



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO 18 OF 2008

CHRISTOPHER MWANGI NGUTHI.....APPELLANT

Versus

C.G. RETREAD LIMITED.....RESPONDENT

(Appeal arising from the judgment of Hon. J.K. Ng'eno

Principal Magistrate Nyeri in Civil suit No. 52 of 2007)

JUDGMENT

1. The Appellant sued the Respondent through a plaint filed on 31st January 2007 in respect of repair of two tractor tyres with their rims and tubes at an agreed sum of Ksh. 39,000/-
2. That the Respondent failed to repair the said tractor tyres thereby occasioning the appellant loss of Ksh. 166,000/- as pleaded in paragraph 7 of the plaint herein. The appellant further claimed loss of user at Kshs. 10,000/- per day until the determination of the suit.
3. The Respondent filed a defence in which the same pleaded that it duly retreaded the two tyres belonging to the appellant and by way of counter claim claimed a sum of Ksh. 39,000/- being the cost of the services rendered.
4. The matter proceeded for hearing wherein the appellant testified that on 1st November 2006 the Defendant/Respondent took his two tractor tyres for retread together with two rims and two tubes of the rear tyre which was supposed to be done and brought back to him on 7th November 2006.
5. That when the goods were not brought back to him he called Mr. Kago of the Respondent on his cellphone to no avail and on 20th November 2006 he made a demand which was sent to the Respondent through fax.
6. On 29th November 2006 Mr. Kago brought the goods but upon checking he found that they were not his since his were Firestone but the one brought were Dunlop tyres which he rejected. He further testified that he used to make Ksh. 10,000/- per day.
7. On behalf of the respondent BENJAMIN ANGANA ENOS testified that on 6th November 2006 their salesman took the tyres to the appellant but the same did not have money so the goods were returned to Nairobi and that they kept the tyre in their store and since they had overstayed they sold the same.
8. Based upon the said evidence the trial court held as follows.

“my finding is that the contract between plaintiff and defendant was first breached by defendant when they failed to return plaintiffs goods in 7 days as agreed.

Whether plaintiff had or not 39,000/- on 29th November 2006 the issue is that it was not within seven days of the contract.

The defendant therefore have not claim of 39,000/- against the defendant at all and I dismiss their counter-claim. They have already recouped that from the sales of the plaintiffs tyres which fetched them 47,000/-. the plaintiffs claim for non-user today or loss of user is also unconscionable.”

9. Being aggrieved by the said judgment the appellant filed this appeal and raised the following grounds:

1. ***The honourable magistrate erred in law and in fact in not finding that the appellant had proved his whole case on a balance of probabilities.***
2. ***The honourable magistrate erred in law and in fact in holding that the appellant was not entitled to a relief of the loss of user as per the plaint in the matter.***
3. ***The honourable magistrate erred in law and in fact in holding that the appellant was only entitled to a return of two wheels of unspecified make, rims – and tubes.***
4. ***The honourable magistrate erred in law and in fact in making the final judgment in the matter which judgment was against the evidence adduced in the matter.***

1. Directions were given that the appeal be heard by way of written submissions which have now been filed.

SUBMISSIONS

2. It was submitted by the appellant that the trial court erred in law and fact in finding against the weight of evidence that the plaintiff was entitled to a sum of Ksh. 166,000/- or return of specified make of tyres (Firestone) it is submitted that the appellant proved during trial that the goods were estimated at Ksh. 166,000/=.
3. It was submitted that the trial court misapprehended the law and fact in holding that the claim on loss of user completely failed and that the plaintiff failed to ameliorate mode loss and in support thereof relied upon the case of CITY COUNCIL OF NAKURU v JOHN MACHARIA HINGA (2006)eklr which I have looked at.
4. On behalf of the respondent it was submitted that the appellant breached the cardinal terms of the contract by not collecting the tyres within one month from the date of receipt and that the appellant did not prove his case on the required standard and that the tyres having been sold to defray costs pursuant to a contract the same cannot be available for return and that the trial court rendered herself correctly save for the order that the two tyres be returned to the appellant.
5. This being a first appeal the court is required to evaluate the evidence tendered and to come to its own conclusion and as noted above the court has evaluated the evidence tendered before the trial court and comes up with the following issues for determination.

APPELLANT CLAIM FOR LOSS OF USER

6. It is trite law that special damage be pleaded and strictly proven. This is confirmed by the authority produced by the appellant herein. COUNTY COUNCIL OF NAKURU vs JOHN MACHARIA HINGA (2006)EKLK.
7. It is noted that the appellant at paragraph 7 of the plaint pleaded loss of user of Ksh. 10,000/- per day until the determination of this suit but presented no evidence to support his claim herein. I take the view that his bank statement was not proof that he was making the alleged sum of money per day from the use of the said tractor and though I find fault with the reason used by the trial court in dismissing the appellants case for loss of user I would still dismiss the appellants claim for want of proof.

APPELLANT CLAIM FOR THE VALUE OF THE TYRE

8. The evidence tendered before the trial court was that the plaintiff/appellant tyres had been sold by the defendant/respondent. The trial court therefore fell into error by ordering the defendant/respondent to return and deliver to the plaintiff/appellant two tyres two rims and tubes.
9. The appellant had presented evidence before the trial court which evidence was unchallenged on the current costs of similar tyres and the court having found that the defendant/respondent had breached the contract herein. I take the view that an appropriate award to the appellant would have been the cost of the said tyres.
10. I would therefore set aside the judgment of the lower court in respect of return of the good herein and substitute it with a judgment for Kshs. 166,000/- being the cost of replacement of the items claimed by the appellant in the plaint.
11. In the final analysis I therefore allow the appeal herein and set aside the judgment of the trial court and substitute the same with a sum of Ksh. 166,000/- being the cost of the said items plus cost.
12. The respondent shall pay the cost of this appeal.

Dated and delivered at Nyeri this 6th day of June 2013.

J. WAKIAGA

JUDGE

Mr. Kimunya for the appellant.

No appearance by the respondent advocate.

Court: The judgment is read in open court in the presence of the Advocate for the appellant and in the absence of the advocate for the respondent.

J. WAKIAGA

JUDGE