



**Jane Wambui Macharia t/a Faith Transporters v Credit Bank Limited (Civil Suit E064 of 2022) [2024] KEHC 1214 (KLR) (Commercial and Tax) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1214 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E064 OF 2022  
FG MUGAMBI, J  
FEBRUARY 9, 2024**

**BETWEEN**

**JANE WAMBUI MACHARIA T/A FAITH TRANSPORTERS ..... PLAINTIFF**

**AND**

**CREDIT BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

1. By way of a plaint dated 2<sup>nd</sup> March 2022, the plaintiff seeks redress in the form of compensation and damages arising from the alleged possession and wrongful actions over a prime mover and trailer belonging to the plaintiff. More particularly the plaintiff prays for:
  - i. Compensation for the market value of the prime mover registration number KBQ 028L in the sum of Kshs. 2,500,000.00.
  - ii. Compensation for the current value of the trailer registration number ZB 2479 in the sum of Kshs. 1,250,000.00.
  - iii. Compensation for loss of use at the rate of Kshs. 2,081,000.00 per month from 29<sup>th</sup> August 2016 until the date of the judgment.
  - iv. Damages for the tort of conversion and detinue.
  - v. Interest on (a), (b) and (c) above from the date of filing this suit until payment in full.
  - vi. Cost of the suit.
2. The genesis of the dispute traces back to September 2011, when the plaintiff, seeking to purchase a second-hand prime mover, secured a credit facility from the defendant (the bank). This arrangement led to the acquisition of the prime mover registration number KBQ 028L which was subsequently



- registered jointly between her and the bank. The prime mover along with the plaintiff's trailer, was later detained in Uganda, setting off a chain of events culminating in the current legal proceedings.
3. The plaintiff submits that in December 2013, the prime mover, along with its attached trailer bearing the registration number ZB 2479, was impounded at the Mbale Police Station in Uganda. The plaintiff alerted the bank of this situation *vide* a letter dated 23<sup>rd</sup> December 2013. Subsequently, after her endeavors to reclaim the vehicle, the Mbale Chief Magistrate's Court, through a verdict in Civil Suit No. 006 of 2014 dated March 2016, ordered the release of the vehicle, contingent upon the submission of proof of ownership.
  4. In pursuit of regaining control over the vehicle, the plaintiff sought assistance from the bank for the necessary documentation. Unbeknown to her, the bank had meanwhile commissioned one Paul Musyimi, operating under the name and style of KGB Investigators, to illegally and unlawfully repossess the vehicle while transporting it from Uganda to Kenya.
  5. The plaintiff claims that the bank illegally repossessed the trailer which had not secured the loan facility and was not encumbered at all. With respect to the prime mover the plaintiff accuses the bank of failing to hand over the vehicle to her or to disclose its whereabouts, failing to issue the requisite notices prior to the repossession, failure to advertise and sell the vehicle by public auction or private treaty and further failure to credit the proceeds of the sale to the plaintiff's account if at all it was sold.
  6. The bank refutes these allegations *vide* a statement of defense dated 20<sup>th</sup> April 2022, instead emphasizing their non-involvement in the operational dealings of the plaintiff with the prime mover post the loan. The bank equally denies any part in the repossession process or sale of the prime mover, although they submit that the plaintiff was in arrears as evidenced by a letter dated 28<sup>th</sup> December 2013 written by her.
  7. The bank further maintains that while their rights of repossession had crystallized on 28<sup>th</sup> December 2013, they had not been able to recover anything from the plaintiff. The bank confirms that the trailer was not a security for the loan and could not therefore have been repossessed.

### **The testimonies by the witnesses**

8. At the hearing, the plaintiff testified as the only witness in support of the plaintiff's case. At cross examination she confirmed having been advanced the loan by the bank and further confirmed that she had not finished repaying the facility. In fact, she concurred that the bank, through a letter dated 7<sup>th</sup> April 2016, had demanded for Kshs. 4,245,063.74/=. She further affirmed that her husband was responsible for managing the trailer, which was utilized for transporting luggage, and that the bank had never made use of it.
9. The plaintiff admitted that she did not have a police report confirming that in 2013, the prime mover was hijacked and that it was at Mbale Police Station in 2014 and 2015. She further confirmed that the bank was not a party to the case in Uganda.
10. Despite stating that the prime mover was released from Uganda on 25<sup>th</sup> August 2016 and arrived in Kenya on 26<sup>th</sup> August 2016, the plaintiff further confirmed that there was no letter showing that the bank followed up the vehicle in Uganda in 2013. She admitted that she did not know Paul Musyimi who allegedly repossessed the vehicle.
11. The plaintiff however produced a letter dated 29<sup>th</sup> August, 2016 through which the said Paul Musyimi had allegedly informed the bank that he had repossessed the vehicle, as per their (the bank) instructions, disclosing that it was parked at Malaba Border, awaiting repairs so that it could be driven to Nairobi. She verified the absence of the bank's stamp on the letter along with the cargo manifest that was



- attached to the letter, showing the prime mover's relocation to the Malaba border. She finally confirmed that she had no documentation proving the sale of the prime mover to any third party.
12. During re-examination the plaintiff assured the court that she was not trying to evade repaying the loan, and further confirmed that through a letter dated 23<sup>rd</sup> December 2013 she had informed the bank that the vehicle had been stolen.
  13. Francis Wainaina, the Head of Legal Services, testified on behalf of the bank. During cross-examination, he acknowledged being aware of a meeting that took place on 21<sup>st</sup> April 2021 between the plaintiff and the bank. He affirmed that the bank currently retains the logbook for the prime mover. Additionally, he mentioned that the bank had no access to the documents related to the vehicle's detention in Uganda. Top of Form
  14. When questioned about the letter of 29<sup>th</sup> August 2016 from Paul Musyimi the witness clarified that it was the plaintiff who had forwarded the letter to the bank. He was firm that the bank had not appointed any agent to repossess the vehicle. Finally, he reiterated that the credit facility is still outstanding.

### Analysis

15. I have carefully considered the pleadings, evidence and submissions presented by the rival parties. The issues that arise for determination is whether the defendant is liable for conversion and whether the plaintiff is therefore entitled to the prayers sought.
16. The *Black's Law Dictionary* (8<sup>th</sup> edition) defines conversion as:

“The wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of wilful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property.”
17. The tort of conversion should be distinguished from detinue even though both relate to the wrongful possession or handling of property. In simple terms, detinue involves the wrongful detention of personal property that belongs to another, with the refusal to return the property upon demand. It is defined in the *Black's Law Dictionary* 2<sup>nd</sup> Edition's as:

“A form of action which is a form of recovery in specie, of personal chattels from one who acquired possession of them but retains them without right together with damages for detention.”
18. I am cognizant that the claim before the court is one of conversion and/or detinue. This requires the plaintiff to unequivocally demonstrate that the defendant exercised unauthorized control over the property to the detriment of the plaintiff's rights as well as continued illegal detention of the property after a demand.
19. The burden of proof, as mandated by section 107 of the *Evidence Act*, rests with the plaintiff to substantiate the claims made. It provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”



20. Section 112 of the *Evidence Act* further provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

21. The *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14 describes both the legal and evidentiary burden of proof as follows:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

22. In applying these principles to the current case, the legal burden of proof lay with the plaintiff. The evidentiary burden of proof as well. It is only when the plaintiff had discharged the evidentiary burden of proof that the same would shift to the bank to disaffirm the evidence by the plaintiff. I say this so as to clarify on the submission made by the plaintiff in which it is suggested that it was automatically the bank's burden to disprove the allegations. The question is whether the plaintiff had proved its averments to the required threshold to warrant the shifting of the evidential burden to the defendant.

23. The plaintiff produced a letter dated 2<sup>nd</sup> April 2016 from Paul Musyimi T/A KGB Investigators' addressed to the defendant which she relied on as proof that Paul Musyimi was known to the defendants and that he repossessed the prime mover and the trailer with instructions from the defendant. The plaintiff also relied on an East African Community Cargo Manifest attached to the letter, bearing the stamp of Uganda Revenue Authority showing that the vehicle exited Uganda and into Malaba Kenya. The name of the owner/driver is indicated to the Paul Musyimi.

24. On the flipside, the defendant argued that since the grant of the facility, the plaintiff had been in possession of the prime mover and there is no evidence that it ever came into the defendant's possession. The defendant denied having knowledge of the said Paul Musyimi or instructing him.

25. In this instance, the plaintiff's reliance on certain documents to establish the defendant's alleged wrongdoing falls short of conclusively proving unauthorized repossession or conversion. The letter purportedly written by Paul Musyimi to the bank is not reliable as it neither indicates how it was sent or received. In an uncharacteristic departure to other documents on the record that originate from the bank, this letter and the cargo manifest do not bear the bank's official stamp of receipt. There is therefore no proof that they were received by the bank.



26. According to the defendant, the letter by Paul Musyimi was shared with the bank by the plaintiff at the meeting of 21<sup>st</sup> April 2021. The circumstances under which the plaintiff got into possession of the letter were not elaborated especially since she confirms that she had never met the said Paul Musyimi.
27. Notably, the absence of corroborating evidence or testimony, particularly from a pivotal witness such as the said Paul Musyimi, weakens the plaintiff's position. Alternatively, the plaintiff did not also produce a corresponding letter of instruction from the bank to Paul Musyimi to confirm that the said was acting as an agent of the bank.
28. The bank presented the log book, as evidence of joint ownership of the prime mover together with the plaintiff. A log book serves as evidence of ownership of a motor vehicle. If indeed the plaintiff wanted to substantiate the claim that the vehicle had been transferred to a third party, she ought to have presented a re-registration of the vehicle with the NTSA or other such document. In the absence of any other form of evidence of sale or transfer of the vehicle, the plaintiff's claim of wrongful repossession or conversion fails.
29. This court espoused in the case of *Eastern Produce (K) Ltd-Chemomi Tea Estate v Bonfas Shoya*, [2018] eKLR the principle that when a court is faced with two probabilities, it can only decide the matter if evidence shows that one probability is more probable than the other.

#### **Determination**

30. Given these considerations, the court finds that the plaintiff has not met the requisite burden of proof to establish the claims of conversion and detinue. Consequently, the plaintiff's suit is dismissed with costs to the defendants.

**DATED, SIGNED AND DELIVERED IN NAIROBI**

**THIS 9TH DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

