

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 311 OF 2016

WAINAINA NG'ANG'A GAKUO.....APPELLANT

VERSUS

CREDIT BANK LIMITED.....RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court Milimani Commercial Court Nairobi by Hon. SPM M. Obura on the 20th May, 2016 in CMCC NO. 4906 OF 2014)

JUDGMENT

The appellant sued the respondent in the lower court for two substantive orders

- a) An order for the release of the log books in respect of motor vehicles registrations No.s KBA 584N and KBA 886N by the defendant to him, and,
- b) General damages for loss of business in respect of motor vehicle registration No. KBA 584N.

The claim was denied by the respondent but after hearing the parties the lower court gave judgment in favour of the appellant and awarded Kshs. 312,000/= for loss of business and entered judgment accordingly. The appellant was not satisfied and lodged this appeal.

His main complaint is on general damages which he says the award by the lower court was average loss incurred per month only and that the court should have considered a period from December, 2013 to May 2016 which was the date of the judgment of the lower court.

The genesis of retention of the appellants' log book was what the respondent said to be default on the part of the appellant of the terms of credit advance to him by the respondent, in particular the failure by the appellant to pay debt collection charges following default on his part.

Whereas it is true that the appellant claimed general damages for loss of business it was incumbent upon him to place before the court sufficient guidance to assist the court in arriving at a figure that would compensate him for the said loss. From the evidence this dispute would not have reached the court had there been dialogue between the parties. There was evidence which was uncontroverted that a firm known as Quest collectors acted on behalf of the respondent and collected money from the appellant and that is why it raised a claim for Kshs. 35,600/= falling under clause 12 of the agreement.

Proof in any civil proceedings is by way of balance of probability. The evidence adduced on behalf of the defence is that the appellant made the last payment in March, 2013. It was only after engaging a debt collector that he paid on 6th November, 2013.

On the other hand the appellant said that there was no breach whatsoever. The evidence presented in the lower court was that of the appellant as against that of the defence witness D.W. 1. As at the time of the hearing the appellant was yet to pay the debt collector. In awarding the appellant Kshs. 312,000/= the lower court relied on exhibit 9 which the appellant himself produced. The work sheet he produced was for the period of September to December, 2013 which worked to 3 months. The average collection from motor vehicle registration No. KBA 544N was Kshs. 312,000/= monthly. That is the sum he said he had lost. He did not produce any work sheet other than exhibit 9. The amount claimed by the respondent on behalf of the debt collector was equivalent to three day's earnings from the appellant's business.

What appears confounding is why a businessman would allow his motor vehicle to be grounded for sum of money he could have easily paid, and claim from the financier in the event it turned out to be a wrong claim.

Further to the foregoing, one is bound to ask why the appellant opted to sue the respondent for general damages when his claim clearly was for lost revenue, if at all, following the withholding of the log book of his motor vehicle. If exhibit 9 was anything to go by, the appellant had an opportunity to pursue a liquidated claim for loss of earnings. Whatever the case, the appellant made no effort whatsoever to mitigate his loss and cannot fault the court for awarding him the general damages. I am unable to interfere with the discretion of the lower court in that regard.

It follows the appeal lacks merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 30th day of October, 2018.

A. MBOGHOLI MSAGHA

JUDGE