



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 92 OF 2017

*(Arising from the judgment by Hon. Muholi, RM, delivered on 15<sup>th</sup> February 2017 in NBI CMCC NO. 7551 OF 2012)*

(CORAM: F. GIKONYO J.)

DAVID MURITHI GITHAIGA.....APPELLANT

Versus

CFC STANBIC BANK LIMITED...RESPONDENT

**JUDGMENT**

1. From the five grounds of appeal stated in the Memorandum of appeal dated 6<sup>th</sup> March 2017, the pleadings, evidence adduced, statement of issues and the arguments made by the parties, the following albeit inextricably related, emerge as issues for determination by the court:

*(a) Whether the appellant mitigated his loss.*

*(b) Whether the Appellant is entitled to an award for loss of user from 10<sup>th</sup> October 2010 to the date of delivery of judgment herein.*

*(b) Whether the global award of Kshs. 130,000 is fair compensation for inconvenience caused to the Appellant by the Respondent; and*

*(c) What is the appropriate remedy?*

**Duty of court**

2. As first appellate court; I should evaluate the evidence and come to own conclusions except I am reminded that I neither saw nor heard the witnesses. See: **SELLE & ANOTHER vs. ASSOCIATED MOTOR BOARD COMPANY LTD. [1968] EA 123**. In this exercise, the court is not beholden or compelled to adopt any particular style. What must be avoided however is mere rehashing of evidence as was recorded or trying to look for a point or two which may or may not support the finding of the trial court. Of greater concern should be to employ judicious emphasis and alertness, have an eye for symmetry or balance (where legally permitted) and an ear for subtleties of evidence adduced so as not to miss the grace and power of the testimony of witnesses and the applicable law. Such is a style that insists on simplicity in writing and keeping as close as possible to the words used in the testimony recorded. Ultimately, little difficulty or none at all will be experienced in making the overall impression of the evidence, facts and the law applicable in sheer clarity and directness. I shall so proceed.

**ANALYSIS AND DETERMINATION**

3. The appellant's claim is for: (a) handover of the logbook and registration documents in respect of motor vehicle registration number KBG 950A (hereafter "the subject motor vehicle"); (2) loss of user of the said vehicle from 10<sup>th</sup> October 2010 until the logbook and registration documents for the subject motor vehicle are delivered; or alternatively (3) return of the purchase price plus interest. His claim is based on the failure or refusal by the Respondent to deliver the logbook and registration documents of the subject motor vehicle after he purchased it in an auction. His full evidence is recorded and is part of the record.

4. Contrary to the Respondent's argument, the Appellant stated that he mitigated his loss by making numerous frantic efforts, oral and written, to request the Respondent to deliver to him the logbook and transfer form of motor vehicle registration number KBG 950A. But, all his enquiries thereto fell on deaf ears. As a result, he says that he was forced to issue a written demand letter and eventually filed this suit.

5. The story does not end there. He also urged that the official search of records of the registrar of motor vehicle conducted in November 2012 revealed that the registered owner of the subject motor vehicle is KARURI JOHN and not BARBARA WANGUI MAINA and the Respondent as alleged in the letter dated 26<sup>th</sup> November 2010 written by the Respondent.

6. According to the Appellant the foregoing matters portend two things: (1) that he mitigated his loss; and (2) he is entitled to an award of loss of user at Kshs. 35,000 per month from 10.10.2010 to 15<sup>th</sup> February 2017 when the judgment herein was delivered. On that basis, he urged this court to find that the trial magistrate erred in limiting mitigation of loss to the date of the written demand herein. It was also argued by the appellant that in light thereof, the trial magistrate erred in awarding a global sum of Kshs. 130,000 for his inconvenience which was quite low and he now wants it to be enhanced. Reasons wherefore the Appellant prays for the judgment by the trial court to be reversed and judgment to be entered for him as prayed for in the plaint and supported by evidence adduced.

7. The Respondent was contented with the judgment by the trial court. It submitted that the Appellant did not mitigate his loss as he did not take advantage of the leeway provided in section 9(2) of the Traffic Act and have him registered as the owner of the subject motor vehicle when he realized that the logbook and transfer form were not forthcoming. In the premises, the Respondent posits that the trial magistrate correctly made a global award for Kshs. 130,000 and urged this court to uphold the said award. They also asked the court to reject the award of loss of user as it was not specifically pleaded and proved as required in law. According to them, PW2 did not prove that he was a director in TAUSI CAR HIRE AND SAFARIS or that there was any business done with the Appellant at the rate of Kshs. 35,000 per month. To them this claim does not lie in the circumstances of the case and should be dismissed. Evidence of DW1 is recorded and forms part of record.

8. As I stated in the opening paragraph of this judgment, the issues for determination are inextricable and will be so discussed and determined.

### **Mitigation of loss**

9. Mitigation of loss is at the centre of this appeal. The principle of mitigation of loss imposes a duty on the party injured by a breach of contract or tort to mitigate his loss by taking such reasonable measures to minimize his loss arising from the breach or tort. See the case of **Farah Awad Gullet vs. CMC Motors Group Limited [2018] eKLR** that:-

**On mitigation of loss, we agree with the judge's finding that it is now well settled principle of law that a party seeking redress in damages either for breach of contract or in tort has a duty to mitigate his loss; [cited with approval the case of British Westinghouse Electric and Manufacturing Co Ltd vs. Underground Electric Railways Co of London Ltd [1912] AC 673 as per Lord Halden LC**

10. The policy consideration underpinning this principle is to prevent unscrupulous persons to temporize their loss for as long as possible in order to derive maximum benefit. Such conduct is not only unjust but stealth and veiled greed; it is this conduct the principle of mitigation of loss seeks to restrain for the sake of fairness and justice. Did the Appellant mitigate his loss?

### **Relevance of section 9**

11. I have been referred to section 9(2) of the Traffic Act. The section provides as follows:-

#### **9 Change of Ownership**

**(1) No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner thereof.**

**(2) Upon the transfer of ownership of a motor vehicle or trailer, the registered owner thereof shall, within seven days from the date of the transfer, inform the Registrar in the prescribed form of the sale or disposition, name, postal and email addresses and telephone number of the new owner, the mileage recorded on the mileage recorder (if any), of the motor vehicle, and such other particulars as may be prescribed, and shall deliver the registration book in respect of such vehicle to the Registrar together with the transfer fee, whereupon the vehicle shall be registered in the name of the new owner:**

**Provided that, where in any case the registered owner of a motor vehicle fails to comply with the provisions of this subsection, the Authority may, on being satisfied that the registered owner has died, left Kenya, cannot be traced, or has refused to comply with the provisions of this subsection, cause the vehicle to be registered in the name of the new owner on payment of the prescribed fee. [Underlining mine]**

12. According to the proviso to section 9(2) of the Traffic Act, where in any case the registered owner of a motor vehicle fails to comply with section 9(2), the Authority may, on being satisfied that the registered owner has *inter alia* refused to comply with the provisions of the said subsection, cause the vehicle to be registered in the name of the new owner on payment of the prescribed fee. This proviso aims at ensuring that the new owner is registered as the owner of the motor vehicle within the time prescribed in law or without delay. It also saves the new owner from being visited by two ills; (1) to become a hostage of the default of the current owner (intentional or otherwise) to comply with the law; and (2) to suffer the severe restrictions on use of the vehicle on the road stated in section 9(1) of the Traffic Act. Note section 9(1) provides as follows:

**No motor vehicle or trailer the ownership of which has been transferred by the registered owner shall be used on a road for more than fourteen days after the date of such transfer unless the new owner is registered as the owner thereof.**

13. Accordingly, section 9 of the Traffic Act creates a leeway for the new owner- in the event of default by the current owner to comply with

the law on change of ownership of a motor vehicle- to move the Authority and to be registered as owner of a motor vehicle upon payment of the prescribed fee. As such, it is expected that the new owner should act quickly and diligently to ensure compliance with the law on change of ownership of a motor vehicle. This section would aid the Appellant as the party injured by breach of contract, to mitigate his loss and end anguish caused by the defaulting Respondent. He ought to have acted diligently to procure his registration under section 9(2) of the Traffic Act as owner of the subject motor vehicle immediately it became clear to him that the Respondent was not willing to comply or had not complied with section 9 of the Traffic Act. The initial efforts to try and obtain the logbook and transfer form from the Respondent were genuine and necessary actions. But, the prolonged enquiries over these items were ill-advised benevolent acts which smirks lack of care and diligence on the part of the Appellant. Therefore, the trial magistrate was right in holding that the Appellant ought to have mitigated his loss. The only question is whether the trial court erred in limiting the mitigation of loss to the date of the demand letter. I will answer this question after I have answered the next questions on the global award of Kshs. 130,000 and loss of user.

### **Of global award of Kshs.130,000**

14. The Appellant on the basis of his arguments that he mitigated his loss faulted the trial court in making a global award of Kshs. 130,000 for inconvenience instead of calculating the loss of user from 10.10.2010 to 15.2.2017 when the judgment was delivered at a monthly rate of Kshs. 35,000. I note that the Appellant sought in the plaint, handover of the logbook and registration documents; and loss of user at the rate of Kshs. 35,000 per month from 10<sup>th</sup> September, 2010 until the handover of logbook and registration documents. The trial court made a global award of Kshs. 130,000 for inconvenience. There was clearly a breach on the part of the Respondent in not delivering the logbook and registration documents in respect of motor vehicle KBG 950A. The Respondent supports this award as being reasonable. The Appellant, on the other hand, asked the court to enhance this award to reasonable amount given the great inconvenience caused to him by the conduct of the Respondent.

15. Both parties agree that the Respondent failed to perform its part of the bargain. The quarrel is only on the amount of damages payable to the Appellant under this head. The Respondent suggests that Kshs. 130,000 awarded is fair compensation. The Appellant is of a different opinion. I see a mix-up of this item and that of loss of user. I will say my bit on loss of user later in this decision.

16. Be that as it may, in assessing damages any factor such as conduct of a party which aggravates the loss of the claimant is an important consideration. The damages so awarded are known as aggravated damages. I will cite ample judicial decisions on this matter below.

### **Aggravated damages**

17. The Court of Appeal stated in the case of **Obongo and another –Vs- Municipal Council of Kisumu (1971) E.A. 91** that:

**“...I would add, to avoid misunderstanding, that the restriction on the power to award exemplary damages does not affect the power of the court when making an award of general damages to take into account the conduct of the defendant as an aggravating factor.”**

The court went further to state the following:

**“It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and court is making general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”**

18. See also the case of **Geoffrey Githiri Kamau v Attorney General [2015] eKLR** that;

**“.....Aggravated damages are awarded in actions where damages are at large. That is to say where damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copyright, among others.**

**Such damages are part of, or included in the sum awarded as general damages and are therefore at large. As such, they need not be specifically pleaded or included in the prayer for reliefs.**

**See Rookers v Banard (1964) 1A ER 367. However, where the plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matter. The matters that the court should take into account in awarding such damages include the defendant’s motives, conduct and manner of committing the tort. The court has to consider whether or not the defendant acted with malevolence or spite or behaved in a high handed, malicious, insulting or aggressive manner. The court may also consider the defendant’s conduct up to the conclusion of the trial including what he or his counsel may have said at the trial. If any of the defendant’s acts will have worsened the plaintiff’s damage by injuring his feelings of dignity and pride that may also be considered. In awarding aggravated damages, aggravated damages are therefore compensatory in nature (see Abdulhamad Ebrahim Ahmed v Municipal Council of Mombasa (2004) e KLR Maraga.....”** Emphasis Added

19. The Appellant stated that the Respondent’s conduct was callous and produced great inconvenience to him and loss of user of the vehicle in question. He stated that he made numerous enquiries about the logbook but the Respondent remained mum. To make matters worse, it seems the said vehicle was transferred to a Mr. KARURI JOHN after it had been sold to the Appellant and during the time the Appellant was pursuing his remedy against the Respondent. It was not explained how this happened and the Respondent did not address the issue. In light of

the facts of this case, this aspect of the case is not only perturbing but one that enhanced the Appellant's distress. I note also that by law the Appellant was prohibited from using the motor vehicle herein on any road after 14 days of sale of the vehicle to him until change of ownership was effected in the register. See section 9(1) of the Traffic Act. Accordingly, failure by the Respondent to hand over the logbook and registration documents denied the Appellant owner use of his vehicle for any purpose. Accordingly, damages herein should be aggravated. **Black's Law Dictionary** 9th Edition defines aggravation to refer to:-

1. *The fact of being increased in gravity or seriousness.*

In the circumstances of this case, I enhance damages for inconvenience to Kshs. 300,000.

#### **On loss of user**

20. Loss of user is not general damages; it is special damages which must be specifically proved and proved. See the case of David Bagine vs. Martin Bundi [1977] eKLR. On this head, the Appellant stated that he bought this vehicle to improve income. He paid as per the rules of the auction and collected the vehicle 10<sup>th</sup> September 2010 and approached Tausi Car Hire and safaris to engage his said vehicle in their car hire business. PW2, ANTHONY NGASHA WANJUKI of Tausi Car Hire and Safaris adduced evidence to the effect that the Appellant approached him to let his vehicle for car hire business. He accepted and Tausi issued the Appellant with a car hire agreement dated 20<sup>th</sup> September 2010 (exhibit 10) for the hire of motor vehicle KBG 950A at a rate of Kshs. 35,000. The vehicle was to be brought to Tausi's office on 1<sup>st</sup> October 2010. However the Appellant had to meet certain requirements, namely:-

- (a) Produce original logbook for confirmation of ownership;
- (b) The vehicle must be insured by a comprehensive insurance; and
- (c) The vehicle to be of clear and presentable interior.

21. PW2 stated in court that his business was operating as a business name. He produced a car hire agreement with the Appellant. The Respondent alleged that PW2 was paid to come and give false evidence. This was a serious allegation and ought to have been fully established. It was not. Other than terse cross-examination, there was nothing tangible which vitiated the evidence by PW2. It bears repeating that the Appellant stated that he bought the subject motor vehicle to boost his income. True to this averment, he engaged an agreement for hire of his vehicle at the rate of Kshs. 35,000 per month. By this evidence the Appellant specifically proved that he entered into an agreement for hire of the subject vehicle as the rate of Kshs. 35,000 per month. As a matter of law and fact, due to failure by the Respondent to provide him with the logbook and registration documents, the Appellant could neither have been registered as owner of the motor vehicle within reasonable time nor use the vehicle on the road or for any purpose or business venture of car hire with Tausi. Loss of business or investment opportunity is loss which is remediable in law and in this case it was quantifiable and was proved as such on balance of probabilities. The Appellant specifically pleaded and proved loss of user to the required standard.

22. Following the foregoing finding and the finding that the Appellant ought to have mitigated his loss, what is the appropriate period for which he should lawfully be compensated? I stated earlier that the principle on mitigation of loss prevents the injured party from unduly taking advantage of the breach to unjustly enrich self. I also stated that the initial enquiries about the logbook and registration documents from the Respondent were genuine and necessary steps to make the Respondent meet their side of the bargain. But, the prolonged enquiries were misguided. Therefore, I would award him loss of user for a period of six months as he ought to have acted under section 9(2) of the Traffic Act as a way of mitigating his loss. He failed to do so and so this court cannot countenance such temporizing of claims by parties in order to reap maximum benefit from the breach. The award will be 6x 35,000 which totals to Kshs. 210,000.

#### **Repairs**

23. As for repairs carried out on the vehicle; these costs were not pleaded in the plaint and so nothing is awarded.

#### **Order against the Authority**

24. Before I give final orders, I should determine the argument by the Appellant to the effect that the NTSA was not a party in the proceedings and the Registrar ought not to have been directed by court to register the Appellant as owner of the subject motor vehicle. Section 9(2) permits the Authority, on being satisfied that the registered owner has died, left Kenya, cannot be traced, or has refused to comply with the provisions of the said subsection, to cause the vehicle to be registered in the name of the new owner on payment of the prescribed fee. Failure or refusal to comply with the law on change of ownership of a motor vehicle by the Respondent was directly in issue in these proceedings. Thus, from the evidence adduced, the Appellant bought the subject motor vehicle and is the new owner. I declare him to be so. As such owner, he is entitled to be registered as the owner of the subject motor vehicle. Accordingly, once the court has decided in favour of the new owner, the decision is to be implemented by the Authority through the Registrar of motor vehicles under the law by way of change of ownership of motor vehicle in the register. Therefore, there is absolutely nothing wrong for a court of law in such proceedings as these to direct the registrar to register a new owner in accordance with section 9(2) of the Traffic Act. Even if no express order was made or directed at NTSA or Registrar, the decision of the court on change of ownership would still have been sufficient satisfaction and important consideration in causing the Authority to order registration of the new owner under section 9(2) of the Traffic Act. The argument on this point by the Appellant yields nothing and is rejected. For the avoidance of doubt, the Authority is directed to register the Appellant as owner of the subject motor vehicle within 14 days of payment of the prescribed fee.

#### **Final Orders**

25. In the upshot, I set aside the judgment of the trial court and enter judgment for the Appellant as follows:-

**1. Damages for inconvenience..Kshs. 300,000**

**2. Loss of user for six months..Kshs. 210,000**

**3. Cost and interest on the award herein.**

**4. The Authority to cause registration of the Appellant as the owner of motor vehicle registration number KBG 950A under section 9(2) of the Traffic Act within 14 days of payment of the prescribed fee by the Appellant. There should be no twists or veiled delay on this matter. It is so ordered.**

**Dated and signed at Nairobi this 19<sup>th</sup> day of September 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> day of October, 2019**

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**L. NJUGUNA**

**JUDGE**