

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.229 OF 1993

ANDERSON NGETHE KAHIO.....PLAINTIFF

VERSUS

CANNON ASSURANCE CO. LTD.....DEFENDANT

J U D G M E N T

The Plaintiff ANDERSON NGETHE KAHIO has sued CANNON ASSURANCE CO. LTD for breach of insurance contract. He claims damages for loss he suffered when his motor vehicles were attached in satisfaction of judgments in Meru HCCC No.72/89 and Meru P.M.'S Court Case No.374/90.

The Plaintiff, Kahio argued that he had insured his vehicle registration No.KXD 801 from third party risks with the defendant company, CANNON. That following an accident involving Kahio's vehicle and a third party he was sued in the two suits at Meru Law Courts. Judgment was passed against him in both cases at 139,293/- in Principal Magistrate's Court Case No.374/90 and in HCCC No.72/89 in sum of shs.127,500/45. It was Kahio's contention that due to Cannon's delay in settling the two judgments and contrary to the Insurance policy he held with them attachments were carried out against him. In case No.72/89, Kahio said that his vehicle Registration No. KYN 796 was attached and eventually sold. He also said his other vehicle KAB 815Z was also attached in same case and held by the auctioneer between 14th February, 1992 and 29th February, 1992. He claimed that he was unable to utilize his said vehicle in transportation business in which it was used during the 15 days it was detained. He said he earned 8200/- per trip per vehicle and in a month a lorry could make 17 trips. He produced a heap of documents Plaintiff exhibit 3 to show payments he received for various vehicles he owned for transport business rendered to National Cereals and Produce Board (NCPB). Kahio told court that in respect of the case 374/90 his lorry registration No.KYN 696 was attached by auctioneers on 6.9.92 and released on 2/12/92.He produced the inventory and warrant of attachment in its respect as Plaintiff Exhibit 4(a) & (b). The vehicle was sold by consent order made in the court by both parties advocates entered on 14/9/92, its sale cancelled. He claims that the vehicle was returned to him after 86 days. He said he used said vehicle for transport to various companies including one produced as Plaintiff Exhibit 3. He claimed he earned 8200/- per trip from said vehicle and could have earned 450,000/- from said vehicle. He claims said sum including repair costs on said vehicle amounting to Kshs.68890/- and 15000/- for cost of replacing spare wheel. He also claims 2100/- salaries to his employees and cost of trips to Meru and telephone calls to the Cannon assurance in respect of said cases.

The defence called one witness, Peter Nyamu whose evidence was to the effect that the said Kahio was indeed their insured. That accident involving Kahio's insured vehicle KXD 801 was indeed reported to them. He said that Cannon was not aware of the attachment of the vehicle KAB 815L and neither was any document showing the attachment took place was ever sent to them. On the vehicle KYN 696 he said Cannon was aware of its attachment and subsequent sale. He said that through their advocates velji, Devji and Bakrania the sale was set aside and the plaintiff's vehicle returned to him. He then produced a document Defence Exhibit 1, in which the plaintiff Kahio signed acknowledging receipt of the said vehicle. He said that Kahio never wrote to Cannon making any claims for damage to the said vehicle and neither did he send any assessment report on it.

I have considered the written submissions by both counsels. There is no dispute that the defendant had contracted with the plaintiff to indemnifying him from third party risks involving the plaintiff's vehicle registration number KXD 801. It is not disputed that the said vehicle was involved in an accident with a third party. The defendant has conceded that the plaintiff was sued in Meru PMCC Case No.374/90 but

denies knowledge of the HCCC No. 72/89. The defendant concedes that plaintiff's motor vehicle registration number KYN 696 was attached.

In respect of the third party claim and released 86 days later as per the warrants of attachment Plaintiff Exhibit 4(a) & (b). It challenges loss allegedly suffered and repair costs and other expenses claimed. The defendant has denied alleged attachment of the plaintiff's motor vehicle KYN 796 and KAB 815L.

I will first decide whether the plaintiff has proved on a balance of probabilities that there was any HCCC No.72/89 arising out of the accident involving his vehicle registration number KXD 801 insured by the defendant and third parties. The plaintiff has produced exhibit 2, the Judgment of the said case. In para 1 of the Judgment, the learned Judge, Oguk, as he then was, stated that the 2nd defendant owned motor vehicle registration number KWP 353 Peugeot in which the plaintiff in the case was passenger. He then states it was involved in an accident with another vehicle whose registration was quoted as KYO 801. It was not stated who the owner was. In the circumstances, I am unable to find that the said proceedings related to the plaintiff's vehicle registration number KXD 801 which is the subject matter of this claim, as invited by the plaintiff's advocate. Even if I were to believe the case had any relationship with this claim, the plaintiff has not produced any documents whatsoever tending to show that the plaintiff's vehicles registration number KYN 796 or KAB 815L were never attached to

recover any claims arising out of a third party risk for which the plaintiff had insured his said vehicle. In that regard, as far as para 10(a) and prayer (c) are concerned the claim is not sustainable.

As stated earlier, the defendant conceded that the plaintiff's vehicle registration number KYN 696 was attached and detained in Meru PMCC 344/1990. It has however denied that any loss was suffered by the plaintiff and he was put to strict proof.

The plaintiff is claiming loss of 410,800/- for 2nd attachment apparently of vehicle KYN 696. The basis of the claim, Plaintiff said, was that he earned 8200/- per trip per vehicle and that each of his of his vehicles made 17 trips in a month. He produced a bundle of documents in support of the claim. Plaintiff's Exhibit 3 were payment vouchers from National Cereals and Produce Board (NCPB) and others from Kenya Co-operative. The plaintiff admitted in cross-examination by the defence counsel that none of the documents makes any reference to the vehicle KYN 696 or any other vehicle for that matter. Only one of the documents miscellaneous receipt serial No.047433 issued to the plaintiff by NCPB quotes registration numbers of plaintiff's lorries including the one in issue. It is dated 21.01.92 and is for payment of 300/- being lorry registration fees. It is irrelevant to this case. The plaintiff had claimed that the payment vouchers were for payments made to him by the two institutions for the use of his various lorries including the one in issue. I am not satisfied that these documents prove on a balance of probabilities that the plaintiff earned any income from his lorry KYN 696. It does not specifically prove that any specific amount of money was earned by the plaintiff in respect of the vehicle in issue. It is trite law that a claim for loss of earning or user is a special damages claim and it not only must be specifically pleaded but also proved. The claim is not proved and therefore fails. The plaintiff has further claimed that during the period that his vehicle KYN 696 was held due to the defendant's default, the vehicle was damaged. That upon release to him, he took it for repairs which he had specified in the plaint. He now claims a total of 68890/- for said repairs and 15000/- for cost of replacing a spare wheel lost during its attachment. Apart from word of mouth, the plaintiff has produced no documents whatsoever either to show what damage the vehicle suffered in the hands of auctioneers or what repairs were carried out. He did not even produce any receipts for any purchase of spares or spare parts. Again claim for refund of repair costs is a special damages claim which had to be specifically proved since no such proof was brought.

I find it unnecessary to delve into the submission by the defence that the claims were barred by a clause in the Insurance Policy. That the plaintiff attempted to prove the claim, the court would have considered whether the defence submission was merited. As it were it is now not necessary to go into it. The claim also fails. In any event defence exhibit 1 is to prove vehicle was in good order when the plaintiff received it back. The other claims by the plaintiff for telephone expenses incurred by him as he called Cannon Assurance Nairobi over the attachment and travel expenses to Meru and Nyeri Courts and expenses for his driver and turn-boy were all not specifically as pleaded. I find they too cannot succeed.

As for general damages claimed, I do not see in which regard such a claim can be awarded. Special damages are only damages recoverable in a claim for breach of contract as in this case. The claim also fails for lack of any merit. The upshot of this Judgment is that the plaintiff's case fails in total and is dismissed with no order as to costs. Let each party bear their own costs.

Dated at Nakuru this 6th day of March, 2004.

JESSIE LESIIT

JUDGE