

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 302 OF 2019

DR. JOSEPH RUDASINGWA ::: PLAINTIFF

VERSUS

KABOYO SIRAJE ::: DEFENDANT

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff brought this suit against the defendant for recovery of the market value of motor vehicle registration number UAL 099Z of Toyota Hiace, mesne profits of Ugx. 80,000/= per day less four days in a month from 2015 to date, general damages, interest at a commercial rate and costs of the suit arising out of the defendant's negligence in dealing with the plaintiff's suit car.

The plaintiff alleges that he was the registered owner of the motor vehicle number UAL 099Z of Toyota Hiace Japan 1993 having bought the same from Azana trading (U) Limited. He hired the services of the defendant on part time to drive the vehicle daily from the new park to Mukono and equally maintained the driver Robert Kalyango. The plaintiff alleges that the vehicle had daily returns of Ugx. 80,000/=.

The plaintiff alleges that the defendant used to return the vehicle on a daily and was expected to return the suit vehicle to the parking yard at Kawala night parking daily by 10:30 pm after consultations of the whereabouts of the plaintiff to ensure that the same had been delivered in the yard. However, on the 6th July, 2015, the plaintiff called the defendant several times at 10:00pm when he was to

deliver the vehicle until about 12:30 am when he reported back and informed the plaintiff that he had parked the suit vehicle at the road side and not the parking yard as was the norm.

The plaintiff upon request to see the vehicle noted that it was being driven away. As such, he contended that the defendant was liable in negligence for the loss of the motor vehicle and since suffered loss of daily returns.

The defendant was served with the summons to file his defence by way of substituted service but he never filed his written statement of defence as required under the law.

The plaintiff therefore applied for a default judgement under Order 9 Rules 5,6, and 10 of the Civil Procedure Rules. The court ordered that the matter proceed ex parte for hearing.

Representation

The plaintiff was represented by Mr. Bulungu John whereas the defendant did not appear before this court.

The plaintiff was therefore ordered to file its scheduling memorandum where the following issues were proposed for determination by this court.

- 1. Whether the defendant was negligent?**
- 2. What remedies are available to the parties?**

Determination of issues

Whether the defendant was negligent.

The **Black's law Dictionary 11th Edition 2019** defines negligence as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregarding of others' rights;

the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances.

Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. It is the breach of legal duty to take care by the respondent/ defendant which results in undesired damage to the appellant/ plaintiff.

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

The essential ingredients of negligence as has been decided by court in **Nabwami Grace vs Attorney General Civil Suit No. 223 of 2015** which cited **Blyth vs Virmingham Water Works 1856 11 Ex. Ch. 781, Donoghue vs Stevenson [1932] AC 562** are;

- i) A legal duty on the part of the defendant towards the plaintiff to exercise care in such conduct as falls within the scope of the duty
- ii) Breach of that duty; and
- iii) Consequential damage to the plaintiff.

The burden of proof in an action for negligence is on the person who complains of negligence. The plaintiff in the circumstances has to show that the defendant was negligent with his vehicle. There must be proof of some duty owed by the defendant, breach of that duty and consequent damage suffered by the plaintiff.

As Lord Atkin in **Donoghue v Stevenson [1932] AC 562** stated that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. It is clear that it was foreseeable to the

defendant that the vehicle would not be safe unless parked in the parking yard as directed by the plaintiff upon consultation in order to absorb any liability in cases of theft. Thus, the defendant having owed a duty of care to the plaintiff while using his car as agreed by the parties, the breach of that duty occasioning loss amounted to an act of negligence.

The law requires that standard and degree of care on the part of a person which should have been taken by a reasonable and prudent person in the like circumstances. Although the standard is uniform, the degree of care is not, it varies in different circumstances. The degree of care required varies directly with the risk involved. The greater the risk; the greater the care. The third ingredient of negligence is that the defendant's negligence must have caused the loss of the plaintiff's motor vehicle and not due to any other cause.

In the present case the defendant had an obligation to return the vehicle on a daily basis to the parking lot by 10:30 pm after consultations of the plaintiff's whereabouts to ensure that the same had been delivered in the yard. Had the defendant delivered the same at the parking lot on the 6th July, 2015, the same would not have been lost.

The plaintiff has satisfied all the ingredients for negligent cause of loss of his property by the defendant.

I therefore find that the defendant was negligent thereby causing the loss of the plaintiff's vehicle.

This issue is therefore answered in the affirmative.

Issue 2: What remedies are available to the parties.

The plaintiff sought for orders for; the value of the motor vehicle number UAL 099Z of Toyota Hiace make, general damages, for the inconvenience caused by the defendant, mesne profits, interest thereon and costs of this suit.

General damages

In the case of **Luzinda Marion Babirye vs Ssekamate Elia Mulwana Samuel & 3 Ors Civil Suit No. 366 of 2017**, this court held that as far as damages are concerned, it is trite law that general damages be awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. Damages are compensation in money for loss or injury of any kind.

General damages are what the law presumes to be direct natural or probable consequences that would have resulted from the defendant's breach of contract. They can be nominal or substantial depending on the circumstances of each case. (See: **Waiglobe (U) Ltd vs Sai Beverages; Civil Suit No. 16 of 2017**) It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions. The power to award damages by court is exercised in the circumstances of a judicious estimation of the loss to the victim once a breach or injury has been established.

I find that the plaintiff has discharged his duty to prove damages and inconvenience caused as a result of the defendant's actions.

The plaintiff is awarded Ugx. 20,000,000/= as general damages

Mesne profits

The position of the law on mesne profits is settled. **Section 2(m) of the Civil Procedure Act (Cap. 71)** defines *mesne* profits as:

"...those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession".

It is settled that wrongful possession of the defendant is the very essence of a claim for mesne profits. (See: **Paul Kalule v. Losira Nonozi [1974] HCB 202**) The usual practice is to claim for mesne profits until possession is delivered up, the

court having power to assess them down to the date when possession is actually given. In **Elliott vs Boynton [1924] I Ch. 236 (C.A) pg. 250** Warrington, L.J, noted;

“Now damages by way of mesne profits are awarded in cases where the Defendant has wrongfully withheld possession of the land from the Plaintiff.”

In the circumstance before this court, the plaintiff sought mesne profits of Ugx. 80,000/= per 26th days per month from the 5th of July, 2015 to date. However, as discussed above, mesne damages are awarded in cases where the defendant has wrongfully withheld possession of the property from the plaintiff which in the circumstances before me does not arise since the defendant caused loss of the vehicle and is not in possession thereof. What the plaintiff should have sought in the circumstances would have been special damages.

I therefore find that the plaintiff is not entitled to mesne profits.

I therefore make the following awards;

- a) An award of the market value of the motor vehicle number UAL 099Z of Toyota Hiace make at a sum of Ugx. 27,000,000/=
- b) General damages of Ugx. 20,000,000/=
- c) Interest on (a) and (b) at court rate.
- d) Costs of this suit against the defendant.

I so Order.

SSEKAANA MUSA

JUDGE

31st May 2023