



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 97 OF 2000

LUCAS ENGINEERING WORKS LTD. APPELLANT

VERSUS

JAMES KAVATHA NDO NYE RESPONDENT

(Being an appeal from the Judgment of the Senior Principal Magistrate's Court at Machakos of Hon P.C Tororey (S.R.M) Civil Case No. 834 of 1999 dated 27th September 2000)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Respondent, **Lucas Engineering Works Ltd** was sued by the Respondent, **James Kavatha Ndonye** for a replacement of a posho mill engine No. 0277 or in the alternative a refund of the sum of Kshs.130,000/= being the purchase price of the same. The Respondent's claim was that the Appellant had agreed to sell the said posho mill and to deliver and install it at the Respondent's premises and further guaranteed to maintain the same in a good working condition for a period of one year.

2. That the Respondent agreed to the terms of the agreement and fully paid the purchase price of Kshs.130,000/= and the posho mill machine was delivered and installed at his premises but when the machine developed mechanical problems, the Respondent informed the Appellant of the same but the Appellant failed to either repair or replace the machine.

3. The claim was denied by the Applicant through the statement of defence filed.

4. After hearing the case, the learned trial magistrate entered judgment for the Respondent as prayed. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:-

1. **“The learned Senior Resident Magistrate erred in law and in fact basing her judgment on pleadings that were not supported by the evidence and in particular the date contract was entered into between the parties.**

2. **The learned Senior Resident Magistrate erred in law and in fact by basing her judgment on a delivery note that was not signed by the Appellant's authorized representatives.**

3. **The learned Senior Resident Magistrate erred in law and in fact by basing her judgment that the posho mill subject matter of the suit was mechanically**

defective in the absence of a report by an engineer to prove that it was defective and could not be used from the beginning.

4. The learned Senior Resident Magistrate erred by failing to hold that he had no complaint to make and made no complaint about the machine having any problem which he had been in possession for almost one year and other relevant circumstances.”

5. The appeal was canvassed by way of written submissions which I have duly considered.

6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

7. On the first ground of appeal that the pleadings are not supported by evidence regarding the date of the contract it is observed that the said date is stated in paragraph No. 3 of the plaint as 25/9/98. Although the Plaintiff’s evidence gives the date of the contract as 25/7/98 in the typed proceedings, the original handwritten proceedings reflect the date as 25/9/98, the same date reflected in the pleadings. The date 25/7/98 reflected in the typed proceedings is clearly a typographical error.

8. On the issue of the delivery note, the Respondent’s evidence is that upon the purchase of the posho mill machine, he was given a guarantee for 12 months. The Respondent produced a delivery note No. 1831 dated 25/9/98 which clearly reflects one year guarantee. It is not denied that the delivery notes emanated from the Appellant’s business premises and was delivered to the Respondent by an employee of the Appellant by the name **Muthama**. The Respondent’s evidence also reflects that he at least on two occasions reported some mechanical problems to the said **Muthama** and the machine was repaired but when the machine later broke down and came to a halt, the Appellant failed to have it repaired satisfactorily notwithstanding that the 12 month guarantee period had not lapsed.

9. The contention by the Appellant that there was no 12 month guarantee period cannot be the correct position because their witness, DW1 **Johnson Mutuku Mutunga** admitted that indeed the delivery note had the entry of a 12 month guarantee period entered by the Appellant’s employee. The procedures on who can give such a guarantee in the Appellant Company and who can witness the same are not for the Respondent to address. The Appellant Company is vicariously liable for the actions of its employees as the delivery note was issued in the course of duty. It is also noted from the evidence of DW1 that one **Muthama** an employee of the Appellant repaired the machine once after the Respondent complained. This adds credence to the Respondent’s evidence. Why would the said employee repair the machine without pay if there was no guarantee period? The evidence of DW1 is inconsistent on the question of guarantee. He admitted that the company gives a guarantee to their customers yet he did not explain why the Respondent was not given such a guarantee in the format that is recognized by the company.

10. This court’s view on the ground of appeal that the Respondent did not call any expert evidence from an engineer to prove that the machine was not working cannot succeed either. It is clear from the Respondent’s evidence that all the three reports he made to the Appellant were within the period covered by the guarantee. The fact that the machine was not working as expected placed the responsibility of ensuring that the same was working fell on the Appellant during the said guarantee period.

11. The Respondent’s evidence establishes that he reported to the Appellant that the machine had problems. Indeed the evidence of DW1 admits that one of the Appellant’s employee by the name **Muthama** serviced the machine at least once. The last ground of appeal that the Respondent did not complain must also fail.

12. Having re-evaluated the entire evidence on record, I find no merits in the appeal and dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **30th** day of **September** 2014.

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B. THURANIRA JADEN

JUDGE