



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 1 of 1995

MAVJI DEVJI PATEL & COMPANYPLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND1ST DEFENDANT

MUGOYA CONSTRUCTION & ENGINEERING LTD.....2ND DEFENDANT

SOLOLO OUTLETS LIMITED.....3RD DEFENDANT

CYPERR PROJECTS INTERNATIONAL LIMITED.....4TH DEFENDANT

J U D G M E N T

P W 1 **Pravin Manji Patel** gave evidence on behalf of the plaintiff. He said that he is a partner of the plaintiff company. That the plaintiff through a sub- contract with Cyperr Projects International Limited was involved in construction work at the 1st defendant's site, Nairobi South B Hazina Housing Complex. That Sololo Outlets Limited and Cyperr Projects International Limited, 3rd and 4th defendant respectfully, were contracted by the 1st defendant to carry out development on the aforesaid site. That in 1993 the contract of that construction, between the 1st defendant and 3rd and 4th defendants was terminated. After that termination that the 4th defendant refused to release a road roller that was on site and which belonged to the plaintiff. Later, in evidence P W 1 was to state that the roller was detained because the 1st defendant itemized that roller in one of tender documents and that because of the problems between the 1st defendant and 3rd and 4th defendant, the 1st defendant denied the plaintiff possession of the said roller. On being cross examined, P W 1 said

“NSSF (1st defendant) did not know our roller was on site. They were not part of arrangement.”

P W 1 attributed failure to release the roller to the plaintiff to two factors: -

- (i) that the roller was included by 1st defendants in tender documents;
- (ii) the 2nd defendant, (Mugoya Construction & Engineering Ltd) used the roller on site;

He elaborated that on termination of the contract between 1st defendant, and 3rd and 4th defendant's the

1st defendant awarded the contract to the 2nd defendant to ensure that its contract is completed.

P W 1 on being cross-examined by counsel of the 2nd defendant P W 1 stated that the plaintiff did not have any claim against the 2nd defendant. After that statement it was not surprising that the 2nd defendant did not call any evidence.

P W 1 further stated that the roller was detained for almost 18 months and during that period the plaintiff suffered loss of user at the rate of kshs 10,000/- per day. P W 1 produced a letter written by a company called Motorways construction dated 14th September 1993. The content of that letter stated: -

“RE QUOTATION FOR ROLLER HIRE

Further to your ‘inquiry, we are pleased to quote the rate of kshs 10, 000/- per day (8 hours) for the hire of our Avelling Barford Roller. This rate is applicable if your requirement is for over 5 months and is exclusive of fuel, lubricants and operator.”

In cross-examination P W 1 accepted that he had not tendered evidence, on behalf of the plaintiff, on the cost of hire of the said roller by the 4th defendant. That the letter quoted herein before was obtained to support the plaintiff’s claim. P W 1 conceded that the plaintiff has many other roller, apart from the one the subject of the suit and accepted that the plaintiff could not prove that there was a time the plaintiff need a roller and lacked one because of the detention of the one, the subject of the suit; and neither was there evidence that they were unable to satisfy a client for hire, of a roller because of the absence of the subject roller.

1st defendant adduced evidence through its witness **Daniel Musya Kiilu**, D W 1. He is a senior estate officer at NSSF whose duties include designing buildings, supervision and projects management.

He stated that 1st defendant was interested to purchase a development and to that end 1st defendants agreed to award 4th defendant a contract to develop that project and transfer the same to 1st defendant on completion. That in 1993 the said developers were placed under receivership and in order to protect its interest 1st defendant moved onto the project and quickly appointed their own contractor that is the 2nd defendant. D W 1 said that the 1st defendant did not have any relationship with the plaintiff, contractual or otherwise. He stated that the procedure is that once another developer takes over a site, that developer maintains all plant and equipment necessary for completion of the project. At the end of that project accounts are taken where the 2nd contractor and the previous contractor are paid.

I have considered the evidence tendered in this case and the exhibits submitted by the witness. I note that it is common ground that the contract between first defendant and 4th defendant was terminated 1993 on 4th defendant being placed under receivership. The first time the plaintiff seems to have demanded the release of the roller was on 28.1.1994. It was not clear why there was a delay in demanding the release thereof. The roller was finally released on 6th April 1995. But I believe more importantly is to look at the claim as presented by the plaintiff before court. The plaintiff has two subsisting prayers for the consideration of this court:

“Damages for loss of user at the rate of kshs 10, 000 per day from first October, 1993 until return of the road roller to the plaintiff;

General damages to be assessed by this Honourable Court.”

In considering this claim it is necessary to consider the evidence of DW 1 in cross-examination by

counsel for 3rd and 4th defendants. P W 1 stated that the plaintiff has many other rollers, apart from the one the subject of this suit; that the plaintiff had not tendered evidence that the plaintiff or its hirer needed a roller and none was available because of the detention of the subject roller, and nor had the plaintiff proved that it failed to carry out it's work as a result of detention of the subject roller.

That evidence demolished the plaintiff's case. The plaintiff cannot indeed succeed in the light of that evidence. The plaintiff also other than providing a letter by another company showing how much they charge for rental of a roller did not provide evidence of their own rates chargeable to clients. The evidential burden to prove the present claim lay squarely upon the plaintiff, which had to prove on a balance of probability. The plaintiff failed to prove its claim.

The plaintiffs claim for general damages fails because similarly, here, the plaintiff failed to fulfill the burden of proof. There was no evidence of loss and suffering requiring compensation in general damages.

Although there were draft issues filed in court but not signed by any party I find that they did not capture the correct issues. To my mind the correct issues would be **'has the plaintiff proved its claim for special and general damage.'** The answer to that is in the negative.

My finding in this matter therefore, that the plaintiff has failed to prove its case against any of the defendants, and accordingly the plaintiff's case, hereof, is dismissed as against all the defendants, with costs being awarded to all the defendants, as against the plaintiff.

Dated and signed and delivered 28th day of September 2005.

MARY KASANGO

JUDGE