



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO: 434 OF 2008

WILFRED IRUNGU NDIRANGU.....PLAINTIFF

VERSUS

CMC MOTORS GROUP LTD.....DEFENDANT

JUDGEMENT

Wilfred Irungu Ndirangu, a surgeon, filed this suit against C.M.C. Motors Group Limited under a plaint dated 11th December 2006, claiming the following reliefs:-

- (a) *That the defendant do compensate the plaintiff with a new vehicle to replace the motor vehicle registration number. KAQ 084G purchased by the plaintiff from the defendants on or about 16th December 2002.***
- (b) *In the alternative the defendant do fit a new engine, clutch pressure plate system cooling and gear transmission system into the said motor vehicle.***
- (c) *That the defendant do compensate the plaintiff for the loss of use of the said motor vehicle from 29th November 2005 to the time when it is fully repaired.***
- (d) *Exemplary damages***
- (e) *Costs of the suit***
- (f) *Such other or further relief as the court may deem fit to grant.***

The plaintiff's claim is founded on the grounds that the defendant fraudulently sold to the plaintiff a defective motor vehicle, failed to rectify the defects despite the existence of a warranty given in respect thereof or to replace all defective parts to the plaintiff's satisfaction and failing to compensate the plaintiff with a new motor vehicle when it was apparent that the defects were, according to the plaintiff, overwhelming, yet the defendant had failed to warn the plaintiff of the said defects at the time of sale.

The defendant filed a defence dated 28th February 2007, denying any liability to the plaintiff, although admitting selling the motor vehicle to the plaintiff at the stated price of Kshs.3,715,000/= and that the subject motor vehicle was sold under warranty extending to cover the first 3 years of the life of the vehicle or 100,000 kilometres, whichever came earlier, and guaranteeing that the vehicle was a brand new Land Rover. The warranty is said to have exempted any items that are subject to adjustments or

replacement during normal service or maintenance, particularly replacement or “**top-up**” of consumable liquids, wiper blades, oil, air, pollen and fuel filter, light bulbs, drive belts, wheel alignment, lubrication, engine tune up, spark plugs, brake pads/discs, due to wear and remote hand set batteries.

Further, the defendant has pleaded that the warranty did not cover the following:-

- 1. Normal wear and tear.**
- 2. The failure to maintain the vehicle in accordance with Land Rovers’ maintenance schedules and service instructions.**
- 3. The refilling or topping up with incorrect fuel.**
- 4. The use of bio-diesel or bio-ethanol alternative fuels with concentrations higher than 5%.**
- 5. Failure to use Land Rover specified parts or fluids or parts of equivalent quality.**
- 6. Unauthorized modifications of the motor vehicle or its parts.**
- 7. Damage resulting from neglect, accident and improper use.**
- 8. Defects caused by or resulting from the use of the motor vehicle in motor sport events or for any other purpose than normal, private or commercial use.**

The warranty is said to have equally excluded liability for lost time, inconvenience, loss of transportation or consequential damage as may be incurred as a result of a defect covered by the warranty. Further, the defendant contends that the warranty imposed certain obligations on the plaintiff as follows:-

- 1. To put the motor vehicle into proper care and use.**
- 2. To carry out proper maintenance and not to misuse, neglect and carry out inadequate maintenance.**
- 3. To ensure that the required maintenance is performed and that the materials used in doing so match Land Rover’s specifications.**
- 4. To ensure that he presents the motor vehicle to a Land Rover dealer or authorized repairer for any warranty repair as soon as it is practicable after noting a defect.**
- 5. To ensure that receipts for completed maintenance works are retained with the vehicle and confirmation of work is always recorded in the service portfolio.**
- 6. To ensure the maintenance of paint and body work by regular cleaning in accordance with Land Rover instructions.**
- 7. To ensure that the body panels are examined annually by a Land Rover dealer and that the same is recorded in the plaintiff’s service portfolio.**

The plaintiff complains that since taking delivery of the subject motor vehicle on 16th December 2002, he experienced multiple problems with the same, the first of which was in the nature of exhaust leaks, experienced barely two weeks after taking delivery. In all, the plaintiff contends that he was faced with five major problems affecting the vehicle during the warranty period which, in his estimation, translated into a manufacturer’s defect in the motor vehicle sold to him, being of the view that the same are unusual in the case of a brand new motor vehicle.

The plaintiff testified as Pw1 and produced a bundle of documents (collectively marked as “P Exh 1”), containing the relevant service and repair requests, job cards and repair invoices. He also called a motor

vehicle assessor and valuer to confirm his layman's opinion on the defects noted in the subject motor vehicle. In his evidence in chief Pw1 stated that he paid the purchase price of subject motor vehicle partly in cash (Kshs.2 Million of own savings) and partly through a hire purchase loan arrangement with the CFC Bank. Immediately upon taking possession of the motor vehicle he noticed that the clutch and gears were difficult to engage. On mentioning the same to an attendant he was told that it was a normal situation with a new Land Rover Freelander. He accepted the explanation but the difficulty subsisted even as he took the vehicle to the defendants for 1st scheduled service at 1000 Kilometers.

The plaintiff testified further that at 5000 Kilometres the air conditioning system was malfunctioning, and the sellers blamed the same on tropical heat. At the same time the rear window was bringing in dust and the sealing rubber was replaced. The gear transmission, breaking system were also problematic. At 10,000 Kilometers the vehicle was over heating and required coolant to be added every now and then. At 40,000 Kilometers, the exhaust system fell off while the plaintiff was driving the vehicle. The same was replaced as a manufacturer's defect.

Pw1 testified further that the overheating persisted, leading to the replacement of the gear and clutch system, by the defendant at the plaintiffs cost. This however did not help as neither the vehicle regained power, nor did the overheating subside. At 58,000 Kilometers, the vehicle refused to start and was towed to the defendant's workshop. It was discovered that water was mixing with oil and an engine knock was imminent. This time, a certain Mr. Diaz, who the plaintiff says was the then General Manager of the defendant, told the plaintiff that the company was aware of the manufacturer's defect in the motor vehicle and intimated to him that the company was ready to replace the vehicle. Mr. Diaz gave Pw1 brochures for vehicles of the same range for him to choose a preferred colour.

The idea of a replacement hit a snag when the then Chief Executive Officer of the defendant, one Mr. Foster differed with the General Manager's opinion, offering instead to repair the motor vehicle free of charge. The plaintiff declined the offer and sought legal redress, for the various problems enumerated in his letter of 29th December 2005 as follows:-

(a) Transmission

It has been very difficult to engage gears – more so the reverse gear. The gear selection was so bad that at 5,000KM service I asked one of your engineers whether they were hydraulic assisted. She replied in the affirmative and I was very surprised. The gear selection especially when at high speed has been very difficult. This became more and more difficult until the car came to a standstill at 50,000KM.

(b) Cooling System

The air conditioning system was not functioning properly and had to be rectified at 10,000km. The car was overheating and we came back for advice and there was not good explanation. 10,000km we could not understand why the car continued running the fan after parking and every time we fuelled the car we had to add the coolant. We came back for this service several times and nobody could tell us why a new car was overheating up to now. The air conditioning of this car does not function well up to now with the heat of Nairobi.

(c) Exhaust System

At 40,000km while travelling from Limuru to Nairobi the silencer got disconnected from the manifold and we brought the car. This time the workshop manager was kind enough to own up it was a manufacturer's fault. The system was repaired and I appreciated.

(d) Electric Windows System at 40,000km

Right near widow system failed. We came for repair and it was done at a very high cost borne by us.

(e) Clutch System

We had noticed that the car was loosing power and gear engagement was difficult at 45,000km the car was packed in the garage at home and it could not move any more. We came for service and the clutch was completely finished. We replaced it at my own cost.

(f) Engine Performance

The car was never a powerful engine from the inception but one thing is remarkable-gradual loss of power and over heating then gear selection remained difficult but of late it is very difficult. We went to top up the coolant at 58,000km and noticed that there was oil in the coolant. This was confirmed by the workshop manager – there was mixing of oil and water.

(g) Dust Proofing

At 5,000km the car was letting in a lot of dust from the boot. This was confirmed and later rectified. A new dust rubber was put.

(h) Summary

Our vehicle registration number was booked in your workshop and upto now you have not managed to make a diagnosis.

Under cross examination, Pw1 admitted that the warranty period expired on 15.12.2005, two weeks prior to his above stated letter. He stated, however, that he persistently complained of the defects from very beginning but, given the assurances by the defendants, he assumed he would get used to the difficulty in manoeuvring the vehicle, which he was told was normal, also hoping that the defects would be permanently taken care of, until the problem of water mixing with oil presented itself. He also testified that he had persistently complained of the malfunctioning of the cooling system until the cylinder head gasket was replaced free of charge. Asked why he declined to take the vehicle back after the repair works at 58,000 Kilometers (after the vehicle was towed to the workshop, having refused to start), yet he was offered an extra 6 months extension of the warranty, the plaintiff stated that, given the myriad of problems he had encountered in regard to the subject motor vehicle, culminating in the threat of an engine knock, the offer was cheap and demeaning. Under the re-examination Pw1 testified that his desire was not to make a profit from the circumstances but to be restituted to the position he was in when he bought the motor vehicle. He emphasized that he considers the defects in the engine and gear transmission to be major since, in his view, the engine and gears constitute the very heart of a motor vehicle.

The motor vehicle assessor, Joseph Miricha Nderitu, testified as Pw2. He stated that, at the request of Pw1, he examined the defendant's service and maintenance records/documents detailing the various repairs and maintenance procedures that had been undertaken in regard to the subject motor vehicle during the period relevant to this suit. According to him, Pw1 needed an expert opinion on the condition of the motor vehicle, more so, as regards the possibility of it having a manufacturer's defect.

Pw2 testified that he was able to draw useful conclusions from his examination of the documents, the contents of which, in his opinion, confirmed Pw1's suspicions arising out of the several problems encountered by him from the time he took delivery of the vehicle until the time he last took it to the defendant's workshop. He testified that, in addition to studying the documentation, he visited the defendant's premises, talked to the workshop manager and supervisor and inspected the motor vehicle but without driving it. He testified having noted the following from the documentation.

1. The plaintiff had complained of the vehicle overheating at 10,000Kilometres.

2. Plaintiff had complained of the air conditioning not working properly at 18331 Kilometres (per service instruction No.5009).

3. Under job card No.03/62584 of 8th December 2005 the cylinder head gasket had been changed at 58,620 Kilometres, and that the explanation given for that was that the engine was mixing water and oil.

4. Under job card No.03/61966 of 14th October 2005 the entire clutch system had been overhauled at 51,757 Kilometres.

Pw2 considered the above to be major defects consistent with the information he had obtained from Pw1 to the effect that:

1. Pw1 had complained of difficulties in changing gears at 5600Kilometres.

2. That the vehicle started overheating at a very early age.

The witness testified that he noted that a repeat job had earlier been done in regard to clutch system which did not solve the gear problems, leading to the over hauling of the entire clutch system in October 2005. He attributed the plaintiff's complaint as regards the loss of power and malfunctioning of the air conditioning to overheating, which was noted at a very early stage, explaining that such problems are usually a consequence of reduced effect in lubrication.

In summary, Pw2 concluded that the vehicle had a manufacturer's defect and recommended that, either it be replaced with a new one or the entire engine or power train be replaced. Under cross examination, Pw2 stated that overheating could have been caused by any of the 13 reasons captured in his report, explaining that the very fact that not any of those reasons could not be isolated by the defendants' diagnostic equipment should lead anyone to conclude that the vehicle must have had a manufacturer's defect. He produced his report as an exhibit, asking the court to consider its contents in their entirety.

In its defence, the defendant called its National Land Rover Service Manager, Stephen Moses Atego who testified as Dw1. He refuted the plaintiff's testimony that the vehicle developed problems at an early age, stating that the first time the plaintiff requested for a mechanical repair was on 14th March 2003, during the 1000 Kilometres service, when the vehicles hill descent light was rectified and the rear door latch replaced under the warranty. Notwithstanding the Pw2's testimony that the plaintiff did not lodge any of the complaints raised in the plaint prior to the demand letter of 29th December 2005, a month after his last delivery of the motor vehicle to the defendant's workshop, the witness testified, inter alia, that the clutch system was repaired at the plaintiffs' cost on 19th October 2005 when the gear box and attendant parts were replaced. A repeat job was done at 58,620 Kilometres alongside the 60,000 Kilometres service.

The witness testified also that the cylinder head gasket was replaced, the plaintiff having complained of loss of coolant. To explain this Dw1 testified that, having not observed any visible leak, a conclusion was drawn to the effect that there must have existed a leakage within the engine itself and therefore not visible. He stated that the cylinder head gasket was replaced under the warranty.

According to Dw1, the subject motor vehicle could not possibly have a manufacturer's defect since no-one else who had bought similar vehicles in Kenya had complained. He described a manufacturer's defect as a fault which occurs very early in the life of a motor vehicle as a result of faulty materials or poor workmanship relating to a particular component at the manufacturing plant. The only reason the given by the witness as to why the vehicle cannot be substituted with a new one or a new engine put is that the same was not contemplated in the warranty, which in any event has expired. He concluded by stating that the plaintiff was still free to collect the motor vehicle and receive the extended six months warranty offered, despite the fact that the offer for the same had since lapsed.

Under cross examination Dw1 agreed that in view of the problem with the cylinder head gasket there was a possibility that water was leaking inside the engine and probably entering the engine bore, with the added risk that, if the driver ignored the warnings shown at the dashboard the engine could cease. He also admitted that there was no evidence of misuse, neglect or inadequate maintenance which could be blamed

on the plaintiff. Dw2 produced the following documents as exhibits.

1. *Exh 04 (a) Service Instruction dated 7.01.2003*
2. *Exh 04 (b) Job Card dated 7.01.2003*
3. *Exh 05 (a) Service Instructions dated 14.01.2003*
4. *Exh 05 (b) Job Card dated 14.01.2003.*
5. *Exh 05 (c) Internal Debit Noted
dated 16.01.2003*
6. *Exh 06 (a) Service Instruction dated 29.03.2005*
7. *Exh 06 (b) Job Card dated 29.03.2005*
8. *Exh 06 (c) Cash sale dated 29.03.2005*
9. *Exh 07 (a) Service Instruction dated 14.04.2005*
10. *Exh 07 (b) Job Card dated 13.03.2005*
11. *Exh 07 (c) Service Invoice dated 6.05.2005*
12. *Exh 08 (a) Service Instruction dated 4.05.2005*
13. *Exh 08 (b) Job Card dated 3.05.2005*
14. *Exh 08 (c) Service Invoice dated 3.05.2005*
15. *Exh 09 (a) Service Instruction*

Issues for determination appear not to have been agreed, although the defendant did file a statement of issues dated 30th April 2009, comprising of twenty (20) issues, which, in the submissions filed on its behalf have been paraphrased and reduced to 6 and set out as follows:-

1. *Whether the motor vehicle developed mechanical problems immediately after the plaintiff took possession and whether the defendant failed to repair the same.*
2. *Whether at the time of purchase, the motor vehicle had inherent manufacturer's defects or whether the motor vehicle has a manufacturer's defect.*
3. *Whether in selling the motor vehicle to the plaintiff the defendant acted fraudulently.*
4. *Whether the plaintiff is entitled to the replacement of the motor vehicle with a new one.*
5. *Whether the defendant should be compelled to fit a new engine, clutch and pressure plate system, cooling and gear transmission system on the motor vehicle.*
6. *Whether the plaintiff is entitled to damages for loss of user of the motor vehicle and exemplary damages.*
7. *Who bears the costs of this suit?*

The plaintiff appears to have no quarrel with the issues as framed in the defendant's submissions. The sale transaction and the terms thereof not being in dispute, and it being common ground that the various complaints lodged by the plaintiff with the defendant were duly attended to by the defendant, with the various repairs and replacement of some vital components of the motor vehicle being carried out during

the warranty period, I am of the view that the main issues for determination, as can be deduced from the pleadings and evidence are as follows:-

1. ***Whether, on the basis of the plaintiff's complaints and the requisite repairs and/or replacements, the motor vehicle can be deemed to contain a manufacturing defect, entitling the plaintiff to claim either a new vehicle or the replacement of the engine or power train.***
2. ***Whether, given the exemptions contained in the warranty, the plaintiff's claim is well founded.***
3. ***Whether the defendant, having attended to all of the plaintiff's complaints, is absolved from any liability in respect of the motor vehicle.***
4. ***Whether the plaintiff has proved his case on the balance of probabilities.***
5. ***Whether the plaintiff is entitled to any of the reliefs sought.***

Considering the submissions filed for the plaintiff herein, two additional issues arise as follows:

6. ***Whether, given the nature of the contract, the circumstances of this case and the intention of the parties, the subject motor vehicle can be deemed to have been of merchantable quality at the point of sale.***
7. ***Whether the plaintiff has lost his right to reject the motor vehicle by virtue of the fact that the warranty period has since expired.***

One may be tempted to argue that the plaintiff in his pleading did not bring in the issues of the merchantability of the vehicle. Such an argument would not, in my view, hold since in every contract for sale of goods, the law presumes an implied warranty that the object sold shall be of merchantable quality. This, as submitted by the plaintiff, is captured in Section 16 of the Sale of Goods Act (Chapter 16 of the Laws of Kenya) which provides that:-

(a) Where the buyer, expressly or by implication makes known to the seller the particulars purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not) there is an implied condition that the goods shall be reasonably fit for that purpose.

(b) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality.

Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed.

I am of the considered view that the above proviso would not apply to the situation at hand and only the representation by the defendants as to the quality of the subject motor vehicle and its components is relevant. Further, in my view, the matter herein is one whereby the merchantability, rather than simple breach of contractual duty is in issue, as is demonstrated by the fact that the parties had the suit transferred from the Civil Division of the High Court to the Commercial Division on 27th day of June 2008. The plaintiff's submissions hinge primarily, on this issue of merchantability.

In discussing issue No. 1 the defendant has submitted that the mechanical problems cited by the plaintiff did not develop immediately upon his taking of possession and that the defendant promptly and satisfactorily carried out the requisite repairs and maintenance works as per the plaintiff's requests. According to the defendant, the service history negates the plaintiff's claim that defects were

discovered early in the life of the motor vehicle.

On the issue of defect the defendant cites *Blacks Law Dictionary (8th Edition)* which defines a manufacturing defect as

“an imperfection in a product that departs from its intended design even though all possible care was exercised in its assembly and marketing”

While admitting that Kenya lags behind in the development of jurisprudence and legal literature on the issue of manufacturing defects, the defendant, in its submissions relies on the testimonies of the witnesses and their understanding of the term. The defendant faults the opinion of Pw2 in this respect, on the basis that he did not prove his professional competence and skills through educational certificates, and also that he did not subject the vehicle to some technical or engineering test, before concluding that the same must have a manufacturing defect and then advising the plaintiff to push for a replacement either of the entire vehicle or the engine/power train. The defendant submits, therefore that since the plaintiff’s ***“expert”*** opinion is not based on any scientific criteria or skill, the existence of a manufacturing defect is not proved by evidence.

Relying on the submission that a manufacturing defect has not been proved, coupled with the fact that the defendant carried out the various repairs and maintenance procedures whenever the plaintiff delivered the vehicle for the purpose, the defendant has submitted that fraud on the part of the defendant in the sale transaction has also not been proved. As regards issue Nos. 4 and 5, the defendant has submitted, that, based on the manufacturers’ warranty, which does not provide for the replacement of the vehicle or the engine thereof, being limited to the “free repair and replacement of any part of the vehicle requiring repair or replacement as a result of manufacturing defect”, the plaintiff’s claims cannot be entertained.

Further, the defendant has submitted that the plaintiff has not proved, on the balance of probabilities, that the whole engine, clutch and pressure plate system, cooling and gear transmission system have a manufacturing defect as would entitle the plaintiff to a substitution of the motor vehicle or the replacement of the engine or power train with a new one. The defendant has submitted further that another reason why the said claims cannot be entertained is the fact that the warranty has since expired.

In relation to issue No. 6 the defendant has submitted that loss of user, being in the nature of special damages cannot be compensated as the quantum thereof has neither been pleaded nor proved as required by law. Also that the same are expressly excluded by the warranty.

As regards exemplary damages the defendant’s submissions is that the same are equally not available since the plaintiff has not demonstrated, by way of evidence, that the defendant is guilty of any wrongdoing or that the defendant’s alleged actions are aggravated by circumstances of violence, oppression, malice fraud or wanton and wicked conduct on the part of the defendant as to entitle the plaintiff to exemplary damages. The defendant submits further that the plaintiff, having been asked to collect his motor vehicle after the last repair but having refused to do so, (despite an extension of the warranty by a further 6 months) should be deemed to be the author of his loss. In conclusion, the defendant has submitted that the plaintiff has not proved his case on the balance of probabilities and the suit should be dismissed with costs to the defendant.

In his endeavour to prove that the subject vehicle must have had a manufacturing defect, both at the time it was sold to him as a brand new Land Rover vehicle and at the time it was last delivered to the defendant, the plaintiff has, in his submissions, placed emphasis on the merchantability of the vehicle. The submissions have highlighted the various problems the plaintiff encountered when handling the vehicle which are outlined therein as follows:-

(a) Exhaust leaks experienced two months after taking possession wherein the manifold was found loose and had to be tightened, followed by the welding of the exhaust pipe on 29th March 2005 and a complete replacement of the exhaust down pipe on 30th April 2005, and a repeat of

the same on 6th May 2005 at the plaintiffs cost.

(b) Overheating and loss of coolant with the possibility of water mixing with oil in the engine, causing the defendant to change the cylinder head gasket to avert a possible ceasure of the engine.

(c) The clutch and gear problems leading to the replacement of the clutch system upon discovery that the same was entirely worn out, at 51,757 Kilometres. The plaintiff had complained of the difficulty in engaging gears after taking delivery of the vehicle, again at 5000 Kilometres and was still complaining of the same the last time took the vehicle the defendant in November 2005.

(d) Dust entering the cabin through a faulty rear hutch rubber which was replaced during the 25000 Kilometres service, although the plaintiff had complained about it at 5000 Kilometres.

(e) Faulty widow regulator and motor assembly which was replaced at 45397 Kilometres.

The plaintiff has submitted that, the above problems having been encountered during the warranty period and the defendant having not denied but confirmed their existence, then, in view thereof, the plaintiff's and Pw2's conclusions as to the existence of a manufacturing defect must be deemed to be correct. The plaintiff holds the view that the failure by the defendant to call its General Manager, Mr. Diaz, and/or its various technicians and mechanics to testify, must be seen as a means of concealing the truth of the matter, which would come out if the said persons were examined on their futile attempts to address the various problems with the motor vehicle, particularly as regards the overheating and loss of coolant, the cause of which they were unable to identify or resolve to the plaintiff's satisfaction.

To support his case the plaintiff has cited the English authority of **ROGERS & ANOTHER -vs-PARISH (SCARBOROUGH) LTD & OTHERS (1987) 2 ALL ER 232**, the facts of which are very similar to his case and where on appeal, the court of appeal found for claimant, holding, inter alia as follows:

“ In considering whether a car was of merchantable quality, the court had to consider, not merely the buyer's purpose of driving the car from the one place to another, but of his doing so with the appropriate degree of comfort, ease of handling and pride in the vehicle's outward appearance. On the facts and bearing in mind the price paid for the car and its description as “new” and as a “Range Rover”, which would give rise to expectations above those relating to an ordinary family car, it could not be said that the car was of merchantable quality.....

The manufacturer's warranty did not require the buyer to accept defects of which he could otherwise complain, since the warranty was in addition to his rights and not a subtraction from them, so that the existence of the warranty did not indicate that the buyer was expecting, or ought reasonably to have been expecting, a vehicle of a lower standard than that which he would have been entitled to expect without the warranty...” (Underlining by this court).

The above case involved the sale of a £16,000 worth Range Rover with a manufacturers' warranty which provided that:-

“for 12 months after delivery parts requiring replacement or repair because of a manufacturing or material defect would be replaced or repaired free of charge”.

The Range Rover proved unsatisfactory after a few weeks of delivery and was replaced with one which although driveable, had faulty seals, and defects in

the engine, gearbox and body work. After several attempts to repair it, the problems with the engine and gearbox persisted. The buyer rejected it after driving it for 5500 Kilometres on the grounds that it was of unmerchantable quality, a claim which the lower trial court disallowed but which the English Court of

Appeal allowed.

Submitting on the misrepresentation and breach of warranty as to merchantability, the plaintiff cites yet another English authority, **DICK BENTLEY PRODUCTIONS LTD & ANOTHER -vs- HAROLD SMITH (MOTORS) LTD (1965) 2 ALL ER 65** wherein the plaintiff had bought a car stated by the defendants to have been ***“one of the nicest cars they had had in a long time”***, that it had done only 20,000 Kilometres since being refitted with a replacement engine and gear box. Upon taking delivery of the vehicle, the plaintiff started experiencing trouble with it, leading to a great deal of repair work being done on it during the guarantee period. Notwithstanding that the problems appear to have been resolved through repairs and the quality of the vehicle greatly improved, the plaintiff sued for breach of warranty and was awarded damages for the trouble the vehicle had given him.

The plaintiff herein submits that the defendant ought to have admitted that the vehicle sold to the plaintiff being new, the engine had defects which could not be rectified and consider it fit for the fitting of a new engine. He asks the court to find that in committing his military pension of Kshs.2 Million and borrowing Kshs.1.75 Million to buy a vehicle he expected that the car sold to him by the defendants was one that would befit his status and purpose, given the nature of work as a medical doctor and a surgeon for that matter. He submits, in this regard, that the car which was sold to him by the defendants was no car at all but one which occasioned him untold anxiety and fear as he was never sure whether it would get him from one point to another without malfunctioning. Having owned and used a Land Rover brand of vehicle for 15 years before the subject motor vehicle, the plaintiff submitted that he is able to distinguish between a reliable vehicle and a non reliable one. There being no fault attributed to the plaintiff in the handling of the vehicle such as poor driving or want in service, the plaintiff submits that the myriad of problems experienced with the subject vehicle can only be as a result of an inherent defect which the defendant refused to address as appropriate although admitting its existence but refusing to classify it as a manufacture defect.

The defendant did not file any submissions on the issue of merchantability. Its defence, in a nutshell, is that the plaintiff has not proved the existence of a manufacturing defect and that the defendant having carried out all the necessary repairs and replacement of parts and having also attended to the motor vehicle whenever the plaintiff complained she is absolved from any liability. The defendant's other position is that the claims made by the plaintiff were not covered by the manufacturer's warranty.

It is clear from the evidence tendered herein that no dispute exists as regards the fact that the vehicle sold to the plaintiff by the defendants though sold as new vehicle of a superior brand did exhibit several problems the nature of which would not be expected of a new vehicle of such superior brand. The defendants have not denied that the same was serviced by themselves throughout and the plaintiff is not said to have done any of the things limited or excluded under the warranty as would amount to a breach thereof.

By giving a 3 year or 100,000Kilometres warranty, the reasonable expectation was, in my view, that the buyer was guaranteed a comfortable run for three years, or an estimated 100,000 Kilometres trouble free driving, whereby only servicing and scheduled maintenance would be required. The subject motor vehicle experienced what can correctly be described as major mechanical problems at just over a half of the warranty mileage of 100,000 Kilometres.

The plaintiff had dutifully taken the vehicle to the defendants for service and repairs, always being promised that the various of the problems had been fixed for good. This however was not the case as is seen from the fact that the final delivery of the vehicle was under tow as it would not start. Prior to this, as was testified by the plaintiff, and supported by the contents of his letter of 19th June 2005 (both of which are not controverted), the plaintiff had been offered a trade-in by the General Manager, Mr. Diaz, who verbally told the plaintiff that the defendant was aware that the vehicle was defective.

The plaintiff's testimony that the General Manager intimated to him that the vehicle could be replaced with a new one and that he even gave him brochures to choose a preferred colour is also not controverted. The said Mr. Diaz was never called to testify for the defendant or to refute the plaintiffs'

claim.

The plaintiffs' witness admitted, under cross examination, that there was a possibility of water having entered the engine bore and mixing with oil, something the plaintiff says he had been told by one of the defendant's technicians. He also admitted the severity of such an eventuality, stating that if, with such occurrence, a driver ignored the warning signs appearing at the dash board the engine could cease. He admitted also that there was no evidence of misuse, neglect or inadequate maintenance that could be attributed to the plaintiff.

Even as they maintain that they have repaired the vehicle to bring it to its ultimate best, the defendant's witness testified that no formal or final report has even been compiled in respect of the repairs done, as to satisfy the plaintiff that the vehicle is as good as would be expected of a vehicle of its age, class and stature.

The defendant has not told the court why it concluded there was no need to raise the plaintiff's complaints with the manufacturer, yet its witness did admit that it was not quite able to establish, with certainty, the cause of the persistent overheating of the engine and loss of coolant, and having, also, admitted that the clutch, which was replaced at 51,757 kilometres should not have failed at that low mileage. It is curious that the defendant would wish to reinstate the expired warranty and extend it by a further 6 months should the plaintiff, collect the vehicle from its workshop and use it.

Considering the evidence tendered herein, it is quite clear that the plaintiff got a raw deal from the defendants who not only misrepresented but callously and consistently attempted to mislead him to believe that the several problems he encountered with the vehicle during the warranty period were expected of a Land Rover Freelander model and that the repairs and replacement of the various parts would cure the problems. The defendant seems happy to off load the problems on the plaintiff now that the warranty period has expired, despite the fact that the vehicle has not made the 100,000Kms warranty mileage.

The subject motor vehicle, which appears to have been more often in the defendant's workshop than it would have been giving the plaintiff value for money and the sheer joy of ownership appears to be more like a piece of "**patch work**" than the sleek top of the range Land Rover Freelander he expected to own. There is doubt that it would even have any resale value at all, despite its low mileage.

I am persuaded, on the basis of the evidence adduced and the submissions filed herein that the plaintiff's claim against the defendants is reasonable, justifiable and well founded. Considering the several attempts the defendant has made to resolve the plaintiff's complaints, coupled with the fact that the no report was produced before court by the defendants to confirm the state of the vehicle at the time they asked the plaintiff to remove it from their workshop, the plaintiff has no guarantee that the issues with the vehicle have now been conclusively resolved or that no new problems shall present themselves in future. As a prudent man, the plaintiff is aware that once the defendant releases the vehicle to him he is on his own.

The defendant has not rebutted the plaintiff's evidence that some of its personnel did intimate to him that the car may have some inherent manufacturing defect and that it was possible to replace it. Whether such replacement was to be through a trade in or as a free replacement in exchange of the old one is, in my view, irrelevant.

The admission by the defendant's witness (Dw1) of the possibility of water entering the bore of the engine, a problem that the defendant's technical team could not resolve supports the plaintiffs claim.

The plaintiff complied with all his obligations (as owner) under the warranty and was meticulous in having the vehicle serviced and maintained by the defendants and appropriate records kept in his service port folio as required. Both parties relied on the said records to support their adverse positions.

The proposal that the plaintiff is out to make a profit from the circumstances is not supported by the facts. He did not strike me as a person out to make a kill but someone who understands his rights as a

consumer and who has dared challenge the status quo, whereby foreign manufacturers would choose to apply different standards in the developing world from those applied at home, as demonstrated by the authorities cited by the plaintiffs' advocate.

I am of the view that in this era of globalization, consumer rights must be enforced uniformly irrespective of the market. The warranty given by Land Rover to the plaintiff, being similar in all material respects to the ones given to its U.K. customers, I am of the view that equal treatment ought to have been accorded to him by the defendants as the marketers of Land Rover, as was done in the case of the U.K. customers represented in the plaintiff's authorities.

Having said the above, I find that the plaintiff has, on the balance of probabilities proved his case against the defendants. I find their actions not to have absolved them from liability to compensate him for his loss, in terms of money, opportunity and time spent over the subject motor vehicle and the suit herein. In my view, such compensation can only be in the form of a new motor vehicle. Accordingly, I grant prayer (a) of the plaint dated 11th December 2006.

I accept the defendant's submission that loss of use must be specifically pleaded, with material particulars being given, and strictly proved. This not being the case prayer (c) is denied. The circumstances justify the award of exemplary damages. However, I am of the view that the award under prayer (a) will adequately compensate the plaintiff, who will also have the costs of the suit and interest thereof at court rates.

DATED, SIGNED and DELVIERED at NAIROBI this 23rd DAY OF April 2012.

M.G. MUGO
JUDGE

Mr. Nderitu for plaintiff

Mr. Kefa Ombati for defendant.