



IN THE COURT OF APPEAL

AT NAKURU

(Coram: Tunoi, Owuor & Keiwua JJ A)

CIVIL APPEAL NO 264 OF 1999

AFRICAN HIGHLAND PRODUCE LIMITED.....APPELLANT

VERSUS

JOHN KISORIO..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya

at Eldoret (Lady Justice Nambuye) dated 4th October, 1999 in

HCCC No 312 of 1997)

JUDGMENT

The success or otherwise of this appeal is grounded on as to whether the learned judge, Nambuye J erred in failing to address herself correctly on the law regarding mitigation of losses by the respondent, the plaintiff in the suit.

The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See *Halsbury's Laws of England* Vol 11, Page 289, 3rd Edn 1955

The plaintiff is allegedly a wealthy businessman operating in Eldoret and Nairobi. During the material time he owned a car a BMW registration number KAG 425L. It was mainly used to take his young children to school in Nairobi. On 13th April, 1997, it was involved in an accident near Gilgil Toll Station along Nakuru - Nairobi highway as a consequence of which the car was extensively damaged. The defendant, now the appellant in the appeal, admitted total liability for the tort, the accident occasioned by the negligent driving of the driver of its motor vehicle registration number KAH 207B. Thus, the only task that fell upon the learned judge to grapple with during the trial was to assess damages.

As a result of the accident, the plaintiff hired for the use of his children a massive luxurious Land Cruiser 3200 cc for which he paid Shs 6,800/= per day for six months with effect from April, 1997. By the time he retrieved his car from the garage in November, 1997, he had paid a total sum of Kshs 1,561,600/= for hire charges.

The plaintiff testified and the learned judge accepted that full and complete repairs on his BMW could have been done within 21 days or less. The explanation given by the plaintiff as to why he did not pay and collect within a reasonable period for the repair of his car was that the defendant used to give him a variety of promises to pay. This went on from April to November, 1997, but, all in vain. The learned judge finally held:

"The prime factor is that he, plaintiff, has a duty to mitigate loss if it is within his means to do so. Herein the plaintiff had the means to do so but did not act prudently. The total claim under this head is Kshs1,432,000.00 and in the Court's opinion the same should be slashed by half in view of what I have said above and so I allow Kshs 716,000.00 under this heading".

It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. Being a man of considerable means he could have within 21 days, repaired his BMW car instead of incurring unnecessarily heavy hire charges. He did not act prudently. A prudent man would certainly not have acted in the way the plaintiff did. He acted, in our view, unreasonably. The learned judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff is entitled only to the loss of user for 21 days which period was necessary to effect in full all repairs on the BMW car. There was no justification whatsoever in law to allow him to enjoy and to harvest from an illegal territory.

For the foregoing reasons we allow the appeal and set aside the sum of Shs 716,000/= awarded for loss of user. We substitute therefor a sum of Shs 142,800/= (Shs 6,800/= per day for 21 days) with interest at court rates from the date of judgment until payment in full. The decree of the High Court must be adjusted accordingly. The defendant shall have 2/3 of the costs of the appeal. These are our orders.

Dated and delivered at Nakuru this 28th day of September, 2001

P.K.TUNOI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

M.M.O. KEIWUA

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JUDGE OF APPEAL