



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**Civil Suit 723 of 1996**

**HUGHES LIMITED ..... PLAINTIFF**

**VERSUS**

**MOHAMMED SHARIF KASSAM ..... DEFENDANT**

**JUDGMENT**

The Plaintiff's suit herein having been compromised, this Judgment is in respect of the amended Defence and counterclaim dated 18<sup>th</sup> March, 2004 and deemed duly filed and served on 3<sup>rd</sup> June, 2004 as per the Order of Hon. Nyamu J.

Let me begin by saying that this is a fairly old and protracted matter, having first been instituted in court in 1989. The defendant, a spare parts dealer, bought Toyota and Mazda spare parts from the Plaintiff who was one of his suppliers. In 1989 the defendant was charged with the offence of breaking into and theft of the Plaintiff's goods (spare parts). Consequently, police visited the defendant's shop in Kirinyaga Road in Nairobi and took away all his goods alleging them to be the stolen goods. An inventory was made and signed by the police, the defendant and a representative of the Plaintiff Company. The inventory has been produced in this Court as an exhibit. The defendant was acquitted in 1994 of all the charges, by an order of trial Magistrate, Ms. C P Mwangi. The trial Magistrate further ordered that the goods taken away from the defendant by CID officials be released to the defendant, as they were his. The Plaintiff however moved the Court for a review of the order thus staying the release of the goods.

On 14<sup>th</sup> March, 1996, Hon. Oguk J in his order for review stated that the trial Magistrate was entitled to make the orders that she made, and that the Defendant having been acquitted was entitled to the return of his goods. However, he conceded that there was a dispute between the two parties on the ownership of the goods and stated that this could only be resolved in a civil suit to be filed within ten days, failing which the goods should be returned to the Defendant.

The Plaintiff therefore filed the present suit against the defendant, claiming ownership of the goods. Their plaint dated 20<sup>th</sup> March, 1996 asked for prayers that:-

- (a) A declaration that the property and ownership of the said goods vests in the Plaintiff exclusively.**
- (b) An order that the defendant by himself, his agents, and/or servants and/or any or any other person claiming by or under him, be restrained from interfering in any manner whatsoever with the Plaintiff's ownership of the said goods.**

**(c) The Plaintiff be authorized to collect the said goods from the custody of the commissioner of police now held in the Industrial Area Police Station, unhindered and without interference as the owner thereof.**

**(d) An order for payment of general damages for loss of user sales and loss profits on the said goods from the date of theft of the same on 8<sup>th</sup> August, 1989, until the date of collection from the police, together with interest at court rates.**

**(e) An order for payment of costs of this suit and costs in revision case No. 53 of 1994 aforesaid, together with interest at court rates.**

**(f) Such further or other relief, as this Honourable Court may deem fit and just to grant in the circumstances and in the interest of justice.**

The defendant filed his defence dated 16<sup>th</sup> April, 1996 on 17<sup>th</sup> April, 1996, where he denied the particulars of the Plaintiff and raised issues that the goods belonged to him at all material times. Several occurrences happened in the suit but allow me to fast forward to 18<sup>th</sup> March, 2004, when the defendant, by chamber summons application, sought leave to amend his defence, to include a counterclaim. By an order of Nyamu J dated 3<sup>rd</sup> June, 2004 leave was granted and the amended Defence and Counterclaim annexed to the application were ordered to be deemed duly filed and served. The counterclaim included prayers that the defendant being the rightful owner of the goods taken by police officers, judgment be entered against the Plaintiff for:-

**(a) An order that the goods, subject matter of this suit, be released to the defendant unconditionally in compliance with the order of the learned trial Magistrate in Criminal Case No. 18372 of 1989.**

**(b) In the alternative to (a) above, the Plaintiff do pay to the defendant the value of the goods, based on their correct market price or their value at the time of confiscation whichever is higher.**

**(c) General damages for loss of sales and/or profits on the said goods from date of confiscation until the date of their release or payment of their value.**

**(d) Cost of this suit.**

The Plaintiff filed a defence to counterclaim dated 13<sup>th</sup> September, 2004 and filed in court on 15<sup>th</sup> September, 2004 whereby the Plaintiff averred that the goods belonged to it and that it would put the defendant to strict proof on the issue of damages. On 1<sup>st</sup> November, 2004, an Order was issued by Ransley J that the goods held by the police be released forthwith to the defendant, that costs be decided by the parties, and that the matter be stood over to 18<sup>th</sup> November, 2004 for consent as regards to costs. The parties could not agree on costs.

On 19<sup>th</sup> September, 2005, this case came up before me for the hearing of the defendant's counter-claim. The defendant gave evidence that he was a motor vehicle spare parts dealer. He testified that following the aforesaid court order, he collected his goods on 24<sup>th</sup> December, 2004. He made an inventory of the goods collected, and produced the same as an exhibit before this court. On inspecting the collected goods, he found that some of the goods were missing, while others were damaged. He said that as a spare parts dealer, he was knowledgeable and had the skill to assess the value of damaged goods. He therefore prepared a list of missing goods and a list of damaged goods respectively stating the value for each. The value for the missing items was put at Kshs.9,120,396/=, whereas that of the damaged goods was placed at Kshs.1,827,052/=. The value was based on current market price. Both lists have been produced as exhibits before this court.

Counsels for the parties made both written and oral admissions. Starting with Counsel for the Plaintiff,

his written submissions stated that only prayers (b) and (c) of the counter claim need to be addressed. This is because prayer (a) was fulfilled by the order of 1<sup>st</sup> November, 2004 releasing the goods to the defendant. With regard to prayers (b) and (c) Counsel argued that these are in the nature of special damages which the defendant ought to have specifically pleaded and proved. Counsel relied on three cases: **Provincial Insurance Company East Africa Ltd vs Mordekai Mwanga Nandwa HCCC No. 475 of 1993**, **Charles C Sande vs Kenya Co-operative Creameries Limited HCCC No. 225 of 1990** and **Savannah Development Company Ltd vs Posts & Telecommunication Employees Housing Co-operative Society Ltd HCCC No. 4790 of 1989** whose relevance I will come to later. In any event, Counsel argued that prayers (a) and (b) are framed in the alternative, and that only one of them may be granted. According to him, prayer (a) having been granted, prayer (b) was no longer available to the defendant.

Counsel for the defendant, in his written submissions, argued that the defendant recovered only 40% of his goods in good condition, the rest being damaged or missing. The value of the missing goods was put at Kshs.9,120,396/=, whereas that of the damaged goods was Kshs.1,827,050/=. These figures are based on current market value. Counsel submitted that these figures were not challenged by the Plaintiff, who deals with similar spares. Counsel further submitted that his client had suffered a loss of profit estimated at Kshs.1,050,000/=. Further to this an estimate of the cost price of the missing and damaged spare parts was put at Kshs.10,947,448.00 together with a net profit of 21% or Kshs.2,298,964/=. The defendant was therefore asking for an award of Kshs.13,246,412/= as the value of missing or damaged spare parts, plus profit that the defendant would have earned on the sales. He further stated that release of part of the goods does not extinguish prayer (b) of the counter claim and the suit should be decided on its own merits.

This court has looked at the evidence before it, the submissions of both counsels as well as the circumstances of the case. In the case of **Provincial Insurance Co. East Africa Ltd vs Mordekai Mwanga Nandwa**, the court held that, “It is now well settled that special damages need to be specifically pleaded, before they can be awarded ...”. The case of **Savannah Development Company Limited vs Post Telecommunication Employees Housing Cooperative Society Ltd** follows the same dicta, in that, .... “wherever the Plaintiff has suffered any “special damage” this must be alleged in the statement of claim with all necessary particulars and the Plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly ...” The case of **Mr Charles C Sande vs Kenya Co-operative Creameries Limited** has sufficiently and exhaustively expounded on the issue of special damages. The laid law therefore is that special damages, must be pleaded and proved, before they can be awarded.

Now, is the Plaintiff’s Counsel correct in his argument that (i) because prayers (a) and (b) have been framed as “alternative” prayers, only one of them may be granted (in this case prayer (b) would not be available as prayer (a) has already been granted in that the goods have indeed been returned); and (ii) that prayers (b) and (c) cannot be granted because these claims are in the nature of special damages which have not been specifically pleaded and proved.

I do not think so. Having examined the pleadings, the evidence before this court, and the special nature of this case, it is my humble view that the Defendant has proved on a balance of probability a substantial part of his counter-claim. Prayers (a) and (b) have been framed in the “alternative” as follows:

***(a) An order that the goods, the subject matter of this suit, be released to the defendant unconditionally in compliance with the order of the learned trial Magistrate in Criminal Case Number 18371 of 1989.***

***(b) In the alternative to (a) above, the plaintiff do pay to the defendant the value of the goods based on their current market price or their value at the time of confiscation whichever is higher.***

It is not true to say that because the goods were returned as per prayer (a), prayer (b) is no longer available. It is an indisputable fact, and the evidence before this Court shows that only about 40% of the goods were returned. The balance were either missing or damaged. That being so, prayer (b) is certainly

available with respect to those goods which were not returned, or returned damaged.

Prayer (b) specifically pleads for payment of “the value of the goods based on their current market price ...” and the Defendant, in my view, has proved, on a balance of probability, the “value” of those goods. Hence, he has fulfilled the principle of law outlined in all the cases cited that special damages must be specifically pleaded and proved.

However, in my view, the Defendant has not established any claim for general damages that flows naturally and directly from the deprivation of his goods, and beyond the current market value. As he is being awarded the “market value”, which is value at which the goods could be sold for today, he has essentially been compensated in full. I will not award any “general damages”.

Accordingly, in my view, the defendant is entitled to, and I hereby award, the total sum of Kshs.10,947,448/= which represents the value of the missing goods (Kshs.9,120,396/=) plus the value of damages goods (Kshs.1,827,052/=). I enter Judgment for the Defendant in his counter-claim against the Plaintiff for Kshs.10,947,448/= together with costs and interest at court rates.

Dated and delivered at Nairobi this 13<sup>th</sup> day of February 2006.

**ALNASHIR VISRAM**

**JUDGE**