REPUBLIC OF KENYA

Court of Appeal, at Nakuru

Civil Appeal No 46 of 1984

Timsales Limited

versus

Up&Down Saw Mills (Kenya) Limited

(Appeal from the High Court at Nakuru, Masime J, Civil Suit No 87 of 1974)

November 6, 1985, Madan Ag CJ delivered the following

Judgment.

On January 3, 1974 the appellant (defendant) borrowed from the respondent (plaintiff) a portable cross-cut saw in good working condition. Inspite of being repeatedly asked to return it the defendant did not do so until January 27, 1976.

On February 12, 1974, when replying to the defendant's letter of 4th February, which is not included in the record of appeal, the plaintiff's advocate wrote that the saw was damaged while it was being used by the defendant, and it would not be collected until it was repaired to the plaintiff's satisfaction; that, in the meantime the plaintiff was claiming Kshs 30 per day for loss of user of the saw.

The plaintiff instituted a suit against the defendant on May 8, 1974 claiming return of the saw in good working condition and damages at the rate of Kshs 30 per day until so returned, together with interest at court rates on the sum awarded until payment thereof.

The defendant denied having borrowed the saw in its defence filed on June 7, 1974. When however the trial first began on June 9, 1976 the defendant glibly conceded that it did borrow it as claimed by the plaintiff.

The learned trial judge held that when the defendant borrowed the machine it was in working order; that the damage to the machine was occasioned at the defendant's premises; it was therefore the defendant's duty to repair the machine and return it in a good working condition, to the plaintiff but the defendant did not do so until much later.

In the circumstances the plaintiff was entitled to hire an alternative machine, which it did, to enable it to keep its business running, and also in order to mitigate damages. The learned judge entered judgment for the plaintiff for:

"(a) Damages at the rate of Kshs 30 per day from January 4, 1974 until the defendant shall return the plaintiff's saw in working condition (ie) up to January 27, 1976).

(b) The return of the plaintiff's saw in working condition or its replacement by a new saw in working condition.

(c) Interest on the sum awarded at court rates from the date of filing suit until payment in full".

The special damages between the two dates under paragraph (a) above were calculated at Kshs 19,170; and, interest thereon Kshs 20,691 at the rate of 12% from May 28 1974 to May 25, 1983. The defendant has appealed. The first, second and fifth grounds of appeal that the learned judge erred in holding that the cross cut saw was in working condition when it was borrowed by the defendant, that the burden was on the defendant to prove that it took reasonable care of the machine, and that the defendant promised to repair it, are, in my opinion, as also contended in the notice of grounds for affirming the decision, without merit. These were findings of fact which are supportable on the evidence before the court.

If the machine was not in working order it should have been returned to the plaintiff immediately instead of keeping it for more than two years, and then returning it after having it repaired which was an acceptance of both the obligation and liability to repair it.

The plaintiff was entitled to refuse to take it back until it had been repaired.

The third, fourth and sixth grounds of appeal are that the plaintiff failed to prove the damages claimed by it; that it failed to mitigate the damage, and that interest on damages was wrongly awarded.

The learned judge said the plaintiff was entitled to hire the use of an alternative machine at a reasonable cost in order to mitigate damages. The question is up to what moment was the plaintiff entitled to continued to hire an alternative machine without taking some other action to mitigate the damage. With respect the learned judge erred in the circumstances of this case, when he said there was no obligation on the plaintiff to mitigate its losses by purchasing another machine since the plaintiff would have expected the machine to be returned to it within a reasonable time. It should have been clear to the plaintiff that the defendant was doing nothing about returning the machine, repaired or otherwise, notwithstanding the plaintiff's letter dated February 12, 1974 which conveyed a clear warning about the damage that was being incurred. The damage however could only be allowed for a reasonable period. In my view, the plaintiff therefore ought to have mitigated the damage by purchasing another machine, say after the expiry of ninety days, which I consider to be a reasonable period during which time the plaintiff could expect the defendant to return the machine. The period of more than two years envisaged and allowed by the learned judge for the machine to be returned during that period was unreasonably long, therefore wrong. The plaintiff should have purchased another machine at the expiry on ninety days for Kshs 1,500, accepting its price for it as against the defendant's quotation of Kshs 903 for it. It is irrelevant that the machine was returned to the plaintiff more than two years later. It had not been returned to him when he became entitled to acquire an alternative machine.

To allow damages up to the time of return of the machine two years and more later, as the learned judge did, with respect, was clearly wrong and exaggerated..

I would set aside the decree of the High Court, and substitute therefore an order for payment of damages Kshs 1,500 the price of a new machine, Kshs 2,700 damages for 90 days at the rate of Kshs 30 per day, with costs thereon, plus interest on the total sum of the items awarded, at court rates but to

be calculated at the rate of 12% per annum only from when that rate of interest came into force on March l6, 1982 as stated in Practice Note No 1 of 1983. I would also allow the plaintiff the costs of the suit in the High Court, costs of this appeal together with costs of the notice of grounds for affirming the decision.

As Kneller and Hancox, JJA agree, it is so ordered.

Hancox JA. The facts giving rise to this suit have been briefly but clearly narrated by Madan, Ag CJ, and I need not repeat them. The judge was quite right in finding that the appellant had borrowed the portable cross cut-saw, and that it was his bounden duty to return it to the respondent in good and working condition, with the possible qualification of fair wear and tear.

The defendant did not return the saw in good condition, it being as the judge found, damaged while on his premises.

The plaintiff was therefore entitled to damages, basically for breach of contract, but also in sounding in detinue. But the measure of damages must be subject to some restraint.

The saw had to be returned within a reasonable time and, if not so returned, the respondent was entitled to (and should) purchase a replacement, which, the evidence showed, would have cost Shs 1,500.

What was a reasonable period to have allowed" Certainly not until January 27, 1976, when it was actually returned, as the judge held after some thought. I am prepared to agree that the reasonable period should be fixed at three months, or ninety days, as Madan, Ag CJ, has said in his judgment, which I have had the advantage of reading in draft.

I therefore agree that this appeal should be allowed on the quantum damages only. I also agree with the orders that Madan, Ag CJ, proposed as regards interest, and as regards the costs of the suit, of the appeal and of the notice of grounds for affirming the decision.

Kneller JA. I agree.

Delivered on the **November 6, 1985**

Madan Ag CJ, Kneller & Hancox JJA