THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0012-2003

D.S.S. MOTORS LIMITED :::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

AFRI TOURS AND TRAVELS LIMITED :::::::::::::: DEFENDANT

AND

AMIN TEJANI :::::::::::::::::::::::::::::::::::: THIRD PARTY

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The plaintiff's claim against the defendant is for damages for breach of contract and negligence, and costs of the suit. From the evidence, by a car hire agreement between the plaintiff and the defendant, the defendant hired the plaintiff's vehicle on a self-drive basis. The hire period was three days. It was not returned within the hire period. Instead the vehicle was involved in an accident as it was being returned to the plaintiff.

At the hearing, the parties agreed that:

1. There was an agreement of hire between the defendant and the plaintiff.

2. The agreed hire value was Shs.100,000- per day.

3. The period of hire was three (3) days.

4. The motor vehicle was involved in an accident while under the control of a third party.

5. The defendant carried out some repairs on the vehicle.

The following issues are for determination:

1. Whether the defendant breached the contract of hire of the motor vehicle.

2. Whether the car hire agreement limited the defendant's liability, in case of an accident.

3. Whether the defendant is liable to the plaintiff for any loss suffered.

4. Whether the third party is liable to indemnify the defendant wholly or in part in the event of any liability to the plaintiff.

5. Remedies.

As stated above already, the defence case is that there was an accident; that it was caused by the negligence of the third party; and that the defendant's wish is to be indemnified for any liability arising out of negligence.

When the matter came up for directions under 0.1 r. 18 of the Civil Procedure Rules, the parties agreed that the issue of liability of the third party, and the quantum of damages, if any, be determined at the trial of the suit. The said third party could not appear as a witness because of his ill-health. He was out of the country by the time the case came up for hearing.

Counsel:

Mr. Mugogo Edward for the plaintiff.

Mr. Siraj Ali for the defendant.

Mr. Kiwuwa John for the Third Party.

ISSUE NO. 1: Whether the defendant breached the contract of hire of the motor vehicle.

From the evidence, by a car hire agreement between the plaintiff and the defendant dated 26/7/2002 the defendant hired the plaintiff's motor vehicle Reg. No. UAA 465Y Toyota Hilux on a self drive basis for a period of three days at a rate of Shs.100,000- per day. The effective date of hire was 26/7/2002. It was returnable on 28/7/2002. The car got involved in an accident while still in the possession of the defendant, in the process of being returned to the plaintiff.

It is the defendant's contention that its failure to return the motor vehicle at the end of the stipulated 3 days cannot be construed as a breach of contract because the accident that took place ensured that the motor vehicle had to be towed from the scene of the accident and could not be delivered to the plaintiff on the due date. The defendant in effect submits that the accident had the effect of frustrating the contract from that point on wards so that any further performance of the contract by the defendant became impossible.

The learned editor of Osborn's Concise Law Dictionary, 9th Edn at p. 179 states:

> *"Under the doctrine of frustration a contract may be discharged if, after its formation events occur making its performance impossible, illegal or radically different from that which was contemplated at the time it was entered into."*

I take the view that not all supervening events will operate to discharge a contract. And certainly in order to frustrate a contract, there must always be something more than mere inconvenience.

In the instant case, it is noteworthy that the vehicle was not completely destroyed or even damaged extensively. It was merely damaged. It was repairable and it was indeed repaired. The defendant through its servant

Malik had it driven to Sambiya River Lodge in Murchison Falls Park. When it was due for return to the owner in Kampala he entrusted its management and control to one Mr. Tejani who on the way caused the accident. In the contract document, some damage had been anticipated and provided for. The repairs which could easily have been effected were marred by arguments between Mr. Malik and Mr. Tejani as to who of them should repair it.

It is the evidence of Malik that Tejani was negligent and that without such negligence, the accident would not have occurred. It is on the basis of this that he has impleaded Mr. Tejani as a Third Party. I will shortly be determining Mr. Tejani's alleged liability for the accident. However, as between Malik and Tejani, there is evidence that Tejani was not a joy rider in the vehicle in question. He was driving it with the consent of Malik. He (Tejani) was a stranger to the contract between the plaintiff and the defendant. But between the defendant and Tejani, he was in my view the defendant's agent. He who does something through another does it himself. The defendant chose an incompetent and/or negligent agent to accomplish its task. It is responsible for his acts. It is the considered view of this Court that where one party has failed to exercise reasonable care in completing the contract, he cannot plead frustration. In these circumstances, the defendant's defence of frustration must fail and it fails. Accordingly, I hold that the defendant breached the contract of hire of the motor vehicle.

ISSUE NO. 2: Whether the car hire agreement limited the defendant's liability in case of an accident.

It is the defendant's contention that the car hire agreement limited the defendant's liability in case of an accident to the full replacement value of the windscreen, tyres and wheel rims. The plaintiff argues otherwise. The contract between the parties was reduced in writing. The relevant part reads:

> *"TERMS:*
>
> *The Hirer is fully responsible for damage to windscreen/tyres/wheel rims to full replacement value, as these items are not insured if damaged."*

The impression I get from the reading of this condition is that whatever else was not mentioned in the agreement was fully insured. There is no evidence that before the vehicle was submitted for repairs the Insurance refused to meet the repair costs. Since the agreement between the parties was in writing, the parol evidence rule is applicable to it. This rule is to the effect that evidence cannot be admitted (or that even if admitted, it cannot be used) to add to, vary or contradict a written instrument. In relation to a contract of this nature, the rule means that where a contract has been reduced to writing, neither party can rely on evidence on terms alleged to have been agreed, which is extrinsic, that is, not contained in it.

I have considered learned counsel for the plaintiff's submission that at the time of signing the agreement the plaintiff wholly and fully disclosed to the defendant that the motor vehicle was not comprehensively insured but only had a third party insurance. The rationale of the parol evidence rule is that parties who have reduced a contract to writing should be bound by the writing alone. If the plaintiff had wanted any more terms incorporated, what was the hurry for? They should have done that there and then. That the vehicle was not comprehensively insured is obvious from the Hire Agreement itself. That was the reason for agreeing that the hirer would be fully responsible for damage to listed parts: windscreen, tyres and wheel rims. It is stated that these items, in case of damage to the vehicle, are not fully insured, implying that the rest were. In these circumstances, Court is unable to make this case an exception to the parol evidence rule.

I hold that the car hire agreement limited the defendant's liability in case of an accident.

ISSUE NO. 3: Whether the defendant is liable to the plaintiff for any loss suffered.

In law, the victim of a breach of contract will have to decide which of the three possible courses is most appropriate. He may sue for damages, he

may treat the contract as discharged or he may seek a discretionary remedy. The plaintiff herein has opted to sue for damages. In the circumstances of this case, the defendant is liable to the plaintiff for the loss suffered. It cannot of course be for any loss suffered. It would be unjust to make a man pay for every misfortune which could conceivably be connected in some fanciful way with the defendant's act of damaging his vehicle. It must only be foreseeable loss.

ISSUE NO. 4: Whether the Third Party is liable to indemnify the defendant wholly or in part in the event of any liability to the plaintiff.

This issue is between the defendant and one Tejani who caused the accident. The defendant applied for a Third Party Notice under 0.1 r. 14 of the Civil Procedure Rules. It is not disputed that the vehicle was involved in an accident while under the control of the Third Party. The defendant seeks to make him liable because of the alleged negligent manner in which he drove the vehicle and an apparent promise to him after the accident that he would contribute to the repair costs.

From the facts, the defendant authorized Tejani to drive the vehicle from Murchison Falls Park to Kampala. He did not take the car by force or deceit. I have already observed that this created a principal – agent relationship. From the pleadings, while the plaintiff's case against the defendant is based

on a contract, the one between the defendant and the Third Party is based on the tort of negligence. I understand the law to be that in order that a Third Party be lawfully joined, the subject matter between the third party, and the defendant must be the same as the subject matter between the plaintiff and the defendant and the original cause of action must be the same. In **Yafesi Walusimbi –Vs- A.G. [1959] EA 223** the plaintiff was suing the defendant for negligence and the defendant sought to proceed against a third party on allegations of fraud. He could not succeed. The Court observed that it was not sufficient that, if the plaintiff succeeded, the defendant would have a claim for damages against the third party. The defendant would have to have a direct right of indemnity as such, which right should have, generally, if not always, arisen from a contract express or implied.

I have not seen any element of a contract between the defendant and Tejani in the instant case to warrant an order for indemnity against him. He (Tejani) was at the time of the accident acting within the scope of his authority to drive the vehicle in question and deliver it to the plaintiff in Kampala. This did not create any contractual relationship between them. And even if Tejani may have promised after the event in sympathy to the defendant to meet part of the repair costs, I have not seen any commercial element in such promise to raise any inference that a legal relationship was intended. In all these circumstances, I have seen no basis for any third party liability to the

defendant to warrant any order of indemnity against him. I would dismiss the claim against the third party and I do so.

Turning now to remedies, the plaintiff's first prayer is for Shs.10,500,000- being loss of income arising out of the defendant's failure to return the plaintiff's vehicle. It has put it at the rate of Shs.2,100,000- per month from the date of default till the date of filing the suit. It is noteworthy that for the three days of hire, the defendant had made full payment by the time the accident occurred. It is also noteworthy that the plaintiff was duly informed about the accident. The defendant undertook to repair it as per the terms of the Hire Agreement. The vehicle was taken to a garage for repairs with the approval of the plaintiff's officials. The problem that arose was of course as to who of them would meet the full cost of its repair. From the evidence, there was a misunderstanding as to the interpretation of the Hire Agreement. In view of what I have said about the parol evidence rule, I have no doubt in my mind that the plaintiff was at the wrong end of the law in as far as the interpretation was concerned. However, the defendant having undertaken to perform his perceived duty under the contract had to do so in reasonable time as well.

It is settled law that the plaintiff who is deprived of the use of his car is entitled to damages no matter whether he used the vehicle in a profit making capacity and whether he has suffered any actual pecuniary loss or

not: **Joseph Kyalimpa –Vs- URA HCCS No. 5 of 1996** (un officially) reproduced in **[1996] 1 KARL 155.**

I consider it morally un acceptable for one person to seek to make a fortune out of the other's misfortune. From the circumstances of this case, the failure to return the vehicle at the end of the stipulated three days was not deliberate. It was because of the accident which had rendered the vehicle immobile. If the parties had understood each other on the question of who would do what according to the hire agreement, a lot of time would have been saved. The vehicle would in my view have spent not more than three weeks in the garage. Because of the parties hostile conduct towards each other, the vehicle stayed longer in the garage. Neither party earns a credit for that post-accident hostility. An accident by its very nature cannot be the desire of any sane person.

I'm mindful that the measure of damages is what the plaintiff would have earned had the negligence of the defendant (through the Third Party) not intervened to render the vehicle temporarily in-operative. I'm also mindful of the role of the injured party following the breach of a contract: he is expected to do what he can to look after his own interest, to mitigate the loss, so to say.

In consideration of the above legal principles, I have allowed a sum of Shs.2,100,000- (two million one hundred thousand only) being the equivalent of the hire price per day for 21 days, to represent the plaintiff's estimated lost earnings following the breach.

The plaintiff's other prayer is for Shs.10,000,000- being the cost of repair of the said vehicle. In the alternative, it prays for Shs.16,000,000- being the value of the vehicle before the accident.

From the evidence of DW1 Dungu, the defendant effected some repairs on the vehicle although according to him it was not to the plaintiff's desired standard. The plaintiff asked the defendant to return the vehicle to them so that they repair it themselves. They found it with a leaking roof, tried to sell it as it was but failed to get a buyer until they bought another body "*at a cost between Shs.3m – Shs.3.5m*." In the end they got a buyer who took it for a sum of Shs.8,000,000-. This witness was unable to tell Court how much the plaintiff spent on repairs. But Court accepts Dungu's evidence that some repairs were done on the vehicle, in addition to what the defendant had managed to do.

In the submissions, counsel for the plaintiff has prayed for a sum of Shs.6m under this head being difference between the pre-accident value of the vehicle (Shs.16m) and the actual amount realised out of it (Shs.10m). I have

not appreciated counsel's insistence that Shs.10m was realised out of it given that the sale agreement talks of Shs.8m.

It is trite that special damages must be pleaded and strictly proved. It is not enough to just allege as has been done herein. Where documentary evidence is not forthcoming, or where there are documents but their authors can not come to Court, the party should be contented with an award of general damages. The plaintiff's evidence has fallen short of the standard required in cases of this nature. Its claim for special damages under this head is therefore disallowed. As regards general damages, these are presumed by law to be a necessary result of the harm alleged. The general rule regarding their measure, whether it is an action grounded in contract or tort, is what Courts have stated time and again as that sum of money which will put the party who has been injured in the same position as he would have been in if he had not suffered the wrong complained of. Such damages can only be an estimate, a very rough estimate of the present value of his prospective loss.

I have taken into account what befell Mr. Malik. He certainly never desired it that way. I have also considered the fact that Tejani is not bound to contribute anything more or at all towards the defendant's final bill. I consider it just and equitable that the defendant pays a sum of Shs.2,000,000- (two million only) to the plaintiff as general damages under

this head, in addition to the unascertained amount the defendant spent on the shoddy repairs. I order so.

The plaintiff has prayed for interest on the loss of income award at the rate of 21% (I assume per annum) from the date of filing till the date of judgment. An award of interest is discretionary. Court has had to make an assessment of damages before the plaintiff could be entitled to them. In such event interest should only be given from the date of judgment. The plaintiff is entitled to the rate prayed for (that is, 21% per annum) on the decretal amount of Shs.4,100,000- from the date of judgment till payment in full.

As regards costs, the usual result is that the loser pays the winner's costs. This practice is subject to the Court's discretion, so that a winning party may not necessarily be awarded his costs. For example, in **Dering –Vs- Uris [1964] 2 ALL E.R.** 660 the trial judge did not award the plaintiff his costs, even though they probably ran into thousands of pounds. I have considered the peculiarity of the case, especially as between the defendant and the third party. In all fairness, no order for costs should be made against the defendant.

As between the plaintiff and the defendant, the defendant's effort has in my judgment achieved considerable success. I assess it at 40%. I would therefore decree 60% of the costs of the suit to the plaintiff.

It is ordered accordingly.

Yorokamu Bamwine

J U D G E

13/06/2006