



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 1786 OF 1993**

**HILLARY DAVID ODONGO.....PLAINTIFF**

**VERSUS**

**THE MANAGER, JUHUDI LOAN SCHEME.....1ST DEFENDANT**

**T. ONYANGO.....2ND DEFENDANT**

**JUDGEMENT**

**1. Pleadings**

The plaint, dated 15th April, 1993 and filed on 16th April, 1993 was amended on 13th June, 1997.

It is stated that the 1st defendant operates a loan scheme, and is based at Kibera Estate in Nairobi. The 2nd defendant, also known as “Dr. Watch”, runs a watch-repair outfit at the same estate.

The plaintiff pleads that, at about 5.00 p.m. on 13th April, 1993 the 2nd defendant, accompanied by 14 others being servants or agents of the 1st defendant, without lawful authority forcibly entered the plaintiff’s house which was then in the said Kibera Estate, and seized a Singer sewing machine, black in colour, model 188-K1, valued at about Kshs.38,000/=. At the time of the said forced entry, those in the plaintiff’s house were his children; but his sister in law, by name **Hellen Anyango**, arrived thereafter, whereupon the strangers or some of them, assaulted her causing her physical injury.

On visiting the house of the 2nd defendant at 7.30 a.m. on 14th April, 1993 the plaintiff learned from him that the Singer sewing machine, model 188-K1 (hereafter referred to as the suit machine) had been seized for the purpose of being sold, to recover a sum of money allegedly loaned by the 1st defendant to one **Peter Olang’o**. The 2nd defendant then directed the plaintiff to the office of the 1st defendant, and there the plaintiff was informed that the suit machine would indeed be sold, to recover the alleged loan to Peter Olang’o. The 1st defendant, however, did not inform the plaintiff of how the said loan to Olang’o was incurred, nor did he show the plaintiff any documentation relating to such loan, and neither did he disclose to the plaintiff the outstanding balance on such loan.

It is pleaded that the 1st defendant continued to hold and to detain the suit machine; and that it later became apparent that the unpaid loan in respect of which it was being so detained, had been secured on the basis of a sewing machine model K 188 and not the plaintiff’s machine, which is model 188-K1.

The plaintiff pleads that he is a stranger to any loan arrangements between the 1st defendant and the said **Peter Olang’o**. He did, however, on **20th September, 1994** and to mitigate his loss, pay through his

lawyer, to the 1st defendant, the sum of Kshs.3,010/= being the balance of the alleged loan to **Peter Olang'o**; and consequently the 1st defendant's advocates requested the 1st defendant to release the suit machine to the plaintiff. To that advice there was, however, only much delayed response; the 1st defendant did not release the suit machine to the plaintiff until **30th April, 1997** and when it was so released to the plaintiff, it had been damaged, its lifter was broken and it had no accessories.

The plaintiff claims special and general damages for the unlawful seizure of the suit machine on 13th April, 1993 and subsequent detention thereof between **20th September, 1994 and 30th April, 1997**; and for the broken lifter and missing accessories. He claims lost profits at the rate of Kshs.391/40 per day, for the entire period of detention of the suit machine, from 13th April, 1993 to 30th April, 1997.

The plaintiff seeks (i) a declaration that the seizure and subsequent detention of the suit machine by the defendants, from 13th April, 1993 to 30th April, 1997 was unlawful and illegal; (ii) payment of general and special damages as prayed; (iii) costs of this suit; (iv) interest on costs and damages; (v) any further relief such as the Court may deem fit and just to grant.

The defendants' statement of defence, dated 20th May, 1993 was filed on 2nd June, 1993 and then amended, in response to the amended plaint of 13th June, 1997 on 4th May, 1999. The 1st defendant denies the plaintiff's claim, and pleads that **Peter Olang'o**, a brother of the plaintiff, had obtained a loan from the 1st defendant's loan scheme at the request of the plaintiff. It is pleaded that the collateral to secure the said loan had been the suit machine, and that **Olang'o** defaulted in making payments and had fallen in arrears to the tune of Kshs.6,962/=. The 1st defendant then instructed the 2nd defendant and members of some organization called the Ndizi Self-Help Group, to seize the suit machine. He denies that anyone in the plaintiff's house had suffered physical injury during the process of taking away the suit machine, which process is asserted to have been lawful. It is pleaded that payment by the plaintiff to the 1st defendant of the sum of Kshs.3,010/=, on 20th September, 1994, "was a positive affirmation of the fact that money was due and owing to the defendants which [fact was] within the plaintiff's knowledge."

Earlier on, on 23rd February, 1994 the plaintiff had filed a reply to the statement of defence, and he later, on 13th August, 1999, filed a reply to the amended defence. He had denied the assertions in the statement of defence and, significantly, stated that "although he is a brother to **Peter Olang'o**, he, the plaintiff, was not a party to the loan transactions between Peter Olang'o and the defendants." The plaintiff asserts that it was known to the defendants that Peter Olang'o had rented the suit machine from him, and so he could not pledge it as security for a loan advanced to himself, which loan had moreover been secured by entirely different arrangements made between the said **Olang'o** and the 1st defendant. The plaintiff stated that he bore no responsibility for the sum of Kshs.6,962/= said to be outstanding in arrears in the name of Peter Olang'o. The plaintiff asserted that the suit machine had been kept in his house because it was his property, and its seizure by the defendants was unlawful.

## 2. Evidence

Learned counsel for the plaintiff, **Mr. Mutange**, on the occasion of hearing the case on 18th May, 2004 introduced his client's case by stating that its foundation was loss of user of the suit machine, unlawfully attached and detained by the defendants for as many as four years. In consequence, the plaintiff suffered loss and damage.

PW1, **Mr. Hillary David Odongo** who was the plaintiff, was sworn and gave his evidence. He said he was now a farmer in Rachuonyo District, growing maize, beans, groundnuts, cassava and millet, which crops he sells to the local market. He testified that in 1993 he was living at Kibera Estate in Nairobi, and he had a tailoring business at the City Market in the Central Business District. He had a sewing machine for the business, and he had employed a tailor. He exhibited his receipt, issued in 1975, for the sewing machine, model No. 188 – K1, at the time of purchase. He exhibited a sales voucher issued to him; he had purchased the machine for Kshs.2,820/= in 1975. Peter Olang'o, who was the plaintiff's brother, was a tailor. The plaintiff testified that he had not been aware that **Olang'o** had obtained a loan from the 1st defendant until the day the defendants entered his residence and took away the suit machine, model No. 188 – K1. He said he had leased the suit machine to **Olang'o**, who was using it. He had allowed Olang'o

to continue using his sewing machine because at that time he had leased another machine from one **Thomas A. Owour**, to enable his tailoring work to continue (he produced the leasing agreement as an exhibit). The plaintiff testified that he had no knowledge that his own sewing machine had been tendered by **Olang'o** as security for a loan, until the defendant's took it away from his residence. Those who attached the suit machine showed the plaintiff a document, a security declaration form; but the sewing machine referred to in that document is K188, and not 188 – K1 which is the model of the suit machine. In the meantime, **Olang'o** had died and so the confusion in information could not be clarified.

On the day the defendants levied distress on the suit machine, the plaintiff had not been at his house, on Karanja Road in Kibera Estate. He returned to find his children scared, and his sister-in-law injured. He testified that he took the sister-in-law to hospital the same evening, and reported the incident to police.

The police gave a P3 form which was filled in, and which showed the injuries suffered by the plaintiff's sister-in-law. The plaintiff testified that he spent Kshs.1050/= in the treatment of **Hellen Anyango**, his sister-in-law (the receipt was pl's exhibit No. 7).

When the first defendant supplied a copy of the loan account (in the name of **Olang'o**) to the plaintiff, he applied before the Court for orders stopping the sale of the suit machine. He then requested the 1st defendant for a statement on the alleged loan, and he was given the figure of Kshs.3,010/= as the outstanding loan amount.

He then went back to the sewing machine dealer, to find out the current price of the Singer model 188-K1. He found that this model was no longer available, having been replaced by model No. 188-U, but the price of this one as at 1994 after discount was Kshs.72,150/=. He then took the decision to pay off the sum of Kshs.3,010/= said to be owing in the name of **Olang'o** (then deceased). He paid by cheque to the 1st defendant's advocates (exhibit 10), and the advocates issued a receipt (exhibit 11). When, thereafter, the plaintiff visited the offices of the 1st defendant's advocate, the said advocate sent him with a letter, dated 24th May, 1995 to K-Rep Juhudi Credit Scheme (exh.12). By this letter the advocate requested release to the plaintiff of the suit machine. In the meantime, the plaintiff's cheque for Kshs.3,010/= to the 1st defendant's advocates, of 20th September, 1994 had been duly cleared by Delphis Bank, and a statement to this effect was dispatched to the plaintiff (exh.13).

That was not, however, the end of the story. The plaintiff testified that he visited the offices of the 1st defendant many times, for the purpose of following up on arrangements for the release of the suit machine. The defendants kept on shifting the storage of the machine: at first it was said to be stored at Kibera; later it was said to be in a storage at Kawangware. On 10th April, 1997 the plaintiff hired a vehicle, paying a charge of Kshs.1000/=, to collect the suit machine from Kawangware; but it was not released until 30th April, 1997 when, once again, the plaintiff had to hire a taxi for Kshs.1000/=.

The plaintiff's business accounts were audited by M/s. Njagi Isaac & Associates, and the audit showed gross turnover as Kshs.273,284/= for the period running from 2nd July, 1992 to 9th April, 1993. The net income was shown as Kshs.110,374/=. Although counsel for the defendants had objections to these figures, they appeared by no means, in my opinion, to be in any manner outlandish. Replying on these accounts, the plaintiff computed his net earnings per day at Kshs.391/40 at the time the suit machine was taken away and detained by the defendants. He testified that he lost the use of his sewing machine from 13th April, 1993 to 30th April, 1997 - a total of 1,477 days. As he could no longer conduct his normal business, the plaintiff testified, he was driven to other economic pursuits, and he ended up in farming.

The plaintiff prayed for damages in the sum of Kshs.578,097/80 together with costs of medical care for his sister-in-law who had been injured in the commotion occasioned by the defendants' servants or agents when they unlawfully entered the plaintiff's house; costs of transport; replacement of missing parts in the suit machine; the total came to the figure of Kshs.591,127/80.

On cross-examination, the plaintiff testified that **Peter Olang'o**, the man who is said to have been indebted to the 1st defendant, was his brother; he died on **10th June, 1993**, some two months after the attachment of the suit machine. He testified that he did not know his sewing machine had been pledged

for a loan until after it had been attached; and even then, he remained unsure whether what was pledged was the suit machine, as the model numbering of the machine said to have been pledged was K 188, whereas the plaintiff's sewing machine was model No. 188 – K1.

The plaintiff testified that the late **Peter Olang'o** had returned his sewing machine to him, as soon as **Olang'o** had finished with it. **Peter Olang'o** returned the suit machine to the plaintiff in **February, 1993**, proceeded home in the countryside, and died while being there in June, 1993. The plaintiff said he had not been able to discuss the suit machine with **Olang'o** before his death. **Olang'o** had not even told the plaintiff that he (Olang'o) was enrolled as a member of any business organization or credit scheme.

The plaintiff testified that the suit machine had been in good condition at the time it was attached. He was aware that his brother **Olang'o** had owed some money to Ndizi Self-Help Group, but he knew very little about this Self- Help Group.

On re-examination, the plaintiff testified that his reason for paying Kshs.3,010/= in respect of the unpaid arrears of the loan to his brother, **Olang'o**, was to avert the disposal of the suit machine.

PW2, **Hellen Anyango**, was sworn on 28th June, 2004 and led through the examination-in-chief by learned counsel, **Mr. Mutange**. She testified that she is employed by the Ministry of Local Government, and the plaintiff is his brother-in-law. On 13th April she left her place of work in the evening, arriving home at about 5.00 p.m. This was House No. 80 on Karanja Road, Kibera, the house of the plaintiff. When she arrived home, there were some 10 – 12 people standing by the door. When she opened the door, these people entered the house, forcing their way in. They indicated they were there to take away the suit machine. They dragged the witness out of the house and beat her up, injuring her back and neck. One of the intruders was one **Martin Anyango**, commonly known as "Dr. Watch." They took away the suit machine. Later on that evening the plaintiff came home and learned of the incident that was unfolding just before his arrival. He took the witness to Makina Clinic in the Kibera area, where she was treated and discharged. Clinic charges were paid by the plaintiff. On the following day, 14th April, 1993 the plaintiff hired a vehicle to take himself and the witness to the Kilimani Police Station, where the incident of the previous evening was reported.

Cross-examined by learned counsel, **Mr. Kaburu**, the witness said she would not be able to recognise all the persons who had been involved in the evening incident of 13th April, 1993. She had gone to the clinic in the company of the plaintiff and the driver. She did not know whether any of the attackers had been arrested. She testified that she and the plaintiff had recorded at the Kilimani Police Station that they were certain of the identity of one of the attackers, **Martin Anyango**.

With PW2, learned counsel, **Mr. Mutange** closed the plaintiff's case. On that occasion, 28th June, 2004 the defendants had no witness and learned counsel, **Mr. Kaburu** applied for adjournment. At the next Court appearance on 7th October, 2004 counsel again applied for adjournment, as his only intended witness was out of the country. On the following scheduled date of hearing, on 23rd November, 2004 **Mr. Kaburu** stated: "I had sought an adjournment to get witnesses. They are not there. I will close my case." A consent order was then entered that the plaintiff was to file and serve his written submission by 7th December, 2004 and the defendant to do the same by 14th December, 2004 after which there would be a mention in Court. The plaintiff's submissions were filed on 27th January, 2005 and the defendant's on 15th February, 2005.

### **3. Submissions**

#### **(a) For the Plaintiff**

Counsel for the plaintiff stated his client's claim as being for a declaration that the seizure and subsequent detention of the suit machine, model No. 188 – K1, by the defendant from 13th April, 1993 to 30th April, 1997 was unlawful and illegal. The plaintiff therefore claimed special and general damages for the unlawful seizure of the machine on 13th April, 1993 and subsequent detention thereof after 20th September, 1994 to 30th April, 1997 together with the value of the broken lifter and missing accessories of the machine. The plaintiff claimed lost profits at Kshs.391.40 per day for the entire period from 13th

April, 1993 to 30th April, 1997.

Counsel submitted that with the evidence of two witnesses, and the production of 18 documents, the plaintiff had made cogent case which should be held to stand up, on a balance of probabilities. Counsel remarked the fact that the defence had called no witnesses to rebut or challenge the plaintiff's evidence; and the fact that neither the 1st nor the 2nd defendant saw it fit to appear and defend themselves against the plaintiff's allegations. These facts, it was submitted, led to the conclusion that the defendants did not have a case.

Counsel submitted that the plaintiff had shown sufficiently that his sewing machine, model No. 188 – K1 was unlawfully and forcibly attached by the defendants, and retained by them between 13th April, 1993 to 30th April, 1997 during which period he suffered financial loss, as his tailoring business collapsed. To buttress this argument, counsel referred to the Court of Appeal case, *Car & General (K) Ltd. v. Diamond Trust of Kenya Ltd*, Civil Appeal No. 159 of 1994.

The facts of the said *Car & General* case have many similarities to the present one. The appellant there, attached a motor vehicle belonging to the respondent. Attachment was levied sometime on or about 10th July, 1992. The attached motor vehicle was the property of the respondent but was on hire to a company, by name, *Four Seasons Resort Ltd*. The appellant had obtained a decree from the Court of the Resident Magistrate in Mombasa, against Four Seasons Resort Ltd. Now armed with that decree, the appellant, through auctioneers, seized the respondent's vehicle. The full picture which led to a clear verdict in favour of the respondent, emerges from the words of the learned Judges of the Court of Appeal:

**“The respondent through its letter dated 10th July, 1992 immediately informed the appellant that the vehicle belonged to them and not to Four Seasons Resort Ltd. The appellant passed this letter to its advocates M/s. Marende & Co. Advocates and on 14th July, 1992 those gentlemen wrote a letter to the respondent to provide relevant documents to prove their ownership of the vehicle. The letter reached the respondent on the 17th July, 1992 and the respondent supplied the information on 18th July, 1992. But all this was wasted labour because the vehicle was sold on 15th July, 1992. It was advertised for sale in the Kenya Times newspaper of the same day, i.e. 15th July, 1992. In those circumstances it was not surprising that the respondent sued the appellant claiming from it Shs.428,871/30 which was said to represent the aggregate principal amount of the instalments due and owing under the hire purchase agreement between the respondent and Four Seasons Resort Ltd.”**

The trial Judge in that case (*Wambilyangah, J*) had held the defence (of the appellant in the appeal) to be frivolous and vexatious, and the Court of Appeal now remarked:

**“The advocates for the appellant were warned that the vehicle was not the property of Four Seasons Resort Ltd; the same advocates wrote asking that they be supplied with proof of ownership and even before this could be done, the vehicle had already been sold. The sale was done in flagrant violation of Order XXI rule 62 which requires that where movable property is attached and is to be sold, the sale shall not, without the written consent of the judgement debtor, take place before 15 days from the date on which the advertisement of the sale is affixed in the precincts of the Court. The handbill advertising the sale and which it is alleged was [affixed] on the Court notice board was dated 8th July, 1992. In the face of this kind of evidence, we cannot see what possible defence was open to the appellant. Indeed the only conclusion open from these facts is that the appellant was rushing the sale to defeat any claim that the respondent was entitled to make.”**

Learned counsel claimed for the plaintiff damages as herebelow particularised:

(i) amount paid to procure release of the suit mature .....Kshs.3,010/=

(ii) transport costs .....Kshs.3,500/=

(iii) medical expenses on PW2.....Kshs.1,050/=

(iv) lost machine accessories.....Kshs.5,470/=

Sub-total Kshs.13,030/=

(v) net income from audit report, Kshs.110,374/= divided by 282 working days in the year, amounting to a total of Kshs.391/40 per day;

· period of loss (13/4/93 – 30/4/97), totals 1,477 days. ·

Computed loss times number of days (391/40 x 1,477), totals Kshs. 578,097/80

Sub-total Kshs.578,097/80

Grand Total = Kshs.578,097/80 + 13,030 = Kshs.591,127/80

Counsel prayed for judgement for general and special damages in the figure of **Kshs.591,127/80** with costs and interests, against both defendants jointly and severally.

#### **(b) For the defendants**

In their submissions for the defendants, counsel raised several points of query:

(i) was the attachment of the suit machine illegal, and who effected it?

(ii) was there any money due and owing to the defendants;

(iii) had the suit machine been pledged as security?

(iv) is the plaintiff entitled to any damages?

Counsel submit that there are no doubts that one **Peter Olang'o** had obtained a loan from the 1st defendant, through Ndizi Self-Help Group, and had pledged, for that purpose, the suit machine. The Group then realised that security, after **Olang'o** failed to honour his repayment obligations.

Counsel submits that the 1st defendant had not participated in the carrying out of the attachment of the suit machine. He further contends that the Court had made a finding that the attachment of the machine had, in any event, been lawful; and that the relevant decision had not been challenged by the plaintiff. He urges that the Court's decision must comply with such earlier ruling. He contends that this Court should find that the attachment of the suit machine had been lawful.

Counsel also founds his client's case on the footing that the plaintiff, by paying to the defendants' advocate the sum of Kshs.3,010/= in the name of Peter Olang'o, on 20th September, 1994 had by conduct admitted that the said **Peter Olang'o** had been indebted to the defendants. Counsel submitted that the suit sewing machine should be held to have been properly pledged as the late **Olang'o** was indebted to the defendants.

Counsel for the defendants contended that damages cannot be awarded, as there was no unlawful seizure of the suit machine. He also challenged the statement of account produced by the plaintiff, as being in breach of the Income Tax Act. He did not, however, give any particulars to reinforce this contention.

#### **4. Analysis and Findings**

It is not contested that the description of the sewing machine which **Olang'o** is said to have pledged in return for a loan from the defendants is K188 and not 188 – K1 (which is the suit machine). The defendants made no plea in respect of this matter; and as they elected not to come to Court and give evidence, they missed the opportunity to tell the Court what their interest would have been in the plaintiff's sewing machine, model No. 188-K1. On this technicality alone I would have proceeded to find in favour of the plaintiff. However, for the purpose of resting this decision on merits rather than on form, I want to assume that an error of entries could have been made, and that the sewing machine which the late Olang'o gave as security was actually the suit machine, model No. 188 – K1.

Who is the owner of the suit machine? There is no doubt, it is the property of the plaintiff. He exhibited the sales voucher and the receipt issued when he purchased the suit machine, way back in 1975. His title to the machine could never be disputed. Hence the legal burden rested upon the defendants to demonstrate how Olang'o could lawfully pledge the suit machine, for which he clearly had no ownership rights. How did the defendants come to advance a loan against property that they could not ascertain as belonging to the borrower? If they were negligent in this regard, then, clearly, the loss issuing forth from that negligence would fall upon them, and not upon the plaintiff.

Assuming the late **Olang'o** would have shown some colour of right to the plaintiff's machine, the plaintiff's protests from the date of attachment, 13th April, 1993 ought reasonably to have led the defendants to re-check the details of ownership of the machine. If they failed to do so - as they did indeed fail - they were negligent; and this would deprive them of any valid excuse for detaining the machine. From the records, they detained the machine from 13th **April, 1993 to 30th April 1997**, that is an inordinately long period of some four years. If anyone takes custody of another person's commercial property and, without reasonable excuse, keeps it for so long, the Court would have to presume intent to debilitate the owner's economic productivity, or alternatively, an act of recklessness, having no regard to the owner's needs and rights of economic survival. Prima facie, evidence of wrongful conduct emerges, in such circumstances. Such an inference is consistent with the evidence given by the plaintiff, that he was left with no choice other than to seek other economic opportunities, such as farming. This may, in my view, be seen as a state of considerable frustration to the plaintiff in the normal conduct of his life and in the management of economic support systems for his family.

I would not, therefore, accept the contention made for the defendants, that when, on 20th September, 1994 the plaintiff paid to the defendants through their advocates the sum of Kshs.3,010/= owed by the late Olang'o, he was thereby proclaiming his own obligation which had in the first place justified the seizure of his sewing machine. The plaintiff and Olang'o were two different persons, and the former's obligations could not be enforced against the plaintiff's properties. The defendants' claim in this regard does not, in my view, succeed. The wrongfulness of the defendants' conduct is further evidenced by the fact that even after the plaintiff made the said payment of Kshs.3,010 in 1994, the suit machine was still not released to him until sometime in 1997. Such conduct is patently wrongful and cannot be excused by any construction of the law.

I am unable to accept the defendants' claim that they are not the ones who seized and detained the suit machine. All actions under this suit have been against the selfsame defendants and the advocates acting for them are on record and well-identified. The defendants committed a wrong, by unlawfully seizing and detaining the plaintiff's sewing machine, thus crippling his business. The plaintiff has adduced convincing evidence against the defendants; the defendants have produced not an iota of evidence. They are well and properly identified, and from the evidence before me, there is no basis upon which the defendants can shield themselves from liability.

Therefore, I now give this judgement in favour of the plaintiff and against the defendants, and make the Court's decrees as follows:

- (i) The defendants jointly and severally shall pay general damages to the plaintiff in the sum of **Kshs.578,097/80**, and the same shall bear interest at Court rate with effect from the date hereof to the date of payment in full.

(ii) The defendants jointly and severally shall pay special damages to the plaintiff in the sum of Kshs.13,030/=, and the same shall carry interest at Court rate from the date of filing suit until payment in full.

(iii) The defendants jointly and severally shall pay the costs of this suit, and the same shall bear interest at Court rate from the date of filing suit until payment in full.

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff: Mr. Mutange, instructed by M/s. T. O. K'Opere & Co. Advocates**

**For the Defendants: Mr. Kaburu, instructed by M/s. Gathirwa & Advocates.**