



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Case 312 of 2000**

**M.S. BAWAZIR (1993) LIMITED.....PLAINTIFF**

**- Versus -**

**1. ZAHIR MANJI**

**2. N. MANJI**

**3. N. KASSAM t/a TURBO SOUND.....DEFENDANTS**

**J U D G M E N T**

By its plaint filed herein on 10/7/2000 the plaintiff claims from the defendants a sum of Sh. 1,400,510/= being the value of goods sold and delivered by the plaintiff to the defendants in the year 1999. In their defence filed herein on 26/7/2000 the defendants admitted owing to the plaintiff only Sh. 371,000/=. According to the defendants as stated in their defence the plaintiff sold and delivered to them goods worthy Sh. 1,960,510 out of which they paid to the plaintiff Sh. 600,000/= on 31/5/2000, Sh. 200,000 on 17/7/2000 and Sh.100,000 on 18/7/2000 and returned to the plaintiff goods worthy Sh. 689,500. That, according to them, left a balance of Sh. 371,000/=.

The parties called one witness each. The plaintiff called its manager Mr. Abdul Mohamed Bawazir. He testified that between May and July 1999 the plaintiff sold and delivered to the defendants TV sets worthy Sh. 2,000,510/= inclusive of transport charges of Sh. 40,000/=. He produced the delivery notes and invoices for a total sum of Sh. 2,000,510/=. To date they have been paid only Sh. 900,000/= of which Sh. 300,000/= was paid after the filing of the suit. He also stated that the defendants returned to the plaintiff goods which the plaintiff sold for Sh. 583,000/=. The plaintiff is therefore claiming the balance of Sh. 517,510/=.

It was Mr. Bawazir's testimony that as stated in their Advocates letter of 27/4/2000 **Exhibit 5** the goods were returned on condition that they would give the defendants credit for whatever sum the goods fetched and claim from them the balance, if any, with expenses of selling them.

Nashir Noordin Kassam the third defendant testified for the defendants. He stated that the goods sold and delivered to them were worthy Sh. 1,960,510. Sh. 40,000/= was for transport which had not been agreed upon. The goods consisted of Goldi and Newstar TV sets which were new in the market and Grundig which had gone out of the market in Kenya. They therefore found it difficult to sell all of them even at cost.

Mr. Kassam stated that when they received the plaintiff's lawyer's demand letter they paid to the defendants a sum of Sh. 600,000/=:, and later Sh. 300,000/=. Although the balance according to them after returning goods worthy Sh. 689,500/=:, was Sh. 371,000/= they paid a further sum of Sh. 200,000/= in good faith to finalise the matter. He was however unable to prove that further payment. He denied receiving the plaintiff's lawyer's letter of 27/4/2000 setting the conditions for the return of the goods. In cross examination he said that the goods were sold on consignment meaning that they were going to return whatever they were unable to sell. Later the defendants paid into court Sh. 371,000/=:. They therefore do not owe any money to the plaintiff and he prayed that the plaintiff's claim be dismissed with costs.

It is clear to me that the really bone of contention in this suit is the condition upon which the unsold goods were returned by the defendants to the plaintiff. Before I deal with that, however, I need to dispose of some minor issues.

The first one is the plaintiff's claim for transport charges of Sh. 40,000/=. This claim is not in any document signed by any of the defendants or by anybody on their behalf. As it is disputed by the defendants as having not been agreed upon I find that the same has not been proved as required. At any rate it is not specifically claimed in the plaint.

The other issue is the defendants' claim that they paid a further sum of Sh. 200,000/= allegedly in good faith to finalise the matter as they did not want to come to court in Mombasa. Under cross-examination Mr. Kassam wavered and was not able to prove the payment of that sum. I dismiss that bit of his evidence. I also reject Mr. Kassam contention that the goods were sold to them on consignment. In cross examination he was not able to explain why they did not put that in their defence or why the point was not put to the plaintiff's witness by their lawyer. That being my view of the matter I find that the goods were sold unconditionally on credit to the defendants for the admitted sum of Sh. 1,960,510/=.

Having disposed of these minor issues I now wish to go back to the issue of the return of the goods by the defendants.

As already stated the goods sold were TV sets. They were therefore specific goods in a deliverable state and they were indeed delivered to the defendants who retained possession of them for almost a year. The sale having been unconditional I find that the property in the goods passed to the defendants when the contract was made in 1999. What then can the return of the goods be called? It cannot be called an exercise of the unpaid seller's lien as the plaintiff had parted with possession of them.

The defendants in their letter to the plaintiff's advocates dated 18th April 2000 **Exhibit 4** proposed to return the goods to be given credit at the price they had bought them for from the plaintiffs. The plaintiff on its part stated in their Advocates' letter dated 27th April 2000 **Exhibit 5** that they were prepared to accept the return of the goods on condition that it would give the defendants credit for the price the goods would fetch and if less than what they had sold them for, it would be entitled to demand the difference.

The plaintiff's Advocates' letter of 27th April 2000 setting out the conditions upon which the plaintiff could accept the return of the goods was allegedly faxed to the defendants and the plaintiff contends that it was upon the receipt of the fax that the defendants returned the goods on 28th April 2000 thus accepting the conditions set therein. The defendants on their part deny having received that fax. In cross examination P.W.1, Abdul Mohamed Bawazir, said he did not know when the letter was faxed and he had no proof that it was indeed faxed. The letter itself does not have the number to which it was allegedly faxed.

In the absence of proof that the letter **Exhibit 5** was faxed to the defendants I find that the parties did not agree on the terms of the return of the goods. The plaintiff therefore resold the goods at its own risk and cannot claim the difference if any from the defendants. In any case the plaintiff did not state or prove the price at which it resold them.

It was not disputed that the defendant deposited a sum on Sh. 371,000/= into court. Nobody said whether or not the same has been released to the plaintiff. If it is still in court the same should be released to the plaintiff in which case the plaintiff will have no further claim against the defendants.

In the upshot I dismiss the plaintiff's claim in this suit. As to the costs of the suit, the defendant paid only Sh. 600,000/= before this suit was filed and the balance after. They are therefore not entitled to costs.

I order that each party bears its own costs.

DATED and delivered this 24th day of June 2005.

**D.K. MARAGA**

**JUDGE**