



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 203 OF 2011

BETWEEN

MORRIS OCHOGLI.....APPELLANT

AND

HASSAN HASHI AHMED.....RESPONDENT

(An Appeal arising from the Judgment and Decree of Hon. C.G Mbogo CM

dated 12th January 2011 at the Chief Magistrate's Court

in Kisii CMCC No. 638 of 2006)

JUDGMENT

1. This is an appeal arising from a case that was dismissed by the trial court. The gravamen of the appellant's claim is set out in the plaint dated 3rd August 2006 and it states as follows:-

3. *On or about 16th January 2002, the plaintiff entered into an agreement with the defendant and agreed to compensate the plaintiff for his motor vehicle Reg. KAL 539Y Nissan Pick Up which had been totally damaged while in the use and custody of the Defendant. The said motor vehicle was at the time valued at Kshs. 620,000/=.*

2. The plaintiff prays for the following reliefs:

(a) An Order directing the defendant to restitute and/or replace motor vehicle Reg. KAL 539Y as per the agreement or its current value.

(b) Costs of user at Kshs. 2000 per day.

3. The hearing of the case before the trial court proceeded ex-parte and the respondent neither cross examined the appellant nor called witnesses to controvert the appellant's case. The trial magistrate noted that the value of the vehicle was not proved and as well as the claim of loss of use. He also held that since the respondent's defence was that the appellant was paid Kshs. 400,000/= in full and final settlement and it was not controverted by filing a Reply to Defence, the appellant had failed to prove his case.

4. The thrust of this appeal is whether the appellant proved his case on a balance of probabilities. The uncontroverted evidence is that after an accident caused by the respondent, the parties entered into an agreement dated 16th January 2002 which set out several terms principally that the respondent undertook to compensate the appellant with a similar vehicle on the following terms;

“Hassan has undertaken to compensate Morris with a similar Nissan Pick Up long chassis within three weeks ending on or before 7th February 2002.”

The appellant sued respondent as he failed to meet the terms of the agreement.

5. The main issue is whether the appellant is entitled to relief claimed in the plaint? On this issue the respondent submits that the value of the vehicle being special damages was neither pleaded nor proved. The respondent also supports the view that failure to file a Reply to Defence

constituted an admission that the claim was settled. The appellant's case is that the particulars of special damages were pleaded in the body of the plaint and value of the vehicle proved.

6. On these issues, I find as follows. I agree that the value of the vehicle is a special damage claim which ought to be pleaded and proved (see **Coast Bus Services Ltd v. Murunga Dairy; CA Civil Appeal No. 192 of 1992 UR**). In this case the value was pleaded in the body of the plaint which was sufficient notice to the defendant of the nature of the claim (see **Zachary Kuriithi v. Jashon Otieno Ochola KSM HCCA No. 153 of 2012 (2016)eKLR**). In his evidence, the appellant stated that he was praying for Kshs. 620,000/= but it is not clear how this figure was arrived at, if at all. There was no valuation or indication of the costs of repair or value of Reg. No. KAL 539Y either in the evidence or in the agreement to enable the court assess the replacement value of the vehicle.

7. Whereas I find that there was an agreement to replace the vehicle, I also find that its value was not proved to the required standard. On this ground I concur with the trial magistrate that the case was not proved to that extent.

8. As to whether the failure to file a Reply to Defence constitutes an admission of the defence, the Court of Appeal in **Joash Nyabicha and KTDA v. Kipkebe Ltd & AG KSM CA Civil Appeal No. 302 of 2010 (2013)eKLR** held that despite failure to file a Reply to Defence, there is still a joinder of issues on that defence. In this case the respondent did not cross examine the appellant or call evidence to support his defence that he had settled the claim.

9. Having re-evaluated the evidence and for the reasons I have stated, this appeal is hereby dismissed. I make no orders as to costs.

Dated and delivered at Kisii this 27th day of June 2018.

D.S MAJANJA

JUDGE