REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 48 OF 2007

RTD COL JOHNSON KIRIRA WACHIRA ..……………………… APPELLANT

VERSUS

CMC MOTORS GROUP LIMITED ..…….....…………………….. RESPONDENT

(Being an appeal for the judgment of Hon. R. Nyakundi, Chief Magistrate Nyeri delivered

on the 8th March 2006 in Nyeri CMCC No. 46 of 2004)

JUDGMENT

The appellants claim in the lower court was for an order of mandatory injunction against the defendant compelling the defendant to repair vehicle registration No. KAL 183C. Further, the appellant sought payment of damages for loss of user of that Motor vehicle. The appellant pleaded in his plaint that on 5th June 2003 he took his said motor vehicle to the defendant with express instruction for the defendant to tune up the engine further that the defendant carried out the engine tune-up but the same had not been properly done. As a consequence it was alleged that the vehicle lost power. The vehicle was returned to the defendant on 6th June and it is alleged in the plaint that the same was not properly tuned and that was after the appellant had purchased spark plug and cables. On 7th June the vehicle was returned to the defendant with the same complaint. The vehicle remained in the garage according to the plaint on 7, 8, and 9th June 2003. The appellant averred that on collecting it on 10th June the vehicle stalled. It is further averred in the plaint that the respondent required the vehicle to be taken to Nairobi for further repairs. The appellant alleges that the respondent failed to carry out proper tuning of the engine. The appellant alleges to have suffered damages for loss of user when he had to hire another vehicle for Kshs.3,500/- per day. In his defence the respondent denied the appellants claim. This case was heard at the lower court and the learned magistrate in his considered judgment dismissed the plaintiffs claim. That dismissal aggrieved the appellant.

The appellant has, therefore, preferred this appeal. He has brought before court the following grounds of appeal:-

1. *That the learned trial magistrate erred in law and fact in arriving at a decision not supported by evidence on record.*

2. *That the learned trial magistrate erred in law on his interpretation and application of principle of mitigation of loss.*

3. *That the learned trial magistrate erred in law and fact in failing to take into account defendant's admission of fault as per evidence on record.*

4. That the learned trial magistrate erred in law and fact in failing to find that the respondents were negligent and failed to exercise degree of skill required in its line of business.

5. That the learned trial magistrate erred in law and fact in failing to assess damages for loss of user.

6. That the learned trial magistrate erred in law on principles applicable to granting a mandatory injunction.

7. That the learned trial magistrate's judgment was wrong in law and not consistent with evidence on record.

The appellant in evidence supported his plaint. He narrated how he first took the vehicle to the appellant on 5th June 2003. He required the engine to be tuned up. On picking the vehicle later he found that it was losing power. On the following day, he returned it to the respondent and again it stalled. This time the respondent's manager requested him to purchase a fuel filter, spark plugs and cables which were installed. Again the vehicle did not start. The vehicle was left with the respondent in the workshop and stayed there for 1 month. It is after 4 months that he instructed his lawyer to make demand. The vehicle was for his private and personal errands. He said that he was also demanding for loss of user of Kshs.3,500/-. He thereafter stated as follows: "*The figures are pegged at the car hire rates whether I needed to move around I had to hire a vehicle for use" (sic).* He said that he had contracted with Eden rent a car company who gave him the brochure which he exhibited before court. On being cross examined by the respondent counsel he stated that when he went for the engine tune up the vehicle did not have other defect. He had had the vehicle since 1997. He confirmed that when he went to the respondent's workshop on 11th June 2003 he signed another job card. In respect for loss of user he respondent thus to the cross examination, "*I have other vehicles but the subject motor vehicle is the one I used to move around."* The appellant called one witness who said that he operates a garage within Nanyuki. He previously worked for CMC Limited as a Service Shop Advisor. That any explanation given by a client is transferred into the job card. When a vehicle requires tuning, the first thing that ought to be done according to him is to check the fuel system, current flow and injunction fuel system. On being cross examined he said that he had no certificate to support his training. The defence evidence was given by the Service Manager of the Respondent Nanyuki branch. He said that he is a qualified national grade 1 in mechanic. He is a holder of a certificate on this area which was given by CMC he produced it before court. He was familiar with the vehicle the subject of this case. The appellant on attending their garage instructed them to tune up the vehicle. He said that a tune up is done when the vehicle is having a misfire. Then later stated that on checking the vehicle they realized that the fuel flow had a problem. The opened the fuel tank and showed the appellant the residue from the tubes. The appellant was informed that there was need to work on the vehicle tank and the fuel distribution block. Such work could only be carried out in their |Nairobi branch. This witness talked to his seniors in Nairobi and arrangements were being made to have the vehicle taken to Nairobi when the appellant filed the case in the lower court. On being cross examined he stated that the vehicle needed high tension cables which were ordered from Nairobi. The local ones were causing a misfire. He said according to him the vehicles cables had a problem and when the vehicle returned to the garage it also had the fuel flow problem. In his view, the engine cannot be tuned if the fuel flow has a problem. In re-examination he stated thus, "*Tune and fuel flow systems are related. If the fuel is not flowing the motor vehicle cannot be tuned up. The distribution block if not working there can be no fuel flow. The vehicle came to the workshop because it had a problem."* The duty of the first appellant court is to reconsider and re-evaluate the evidence bearing in mind that it has not had the opportunity to see or hear the witnesses give evidence. What seems to be clear is that the appellant when he attended the respondents garage the vehicle had a problem. The appellant did not state what problem it had but proceeded to request the respondent to carry out an engine tune up. The respondent in evidence state that the fuel flow had a problem and that an engine tune up cannot be carried out without rectifying the fuel flow. Having reconsidered the evidence before court I find that I am in agreement with the finding of the learned magistrate. In his judgement he had the following to say;- "*The plaintiff has failed to put before court evidence that would enable the court to order a Mandatory injunction for repairs. I am also unable to make a finding from the evidence that the defendant has violated any rights of the plaintiff or the action by the defendant is wantonly illegally acted*". The magistrate further stated in the judgment that what the plaintiff needed to do was to pay for

the vehicle to undergo further diagnosis at the Nairobi workshop. I am in agreement with that finding that the plaintiff did not prove any failure on the part of the respondent in the manner in which the vehicle was repaired.

What would have assisted the appellant would have been expert evidence of one who had examined the vehicle and had indeed found that the workmanship of the respondent was negligent. The burden was upon the appellant to prove negligence on the part of the respondent. See section 107 of the law of the evidence act. The issue of whether or not the appellant should have mitigated his loss was raised by the learned magistrate. The duty is upon the appellant to take all reasonable steps to mitigate the loss he sustained. The burden is however upon the respondent to prove that the appellant had not been mitigated. In this regard, on the appellants claim for loss of user it is pertinent to note that the appellant stated that he had more than one car. He failed to explain why having more than one car it was necessary to hire another one. On that issue I am also in agreement with the finding of the lower court that the appellant needed to strictly prove the loss of user which is in the nature of special damages. The appellant merely produced before court a brochure given to him by a car hire company. There is no evidence before court that he actually did hire a vehicle. The court of appeal in considering the issue of prove of special damages in the case of Jivanji vs. Sanyo Electrical Company Limited (2003) KLR said as follows:

"***This court in CA 192/92*** *Coast Bus Service Ltd v Sisco E Murunga Ndanyi & 2 others* ***(UR) has this to say:-***

"***It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of*** *Kampala City Council v Nakaye* ***[1972] EA 446,*** *Ouma v Nairobi City Council* ***[1976] KLR 297 and the latest decision of this Court on this point which appears to be*** *Eldama Ravine Distributors Ltd and another v Samson Kipruto Chebon,* ***Civil Appeal No. 22 of 1991 (unreported). In the latest case, Cockar, JA who dealt with the issue of special damages said in his judgment:-***

"***It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded. In*** *Ouma v Nairobi City Council* ***[1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J quoted in support the following passage from Bowen, LJ's judgment on pages 532, 533 in*** *Ratcliffe v Evans* ***(1892) 2 QB 524, an English leading case of pleading and proof of damages;***

The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading and proof of damages, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

The plaintiffs claim both for injunction and for damages fails. Before ending this ruling I need to consider the issue raised by the appellant that because the lower court judgment was delayed for 4 months which was contrary to Order XX R 1 that the judgment was therefore a nullity. That order provides:-

"***In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates".***

That rule as can be seen, does not provide default consequence. In my view failure to abide by its provisions is a mere irregularity which does not go to the root of the judgment. Accordingly the appellant argument is rejected. In the end the judgment of the court is that this appeal is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 16th day of October 2008.

MARY KASANGO

JUDGE