



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 293 OF 1994**

**EZEKIEL MWENJA NGURE.....PLAINTIFF**

**VS**

**BHOGAL’S GARAGE LIMITED.....DEFENDANT**

**JUDGMENT**

The facts in this dispute are fairly straight forward and largely uncontroverted. For instance, it is common ground that on 8<sup>th</sup> April 1993, the plaintiff delivered to the defendant a crank shaft for motor vehicle KBQ 965 Albion lorry to be polished. The plaintiff was charged Kshs.500/= for this. By their letter dated 25<sup>th</sup> June 1993, the defendant informed the plaintiff that the crank shaft was ready for collection. The letter further warned the plaintiff to collect the crank shaft within ten (10) days from the date of the letter failing which it would be sold by public auction. The plaintiff was not able to collect the crank shaft as advised because the job card had been misplaced.

On 4<sup>th</sup> March, 1994, the plaintiff traced the job card and presented it to the defendant who demanded payment in the sum of Kshs.500/= and Kshs.2000/= being labour and storage charges respectively. The plaintiff duly paid the sums demanded but the defendant was unable to trace the crank shaft. Subsequent efforts to trace it also bore no fruits, prompting the plaintiff to bring this action claiming:

- (a) Specific performance of the contract to wit release of the crank shaft in serviceable condition.**
- (b) General damages for loss of users (sic) of the motor vehicle to be assessed by court.**

**Alternatively:**

- (c) The monetary value of the crank-shaft**
- (d) General damages for breach of contract**
- (e) Costs of this suit**
- (f) Interest on (a), (b), (c), (d) and (e) above**
- (h) .....”**

This claim is based on the original plaint as the application for amendment of that plaint was withdrawn.

The defendant argued that, the plaintiff having failed to collect the crank shaft within the stipulated period

it (the defendant) went ahead and disposed of the same under the **Disposal of Uncollected Goods Act**; that Kshs.500/= and Kshs.2,000/= for labour and storage charges were received and accepted in error; that the plaintiff has not established his claim against the defendant.

The dispute was initially heard by Visram. J (as he then was) when the plaintiff alone testified and the matter adjourned on 30<sup>th</sup> April 2003. Since that date the matter was adjourned several times until 3<sup>rd</sup> November 2011 when the matter commenced a fresh even though earlier directions were taken to the effect that it would proceed from the stage reached earlier. The plaintiff relied on the earlier proceedings in so far as the cost of the crank shaft is concerned. The cost was given as Kshs.138,000/=. He also confirmed that the same is not available locally. In cross examination, he argued that he was not aware of the thirty (30) days within which he was required to collect the shaft from the plaintiff. He also denied receiving the defendant's letter dated 25<sup>th</sup> June 1993 referred to earlier; that later he was called by the defendant to go to their premises to identify the crank shaft but when he went he was only taken in circles as efforts to trace it from the defendant's store bore no results.

The plaintiff's witness was his brother and manager at the time of the incident, Mwenja Ngure Mwenja whose evidence was to the effect that the motor vehicle from which the crank shaft was removed was a commercial vehicle used in the business of transporting timber from the forest to the millers. According to him, the crank shaft broke down and was taken to the defendant for repairs. It disappeared in their hands and the motor vehicle has been grounded since.

**P.W.3, Isaac Kuria Mwenja**, the plaintiff's son accompanied the late Gideon who took the shaft to the defendant's garage but was not involved beyond that.

The defendant called Augustus Musyoka Mutinda, its Personnel Officer who was at that time of the events in dispute a mechanic. He recalled that after the crank shaft was left with them, it was not collected for about two (2) months, prompting them to write to the plaintiff to collect it or it be sold. When the plaintiff came, he paid Kshs.2,500/= to the defendant's Accounts Department, which was not aware that the crank shaft had been sold.

Having duly considered the foregoing evidence, among the issues falling for determination as framed by the parties are:

- i) whether the plaintiff was notified to collect the crank shaft within thirty (30) days;
- ii) whether any notice was issued to the plaintiff in accordance with the **Disposal of Uncollected Goods Act**;
- iii) whether the plaintiff refused, failed and/or neglected to collect the subject matter;
- iv) in what respect did the defendants receive Kshs.2,500/=?
- v) whether the plaintiff's lorry was being used for commercial purpose and whether he has suffered any loss and/ or damage.;
- vi) whether the plaint discloses a cause of action.

As I have stated earlier, there is no dispute that the plaintiff delivered to the defendant the crank shaft. It is also common ground that after several months, the defendant went to claim it but the defendant could not trace it, or alleged that it had been sold in accordance with the **Disposal of Uncollected Goods Act**. In determining the six issues framed and set out above, two broad questions may be asked:

- i) whether the defendant was in violation of a contract between it and the plaintiff and;
- ii) whether the plaintiff has thereby suffered loss and the nature of the loss, if any?

The relationship between the plaintiff and the defendant was governed by the **Disposal of Uncollected Goods Act**, which applies to the goods in the possession or under the control of custodian under a contract to repair, treat or work on the goods.

Having found that the defendant indeed took possession of the crank shaft, the next consideration is whether the defendant disposed of the crank shaft after giving the plaintiff the requisite notice.

On 25<sup>th</sup> June 1993 the defendant wrote to the plaintiff and stated in part as follows;

**“We would like to inform you that the job required to be done is complete and your crank shaft is ready for your collection on payment of Kshs.500/= being the costs thereon. Please note that unless your above mentioned item is collected within 10(ten) days from the date of this letter the same will be sold by public auction to safeguard our financial interest. Also note that your article is attracting storage charges at the rate of Kshs.20 per day”**

From the record, it is apparent that it is the defendant’s contention that the letter was posted to the plaintiff’s post office box number 198, Nakuru. The plaintiff for his part was adamant that he never received the letter. In terms of **section 5 (6)** and **6(2)** of the **Act**, there are two notices which must be issued by the custodian. The first one is the notice to take delivery and notice of intention to sell. The defendant’s letter of 25<sup>th</sup> June 1993, reproduced above combined the two notices contrary to the requirement of the law, specifically the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> schedules.

In the first place the notice did not specify that it was issued under the **Disposal of Uncollected Goods Act**. The period within which the plaintiff was required to collect the article was ten (10) days while the Act provides that it should not be less than thirty (30) days. It is further a mandatory requirement that both the notice to take delivery and notice of intention to sell must either be delivered by hand to the depositor or by leaving it at his residence or place of business or by sending to the depositor’s last known address by registered post and failing any of the above, the custodian is required to place a notice in both the Kenya Gazette and a national daily newspaper. The defendant did not comply with the above requirements before disposing of the crank shaft. Indeed it is doubtful if the crank shaft was sold for the following reasons.

On the 4<sup>th</sup> March 1994, nearly one year after the notice, the defendant received payment from the plaintiff in the sum of Kshs.2,500/= towards storage and labour charges. The plaintiff led unchallenged evidence that subsequent to this, he went back to the defendant’s premises but the latter was unable to trace the article from the stores. Even after this suit was filed, on 9<sup>th</sup> May 2003, the defendant’s then counsel, Ndeke Gatumu & Co. Advocates wrote to the plaintiff’s erstwhile advocates, Masese & Nyamwange Advocates asking the plaintiff to go to the defendant’s premises to identify some crank shafts.

If the article was sold, it was incumbent upon the defendant to account to the plaintiff for the proceeds of sale as stipulate in **section 7 (4)** of the Act. Besides, there is no evidence that before the alleged sale, the date of the intended sale was communicated to the plaintiff as require by the 2<sup>nd</sup> Schedule to the Act. Again by the requirement of **section 7(2)** of the **Act** the sale must be made in good faith and the defendant was under a duty to take reasonable care to obtain the best price in the circumstances.

For the reasons stated, there is no evidence that the plaintiff was given the two requisite notices and further I find that there is no evidence that the crank shaft was sold.

Turning to the question of the plaintiff’s loss and damages, there are two main prayers and two alternative prayers. The prayer for specific performance is not available for the reason that the article cannot be traced and a similar one is not available in the local market. Regarding the prayer for general damages for loss of user of the motor vehicle from which the article was removed, is a claim in special damages as it amounts to a claim for loss of business, which must be pleaded and proved.

The specific sum lost as a result of loss of user is not pleaded but more significantly the same has not

been proved. Similarly, the plaintiff did not allude to the figure lost in business when he testified before Visram, J (as he then was).

An attempt was made to introduce Kshs.14,000/= per day as the loss of business but that is no longer before the court after the plaintiff withdrew the application to amend the plaint to plead the amount.

The plaintiff also produced several documents to prove that he lost business. These documents include a letter from the Ministry of Environment & Natural Resources addressed to the Divisional Forest Officer and copied to the plaintiff among others. The letter acknowledges some payments. Another letter dated 24<sup>th</sup> September 1980 from the Inspector of Factories, Ministry of Labour drawing the plaintiff's attention to several omissions in his Sawmill in Nyahururu. The plaintiff further relies on a muster roll of his staff for 1974, 1975 and 1979 as well as a schedule of work by the motor vehicle KBQ 965.

All these documents only demonstrate that the motor vehicle was registered in the name of the plaintiff; that the plaintiff did some timber transportation; that the plaintiff had a sawmill and employed workers. It does not show how much the plaintiff earned from the work related to the motor vehicle. Submitting before me, the plaintiff said his loss was in this sum of Kshs.2m without any document or other evidence to support the figure. There is therefore no proof on a balance of probability on the plaintiff's loss of business.

In the alternative, the plaintiff seeks the value of the crank shaft and general damages for breach of contract. It is now established that general damages are not awardable for breach of contract. See **Joseph Ungaji Kedera V. Abbey Kambisha Kavai**, Ksm. Civil Appeal No.239 of 1997.

Regarding compensation for the loss of the article, the plaintiff relied on a proforma invoice from the CMC Motor Group which was produced before the earlier trial court. According to the invoice, the cost of the crank shaft was given as Kshs.138,773.80. In view of the fact that a similar crank shaft is not available locally today and the time that has elapsed since the estimates were given (in 1996) and bearing in mind that the crank shaft in question was used, I award to the plaintiff Kshs.200,000/= being the value of a crank shaft. I also award him costs of this suit and interest on the figure awarded from the date of the judgment till payment in full.

**Dated, Signed and Delivered at Nakuru this 22<sup>nd</sup> day of February, 2012.**

**W. OUKO**

**JUDGE**