



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 35 of 2012

GIDEON MUTISO MUTUA.....PLAINTIFF

VERSUS

MEGA WEALTH INTERNATIONAL LIMITED.....DEFENDANT

JUDGEMENT

The Plaintiff in this suit, **Gideon Mutiso Mutua**, is seeking for judgement against the defendant in the sum of Kshs. 1,041,000.00 plus interest at the rate of 15% per annum from 20th October 2011 until date of full payment; General and Aggravated Damages for breach of contract as well as costs of the suit and interests.

The plaintiff's claim is based on a contract dated 22nd October 2011 by which the defendant agreed to sell to the plaintiff a motor vehicle make Toyota Allion with specifications stipulated in the contract which vehicle the defendant represented in the media had been shipped and was due to arrive in the country on 7th November 2011. Pursuant to the said agreement the plaintiff paid the defendant the full purchase price including the cost of shipping in the total sum of Kshs. 1,013,000.00. On 26th November 2011, the defendant informed the plaintiff to take out an insurance cover since the said vehicle had arrived. On conducting a search with the office of the Registrar of Motor Vehicles the plaintiff discovered that the vehicle that was delivered was manufactured in the year 2004 which he refused to accept as it was not as per the specifications agreed upon. A second car that was delivered by the defendant was similarly a 2004 make. Following this the parties entered into another written contract dated 5th December 2011 by which the plaintiff undertook to deliver the vehicle by 20th December 2011 in default of which the plaintiff would be provided with an alternative vehicle or daily car hire sum agreed at Kshs. 2,000.00. The defendant, however, neither delivered the vehicle nor provided the alternative transport. As a result of the aforesaid the plaintiff and his family were subjected to great hardship and inconveniences and therefore claims the said Kshs. 1,013,000.00 as well as Kshs. 28,000.00 being the agreed car hire charges for 14 days at the aforesaid rate of Kshs. 2,000.00. According to the plaintiff instead of being remorseful the defendant kept on giving him empty promises while continuing to advertise its business to unsuspecting car buyers.

Though served with the plaint and summons to enter appearance the defendant failed to appear as a result of which the plaintiff requested for judgement which request the Deputy Registrar acceded to and on 14th March 2012 judgement was duly entered in the sum of Kshs. 1,041,000.00. The defendant made an application dated 23rd March 2012 seeking leave to settle the decretal sum by way of monthly instalments of Kshs. 100,000.00. Attempts to prosecute the said application seems to have hit a dead end when the court on 27th March 2012 declined to grant an order for stay terming such indulgence an affront to justice. It is important to note that in the affidavit seeking to pay the decretal sum by instalments the sum claimed was not disputed by the defendant.

On 2nd July 2012 the matter came up for assessment of damages when the plaintiff gave evidence. In his evidence he adopted the contents of his written statement which was filed in Court on 1st February 2012 and produced as exhibit 1(a) to (e) the documents comprised in the list of documents filed on the same day. In his said statement the plaintiff stated that having spotted an advertisement placed by the defendant in the Daily Nation Newspaper and being interested in replacing their car, he in company of his wife contacted the defendant and an agreement was arrived at for the sale of a Toyota Allion, Pearl in Colour manufactured in the year 2005. The agreement was that the vehicle would be arriving in the country on 20th November 2011. It was made clear to the defendant, through its agents a **Mr Mwangi** and one **Esther**, that the plaintiff and his wife being both medical practitioners were often called upon at any time to save lives hence the need for the car was critical. Further as the plaintiff's wife was clearly expectant at the time, time was of the essence and 20th November 2011 was agreed as the latest date of delivery as the plaintiff's wife was also due to graduate on 2nd December 2011. Initial down payment of Kshs. 500,000.00 was paid from the proceeds of the sale of the plaintiff's existing vehicle with the balance being payable on arrival of the vehicle. When the defendant on 7th November 2011 confirmed that the vehicle had arrived the balance of the purchase price being Kshs. 513,000.00 was duly paid. After some delay, the defendant informed the plaintiff that the vehicle had arrived bearing Registration No. KBQ 068H and the plaintiff was required to facilitate the insurance thereof. This the plaintiff did but on conducting a search discovered that contrary to the terms of the agreement the vehicle in question was a 2004 Toyota Premio. A subsequent vehicle that was availed was similarly a 2004 Toyota Allion which the plaintiff rejected leading to the agreement for provision of transport or payment of Kshs. 2,000.00 per day for car hire alluded to above. As indicated above the defendant did not honour its part of the agreement to provide transport or car hire either.

As a result of the aforesaid the plaintiff was unable to attend his wife's graduation and his wife was subjected to trauma and anguish and they were forced to hire transport to clinic visits and attendances. The plaintiff and his family were therefore greatly inconvenienced as their movements were restricted. Further the patients' lives were also placed at risk due to their inability to attend to them in good time. The defendant, according to the plaintiff, in the meantime comfortably continued with its business unperturbed. Todate the defendant has not made good its several promises to deliver the vehicle.

According to the plaintiff, in assessing the amount payable in the form of general damages, the court should apply the agreed sum of Kshs. 2,000.00 per day for the period of 262 days which comes to Kshs. 524,000.00. The plaintiff further claims the aforesaid sum with interest at Bank rate of 15%.

At the close of the plaintiff's case the plaintiff filed written submissions. Default Judgement having been entered, it is submitted the only pending issue is the determination of general damages with interests at the rate of 15% per annum from 20th October 2011 till date of full payment. Relying on Busia HCCC No. 19 of 1999 – Chisanthus Onyain vs. Standard Chartered Bank and Mombasa High Court Civil Case No. 155 of 2006 – James Njogu Muogi vs. Gateway Insurance Co. Ltd., it is submitted the general damages are awardable for breach of contract where the plaintiff has been caused financial embarrassment and inconvenience. Based on the said decisions, it is submitted that an award of Kshs. 1,500,000.00 should be awarded under that head guided by the agreed figure of Kshs. 2,000.00 per day as well as the defendant's conduct of proceeding in the same business at the expense of the unsuspecting public. Taking into account the defendant's conduct the Court is urged to award Kshs. 2,000,000.00 as general and aggravated damages.

Default Judgement having been entered I agree with the plaintiff that the only issue that falls for determination is whether the plaintiff is entitled to general and aggravated damages and if so the quantum.

The principle guiding the award of general damages for breach of contract was restated in Provincial Insurance Company of East Africa Ltd. vs. Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289 in which the Court of appeal citing Dharamshi vs. Karsan [1974] EA 41, held that it is quite clear that no general damages may be granted for breach of contract (emphasis mine). In my view the Court of Appeal did not hold that general damages are not awardable for breach of contract.

That notwithstanding the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract. It may however exceptionally include compensation for physical discomfort or inconvenience or loss of time. Otherwise the damages which are recoverable in an action for breach of contract are either nominal damages, that is to say, where a party has proved breach of contract but not proved that he sustained any actual loss consequent to the breach; or substantial damages, that is to say, where a party has not only proved a breach of contract but has also proved that he sustained some actual loss as a result of the breach. See Hadley vs. Baxendale 156 ER 145; Addis vs. Gramophone Company (1990) AC 488; Bailey vs. Bullock (1950) 2 All ER 1167; Sutton and Shammon on Contracts, 7th Ed Page 399.

Bosire, J (as he then was) in Ramesh Manek vs. Kenya Posts & Telecommunications Nairobi HCCC No. 862 of 1993 expressed himself as follows:

“The plaintiff was clearly exposed to all annoyance, inconveniences and even expense including expense relating to this litigation to ensure restoration of his telephone lines. No doubt what the defendant did amounted to a breach of contract. A breach of contract of this nature must of necessity be injurious to a person in his trade or professional calling. Consequently damage must be assessed bearing that in mind. But the plaintiff's lines were restored after a short time. The damages are not to be paid merely because of the annoyance the plaintiff suffered but for the inconvenience arising from the breach of contract by the defendant of the several agreements between the parties. It must be remembered that not all the telephone lines were disconnected but only two, which the plaintiff stated were the main lines and which appeared on his letterheads. The defendant's obstinacy in refusing to investigate the plaintiff's complaints with promptitude is a ground for punitive damages. Punitive damages are in a way expression of the court's displeasure on the conduct of a litigant which is either wrongful, oppressive or illegal and which the party concerned persistently continues to engage in. In this case the defendant acted through its servants and in doing so intended to gain advantage”.

The learned Judge went ahead to award Kshs 200,000/= in general damages and Kshs. 50,000.00 as exemplary or punitive damages.

It is also trite that the parties to a contract may seek in their contract to make special provision for exemplary damages payable on breach and the plaintiff may seek to recover or the defendant to restrict the award to the agreed sum, rather than the actual loss. This, the parties did when they agreed on Kshs 2,000/= per day for 14 days.

In the instant case, the defendant took the plaintiff's money in return for a motor vehicle whose specifications were agreed between the parties. Twice, the defendant tried to trick the plaintiff into taking delivery of a motor vehicle other than the agreed vehicle. The defendant was made aware of the urgency with which the plaintiff needed the vehicle yet it did not make any serious attempts to fulfil its part of the bargain. Instead it went on with its business unperturbed. It made promises which it broke at will. Its word was no longer worth the paper it was written on. Yet it continued plying its trade without any qualms. It neither delivered the vehicle nor refunded the money it had received which money it presumably ploughed into its business. It consequently exposed the plaintiff and the plaintiff's family to a great deal of inconveniences. When its attempts to convince the Court to allow it refund the sum at its own convenience failed, it conveniently disappeared from the scene. One would have expected it, as a mark of good faith to pay whatever it had proposed to pay. The conduct of the defendant, in my view, calls for an award of aggravated damages over and above the refund to the plaintiff of the sum it received from the plaintiff. Just like Ojwang', J (as he then was) in James Njogu Muogi vs. Gateway Insurance Co. Ltd (supra) I am convinced that a sum of Kshs. 250,000.00 damages for the inconvenience the defendant caused to the plaintiff is adequate compensation. The said sum will accrue interest at Court rates from the date of this judgement till payment in full. For avoidance of doubt the default judgement already entered will accrue interest at court rate from the date of filing suit till payment in full since there is no evidence that the parties agreed that the same would accrue interest any other rate. The defendant will also bear the costs of the suit.

Those are the orders of the Court.

Judgment read, signed and delivered in court this 30th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of Mrs. Kaginga for the plaintiff