



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 934 of 2001

JOHN GODANA GUYO.....PLAINTIFF

VERSUS

FOOD FOR THE HUNGRY INTERNATIONAL.....DEFENDANT

JUDGEMENT

The facts in this matter are not disputed. The Defendant herein is an International Non-Governmental Organization. It caters for the relief of refugees and other displaced persons. It has its principal offices in Nairobi. It has a field office in Moyale from which it distributes its aid to refugees and displaced persons in that part of Kenya. The Organization has in its fleet a variety of motor vehicles, at the time material to this case, the Defendant had a tractor model Massey Ferguson registration No. KSR 239 which was not in very good condition, but was both functional and repairable. In this condition, the Organization sold the tractor to the Plaintiff for Ksh 69,000/= under conditions which resembled competitive bidding. The Plaintiff being a native and resident of Moyale Town repaired and left the tractor under the agency of his friend a Mr. Omar to operate it in Marsabit Town.

This Mr. Jeremiah did not come to give evidence on behalf of the Plaintiff but it was clear from the evidence of the Plaintiff that the tractor, although it had been bought by the Plaintiff continued to be used by the Defendant Organization on hire from the Plaintiff's friend. This did not go well with some elements of the management of the

Defendant, who in effect and for lack of a better expression confiscated the Plaintiff's tractor and locked it up in the Defendant's store house or yard where it had always been parked even before it was sold to the Plaintiff . The Plaintiff made every effort to get his tractor released and formally transferred to him without much success. He was shunted by the Defendant's management from Moyale and Marsabit to Nairobi but still did not succeed to have his tractor released to him. Having lost all form of persuasion and dialogue with the Defendant, the Plaintiff came to court.

By an Amended Plaint dated 5.07.1996 and filed on 5.0..7.1996 the Plaintiff claims:-

- (i) The Defendant do release an executed transfer deed of the motor vehicle (read tractor registration Number KSR 239) and in default the Deputy Registrar to execute the same;***
- (ii) Damages for wrongful seizure of the Plaintiff's tractor***
- (iii) Restore the tractor registration number KSR 239 to the plaintiff,***
- (iv) Costs of the suit,***
- (v) Any other relief this court may deem necessary to grant,***

As it is succinctly summarized in both the Plaintiff's written submissions dated 20.7.2005 and filed on 21.07.2005, and the Defendant's Advocates written submissions dated and filed on 20.5.04 the Plaintiff abandoned prayers number (i) & (iii) of the Amended Plaint on the ground that he was no longer interested in being put in possession and ownership of the suit tractor as its condition had irreparably deteriorated and he would rather press on with his prayer for damages in lieu of those abandoned prayers. I allowed this application and the only relief under consideration in this suit and this judgment therefore is damages for alleged wrongful seizure of the suit tractor.

As stated at the opening of this judgment the facts of this case were not disputed. The Defendant sold the tractor to the Plaintiff. The Defendant seized the tractor and locked it up in its yard on the pretext that it was sold to the Plaintiff without following the laid down procedures laid by the Organization. The Plaintiff's attempts to recover the tractor were shunned by the Defendant's management. There was no evidence that the tractor was sold to the Defendant un-procedurally or without following the Defendant's regulations. On the contrary it was the evidence of DW1 Mr. Samuel Labarakwe a Field Supervisor with the Defendants Child Development Programme that the Plaintiff bought the suit tractor in or about 1992 for Kshs 69,000/= and it was sold to the Plaintiff after the tractor had an accident in which the tractor's oil sump was damaged and the Defendants management decided to sell it.

This witness testified that some repairs were carried out on the tractor both after sale and after repossession of the tractor. He could not explain why the tractor was still in the possession of the Defendant. If it was left to him (DW1), he would release the tractor to the Plaintiff in its current condition rather than pay any damages.

The issue here is, the Plaintiff having abandoned any claim to the tractor as it is currently unrepayable what damages, if any, are payable to the Plaintiff.

DW1 acknowledged that the tractor was sold after an accident and damage to its oil sump which is a major component in any moving or mechanical equipment such as a tractor. To be brought back to use, it must have been put to repair, and at a cost. The Plaintiff herein produced an original receipt for the purchase of the motor tractor issued by Defendant the receipt is No. 2297 issued on 2.6.1993 for the sum of Kshs 69,000/=

There was no evidence by either the Plaintiff or the Defendant to show when the Plaintiff took delivery of the tractor. The duplicate Certificate of Insurance No. 42976

issued on 12.9.92 was to expire on 8.8.1993 It is presumed that the insurance cover was made by the Defendants and that having paid for the tractor on 2.06.1993 the Plaintiff took delivery of the tractor immediately after payment thereof. Between 4.9.1993 to 18.4.1994, the Plaintiff expended Ksh 50,400/= over repairs to the tractor. These repairs, in my view added to the value of the tractor. The Plaintiff produced receipts for purchase of diesel for the running of the tractor before it was seized by the Defendant from him. These receipts amounting to Kshs 6270/= in my calculation only show the running expenses of the tractor. They do not show the earnings from the tractor. The Plaintiff in his evidence gave various estimates of between Kshs 120,000 - Kshs 150,000/= as his earnings per month. He did not however submit any proof in his evidence to show or support this claim. Even if he had done so, there was no pleading or prayer in his Plaint to support this claim. In the result therefore this leg of the Plaintiffs claim must fail. I so find.

This leaves therefore only leg of the Plaintiff's claim that is general damages, for loss of his tractor.

Although the Defendant's sole witness, Samuel Labarakwe told the court that the Defendant was today willing to surrender the tractor back to the Plaintiff he did not produce any duly executed transfer by the Defendant transferring the tractor to the Plaintiff. Any order that the Defendant do execute the transfer in favour of the Plaintiff nearly over twelve 12 years after the event would merely be to subject the Plaintiff to the same hardships which he has endured for the said period.

Besides, the Plaintiff abandoned and does not wish to have, the tractor anymore.

In law, the seizure of the tractor by the Defendant after it was paid for in full and receipt of the purchase price issued and further failure to execute the transfer of the

tractor to the Plaintiff was not only high handed but it was also a flagrant breach of contract of sale between the Plaintiff and the Defendant.

If the claim had been framed in a more robust manner, it would in my view, have entitled the Plaintiff to an award of punitive and exemplary damages. Alas there was however no such plea, and thus must leave the Plaintiff only one relief, an award of general damages for breach of contracts. In this category, the damages to which the Plaintiff would in my view be entitled to, are firstly, the restitution of the purchase price, and cost of repairs of the tractor which is now no more than a shell of equipment hinged together with rusting metal and secondly, a fair portion of the earnings which he would have earned since the illegal seizure and detention of his tractor by the Defendant. The Defendant cannot be allowed by the Court to take both the purchase price, the benefit of repairs and now keep the tractor also.

On the question of lost earnings, as I indicated in the earlier part of this judgment, the Plaintiff claimed in his evidence in Chief, earnings of Kshs 223,200/= per month on the basis of weekly earnings from the Defendant and an average net earnings of between Kshs 120,000/= to Kshs 150,000 p.m. The defendant was one established customer of the Plaintiff, but the Defendant had also acquired its own new tractor that source of custom would therefore dry up from time to time. A more sober figure of Kshs 55,000/= per month would most probably reflect the probable gross earnings per month by the Plaintiff.

The Plaintiff's tractor was repossessed in December 1994. The Plaintiff claimed loss of earnings from January 1995, although he filed suit on 22.09.1995. The Plaintiff in his evidence also testified that he spent an average of Kshs 25,000/= p.m. for purchase of diesel at the rate of 40 litres of diesel per week @ shs 30/= per litre.

So, if the Plaintiff had been allowed to retain his tractor, it would have earned him in the ordinary course of events, the sum of Kshs 55,000/= on average for a period of 127 months from 1.01.1995 to 30.07.2005 thus making a gross sum of Kshs 6,985,000/= At the same time the Plaintiff would have continued purchasing diesel for operating the tractor at the said average rate of Kshs 25,000/= p.m. for the said period of 127 months, thus spending at least Kshs 3,175.000/= on average over that period . Further the Plaintiff would have spent funds on repair of the aging tractor at the rate of at least one third of the total earnings over the period. The Plaintiff's damages in terms of lost earnings would therefore be Kshs 1,481,666.00 made up as follows:

1. Total average Earnings from 1.01.1995 to 31.07.2005
(127 months @ 55,000/= p.m. shs 6,985.000
2. Less Running Expenses for 127 months @ shs 25,000/= p.m. -
Shs 3,175,000 = 3,175,000.00
- (3) Less Maintenance Costs @ 1/3 of gross earnings
Shs 2,328,333.00
- (4) Sub total shs 5,503,333.00 = 5,503,333.00
- (5) Net Loss to the Plaintiff shs = 1,481,666

Upon the elation of the Plaintiff not to take back the Decript tractor and claim for the purchase price together with costs of repair, I would award the Plaintiff the cost of the purchase of the tractor in the sum of Kshs 69,000/= together also with the proven cost of the repair in the sum of Kshs 54,400/=. The Plaintiff shall therefore have judgment in the sum of Kshs 1,605,066/= made up as follows

1. Purchase price = Shs 69,000/=
2. Proven Costs of repairs = Shs 54,400
3. Sub Total = Shs 123,4000
4. Lost Earnings as detailed in the judgment = shs 1,481,666.00

5. Grand Total Loss = Shs 1,605,066

The Plaintiff shall have interest on the said sum at Court rates from the date of filing suit till payment in full and shall have the costs of this action, if not agreed upon to be taxed by the Taxing Officer. There shall be a decree accordingly.

Dated and delivered at Nairobi this 28th day of July 2005

ANYARA EMUKULE

JUDGE