were financing the respondent to purchase a new vehicle was not at all challenged; the appellant knew all along that motor vehicle KZH 452 did not belong to the agent, they knew it was an accident salvage, that it was not worth 3.5 million which they paid the agent and they withheld this information notwithstanding, they are the experts in hire purchase and lending of money. Due to appellant's negligence they facilitated the agent to be paid a sum of Kshs.3,500,000/= while knowing the vehicle was not worth the said sum and expecting the respondent to service a loan in that regard.

[15] According to counsel for the respondent, the learned trial judge rightly concluded that the respondent

was a victim of collusion between the appellant and the agent: or due to negligence and carelessness by the appellant, the respondent was exposed to deleterious consequences visited upon him as a consumer of banking services. Counsel cited the provisions of **Section 120**, the **Evidence Act** which provides:

***“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such a belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such other person or his representative to deny the truth of that thing”.***

[16] Lastly, Mr. Bw’Omote urged that where a person or body owes another a duty of care to exercise reasonable care and skill in a transaction, a breach of that duty gives rise to a claim in tort. Reference was made to the **Law of Contract Act, 1961**, to support the contention that the respondent relied on the assurances he was given by the appellant and their agents which turned out to be false and as a result, he lost his money and a pick up motor vehicle and, therefore, he was entitled to a counterclaim under the general law of contract. Counsel cited the case of **Hedley Byrne & Co. Ltd. V Heller & Partners Ltd., (1964) A.C. 465, Gailey & Roberts (Tanganyika) Ltd. v Salum C/o Ramzan, 1962 EA**, among others where it was held *inter alia* that in certain circumstances liability could be incurred for negligent misrepresentation by one person to another even in the absence of any contractual or fiduciary relationship between them or fraud. The person giving advice is so placed, that others could reasonably rely upon his judgment or skill, and such a person has a duty to exercise care.

[17] We were urged to find that the appellant as the financier relied on its standard forms of transaction, the respondent did not draw them, they took advantage of the position of the respondent as a borrower in the whole deal, he was given a vehicle that was 7 years old and was financed by the same appellant 7 years earlier. Thus, although there was no warranty clause in the hire purchase agreement, it was unconscionable for the appellant to deliver a “*dilapidated iron momongery*” to the respondent in the name of a new vehicle which was supposed to do business and undertake the loan repayment. Counsel for respondent went on to submit that evidence on record clearly showed that according to a delivery receipt, the motor vehicle was given on 11<sup>th</sup> January, 1995 giving rise to a collateral contract that preceded the hire purchase agreement. Reference was made to **Halsbury’s Laws of England, 3<sup>rd</sup> Edition Vol. 19 page 532** where the learned authors stated as follows:

***“In hire purchase agreement outside the statutory control, there is an implied term that the goods are fit and suitable for the purpose for which it is to be used and to which it is to be applied”.***

[18] Counsel for respondent went on to state that the conduct of the appellant after the respondent defaulted in loan repayment clearly demonstrated that there was collusion with the agent as the appellant did not seek to repossess KZH 452; and they did not create a chattels mortgage over the same which by their own admission was worth 3.5 Million and more valuable than KAC 165B. The appellant repossessed the respondent’s own vehicle which in their valuation was worth only 223,600/=, this was because the appellant knew from the first day the security in KZH 452 was worth nothing. Counsel urged us to dismiss the appeal with costs.

[19] Having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, the issues that fall for our determination are twofold;- that is, whether the trial judge erred in dismissing the appellants case and allowing the respondents counterclaim. Secondly, whether the allegations of fraud were proved, and if there is justification for the award of damages to the respondent.

This is a first appeal and that being so, we are mandated to reconsider the entire evidence before the trial court and give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify. (See the case of **Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126**, where the Court of Appeal held:-

***“..... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should***

***make due allowance in that respect...” See Jivanji vs. Sanyo Electrical Company Ltd.(2003) KLR 425”.***

[20] It should be common ground as demonstrated by the evidence that the appellant dealt with MAQ’s Motor sales Ltd as agents of the respondent. All the documents were presented to the appellant by the said agents and the loan proceeds of Kshs. 3.5 million being the loan financed to the respondent was paid to the said agents. The trial judge considered the evidence and concluded that there were very many issues that were left hanging and were not resolved by the appellant’s evidence. Key among those unresolved issues was why motor vehicle KZH 452, that was purportedly financed by the appellant for Kshs. 3.5 million was in the name of Joseph Kimelet and the loan proceeds was paid to the agent; why the chattels mortgage dated 7<sup>th</sup> February, 1995, between the appellant and the respondent gives the particulars of motor vehicle KAC 165B which belonged to the respondent and was given as an additional security and not KZH 452 which was worth 3.5 million.

[22] Upon our own analysis of the evidence, and following this line of reasoning it also led us to other questions that were not answered and that is; why there was no specific chattels mortgage created in respect of the lorry KZH 452 which was being financed by the loan proceeds; does it therefore led credence to the submission by the respondent’s counsel that it is because the appellant knew it was worth nothing? Further why were the loan proceeds paid to the agent before the appellant who are experts in financing and hire purchase ascertained that a vehicle worth 3.5 Million was supplied to the respondent? These issues in our own respectful view were not resolved by the evidence of **Elizabeth Wanjiru Hinga** the company secretary, (PW1) or **Florence Mbugua** (PW3). Sample what Elizabeth said in a pertinent portion of her evidence while under cross examination verbatim;

***“ I joined Diamond Trust Bank in October 2000, yes the transaction took place long before the year 2000. I agree I do not have personal knowledge of what took place. I did not see it happen. I do not know which bank officer authorized MAQs Motor Sales Ltd as the agent of the bank. I do see the signatures of Mrs. Chaudry on the documents. She left the bank before I joined it. I do not know where she is. Yes I see exhibit 7B... Yes we have a log book for vehicle KZH 452. MFI 2. Date of registration 31.8.1989 in the name of Joseph Kimble Samunkut and D.T.B (bank). Yes Diamond Trust (K) Ltd must have financed that person. I cannot tell what the value of the vehicle was when it was first registered....I will not know the value of the said motor vehicle as from 1989. Yes the log book was sent to the bank on 16.1. 95. I do not know if that logbook had left the bank. The logbook does not show that the said vehicle was ever discharged by the bank...”.***

[23] Jaman Saisi, PW2, also confirmed that KZH 452 was registered in the name of Joseph Kimelet Samunkunt as at the time the appellant purported to pay the loan proceeds to the agent in order to finance the respondent for the same vehicle.

As regards the allegations that the appellant was negligent by not ascertaining the respondent received the vehicle they financed him for in a good condition, the appellant’s witnesses could not vouch for the valuation report that was relied on to show KZH 452 was valued for 3.5 million. What was produced in court as a valuation report was done by DRILINK who are indicated in the letterhead as-bore –hole test-pumping and ground surveyors.

[24] The above evidence is to be contrasted with the evidence by the respondent who testified that he pledged his motor vehicle KAC 165B Isuzu Pick UP valued at Kshs. 950,000/= as well as a fixed deposit of Kshs. 900,000/= on the understanding that he was being financed for a new lorry and he therefore signed blank forms which were left with MAQs the authorized agents or dealers with the appellant. He testified that he bought KZH 452 from MAQs Motor Sales as salvage and all along he was waiting to be supplied with a new motor vehicle which never happened and even when the loan became due, the agent kept promising him a new vehicle and at one time he insisted he could not pay the loan and the agent paid some Kshs. 282,000/= to the appellant. Eventually, both vehicles were repossessed by the appellant on 5<sup>th</sup> October, 1995. The agents’ offices were closed and the respondent realized he was defrauded by the agent with the connivance of the appellant.

[26] Did the appellant prove their claim that they advanced a motor vehicle loan of Kshs. 3.5 million to the respondent? The said sum was paid to MAQs motor sales and not to the respondent. We agree with the learned trial judge that the appellant was not able to answer a fundamental question. Which was, if indeed the appellant was financing the respondent to purchase motor vehicle registration no KZH 452, and it was **not** in the name of MAQs motor sales why did they pay the loan proceeds to MAQs? Why did they fail to follow up (as experts in financing and hire purchase) and to ensure that the respondent did receive a motor vehicle worth Kshs. 3.5 million the sum paid to the agent? We also find there was no agreement between the appellant and the respondent that the loan proceeds would be paid through the agent nor have we been shown any authorization by the respondent authorizing the appellant to release the loan proceeds to the agent in respect of KZH 452.

[27] In view of the aforesaid findings, we are in agreement with the sentiments of the learned trial judge when he stated in part of his judgment as follows:

***“This is a very disturbing case. Here is a bank which assisted to finance the purchase of the motor vehicle the subject matter of this suit by one JOSEPH KIMILGE. The said motor vehicle was registered in joint names (sic) JOSEPH KIMILGE and DIAMOND TRUST BANK. This was in 1988. Seven years later the same bank is refinancing the purchase of the same vehicle by the defendant in this suit at sh. 3,500,000/=. ...further the evidence shows that the defendant took delivery of the motor vehicle from MAQS MOTOR SALES LTD on 11<sup>th</sup> January 1995 but at the same time the documents produced by the plaintiff indicate that it was valued Kshs. 3,500,000/= on 16<sup>th</sup> January 1995. This poses a question. Could the vehicle have been delivered to the defendant before he signed the purchase agreement? Further still in his letter dated 16<sup>th</sup> January 1995 one I. HUSSEIN the director of MAQS MOTOR SALES LTD sent documents which I have enumerated above which included JOINT REGISTRATION receipt no 269926 for KZH 452 and in the conclusion he said:***

***“We would be grateful to receive our cheque for Kshs. 3,500,000/=”***

***This is interesting because the same bank which owns the motor vehicle refinances its purchase and forwards a cheque of Kshs. 3,500,000/= to MAQS MOTORS SALES LTD. According to section 8 of the Traffic Act cap 403 “ the person in whose name a vehicle is registered, shall unless the contrary is proved, be deemed to be the owner of the motor vehicle”***

***There are very many unresolved issues in this case and I have no hesitation to find that the bank participated actively in the fraud for paying MAQS MOTOR SALES LTD for the said motor vehicle which belonged to the bank and another”.***

[28] We are satisfied the above findings by the learned judge are well founded, the appellant was either negligent or was simply an active participant in a fraud by their own conduct in this matter. The respondent was for all intent and purposes a customer of the appellant, if the bank expected him to repay the loan according to the hire purchase agreement, the bank owed him a duty of care to at least ensure he was supplied with a motor vehicle worth Kshs 3.5 million which was the amount advanced. If the respondent was not supplied with a vehicle worth the said sum, or anywhere close to that value, it would have been unconscionable to expect him to faithfully repay the said loan with interest and costs. By releasing the loan proceeds to MAQs who were mere imposters or fraudsters, the appellant's denial of negligence did not have any basis at all. The appellant as the lender had an absolute upper hand over the respondent as the borrower, being the one that drew the terms of the chattels mortgage and the hire purchase agreement, had the power of control and a duty of care created under common law. Although the respondent signed the security document, that was not a *carte blanche* for the appellant to act unreasonably by releasing the loan proceeds to a third party who did not supply the vehicle to the respondent as per the understanding. The appellant could not offer any explanation how a vehicle it had financed 7 years earlier could pass for the value of 3.5 Million 7 years later and more importantly none of their witnesses could vouch for the valuation report done by a water drilling company.

[29] Did the respondent prove his claim? Due to the negligent financial services rendered by the

appellant, the respondent sustained loss of his motor vehicle and a fixed deposit sum of Ksh.900,000/- which subjected him to an economic loss. The respondent was awarded a sum of Kshs. 1.7 Million as damages for the said loss which is challenged in this appeal. Damages are compensatory in nature and meant to restore the respondent back in the position he was in before the negligent act. The damages suffered by the respondent were identifiable; it was loss of fixed deposit and the value of his motor vehicle KAC 163B. We hold the respondent cannot be compensated for KZH 452 because it was not his vehicle; it is the one which was financed for by the appellant. It should be noted that the appellant paid two installments towards the loan repayment and the said vehicle was repossessed by the appellant. KAC 163 was valued at Kshs. 950,000/= in January 1995 by the same water drilling company. We do not think that was a fair value for the same vehicle when it was repossessed due to depreciation. We are persuaded to go with the valuation by Colin McNaughton who valued it for Kshs. 223,600/= on repossession. We are in agreement with the findings by the trial judge that general damages for loss of business were not payable in the circumstances of this case.

[30] For the aforesaid reasons this appeal partially succeeds as we interfere with the award of Kshs. 1.7 million decreed by the High Court and substitute it with an order that the respondents counterclaim be and is allowed for the sum of Kshs. 900,000/= for the loss of fixed deposit and a sum of Kshs. 223,600/=being the value of KAC 163 making a total of (Kenya shillings one million, one hundred and twenty three thousand six hundred) Kshs.1,123,600/= with interest costs at court rates from the date of the judgment in the high court. As the appeal has partially succeeded, each party shall bear their own costs of this appeal but the respondent shall have the costs in the High Court.

***Dated and delivered at Nairobi this 5<sup>th</sup> day of February, 2016.***

***P. KIHARA KARIUKI (PCA)***

.....

***JUDGE OF APPEAL***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***FATUMA SICHALE***

.....

***JUDGE OF APPEAL***

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**