



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2580 OF 1995

FREDERICK N. WAMALWAPLAINTIFF

VERSUS

JOHN ONGERIDEFENDANT

JUDGMENT

The original plaint, dated 15th August, 1995 and filed on 16th August, 1995 was amended on 14th July, 1998 and again on 18th March, 2002. The plaintiff pleads that by an agreement dated 23rd May, 1994 the defendant agreed to hire his trailer bearing registration marks ZA8411, at a charge of Kshs.160,000/= per month. Pursuant to the said agreement the defendant, on or about 29th December, 1994 took possession of the trailer, together with a 40-foot Tarpaulin and spare tyre and accessories, and has since then remained in possession of the same. It is stated that the defendant has been in breach of the hire agreement by failing or refusing to pay the agreed hire charges.

On or about 1st August, 1995 the plaintiff gave the defendant notice in writing terminating the hire agreement and demanding the return of the said trailer, as well as payment of hire-charge arrears amounting to Kshs.1,280,000/=, based on the agreed rate of Kshs.160,000 per month from 29th December, 1994 to August 1995, and thereafter Shs.30,000/= being mesne profits per day for trespass and unlawful use – until delivery – up. The plaintiff now claims from the defendant Kshs.1,280,000/= hire charges and mesne profits and/or damages for unlawful deprivation of use at the rate of Kshs.30,000/= per day for a reasonable period to be determined by the Court, and/or damages for loss of use, and damages for trespass in addition to damages for detinue or conversion of the said trailer, and exemplary and punitive damages for the said unlawful use and detinue.

The defendant overlooked the plaintiff's demand, and has failed to deliver up possession of the said trailer, or to pay the plaintiff hire charges; he wrongly remains in possession of the trailer, trading therewith, without any benefit to the plaintiff, and at the plaintiff's risk regarding third-party claims turning on the use of the trailer on roads in Kenya and elsewhere. For this reason, the plaintiff claims punitive and/or aggravated damages.

The defendant in his amended defence of 1st August 2002 pleads that the plaintiff's suit is incompetent because it was served upon him with undated summons; he states that he *shall apply* to the Court to strike out the suit.

However, the defendant concedes that the agreement pleaded in paragraph 3 of the amended plaint was indeed made, and adds that this agreement of 23rd May 1994 provided that the defendant would undertake the repair and inspection of the trailer, and that he would deduct the cost thereof, from

the rent due. Thereafter, the defendant pleads, the plaintiff would be responsible for the regular maintenance of the trailer.

The defendant pleads that he had extensively repaired the said trailer, but the plaintiff had disputed the sums expended on those repairs. He pleads that the plaintiff failed to maintain the trailer, and consequently the same became unserviceable and he, the defendant, had not done business using the trailer. The defendant pleads that though it is true he had taken possession of the trailer, it had not been accompanied with a 40-foot tarpaulin or spare tyre or accessories as pleaded in paragraph 4 of the amended plaint. He denies too that he had failed to pay hire charges to the plaintiff.

The defendant pleads that the plaintiff failed to reimburse him repair charges expended on the suit trailer; and that the plaintiff had taken away the trailer allegedly for maintenance service, but then overstayed with it and the defendant's business consequently suffered. This fact, pleads the defendant, denied the defendant revenue, and disentitled the plaintiff to any hire charges.

The defendant states that in April, 1995 he had paid Kshs.60,000/= to the plaintiff as part of the charges for a few days of use of the trailer. He avers that between June 1995 and August, 1995 he had delivered to the plaintiff both the trailer and his own prime mover, under a further agreement which provided that the plaintiff would conduct business and repay himself in respect of any charges payable by the defendant; and that during that period the plaintiff himself conducted business and earned Kshs.1,760,000/= which he has not accounted for.

The defendant pleads that the plaintiff's letter to him which terminated the agreement between the parties, was later rescinded; and he denies liability to the plaintiff for the sum of Kshs.160,000/= per month from 29th December 1994 to August 1995, and thereafter Kshs.30,000/= per month as pleaded in paragraph 5 of the amended plaint. The defendant denies that the plaintiff is entitled to hire charges, or damages for unlawful use, for trespass or for conversion and detinue. The defendant admits that the agreement has been terminated, but denies that he has detained the suit trailer, continued to conduct business with it and not made any payments due to the plaintiff. He puts the plaintiff to strict proof of the claims in the plaint.

Perhaps the critical assertion in the statement of defence is in paragraph 12:

“The defendant states that on or about 5th March, 1997 the plaintiff's [or defendant's?] motor vehicle registration number KAB 510 Z to which the plaintiff's trailer was attached was wrongfully attached by Ndarugu Merchants and subsequently sold. The attachment and sale were brought to the plaintiff's attention. The defendant does not therefore have the possession of the said vehicle. Without prejudice to paragraph 3 hereof, the defendant will apply for third party proceedings against the said Ndarugu Merchants. The plaintiff was given notice of the said unlawful attachment but the plaintiff did not object to the sale of the trailer”.

Lastly the defendant pleads that if the plaintiff had any cause of action against the defendant, he, the plaintiff, had not mitigated his loss.

On the first occasion of hearing this suit before me, on 13th June, 2005 learned counsel, *Mr. Ngoge* represented the plaintiff, while the defendant was unrepresented. Learned counsel drew the court's attention to the hearing notice signed by himself on 26th May, 2005, addressed to *M/s Masore Nyang'au & Co. Advocates of Agip House, Nairobi* and indicating that hearing would take place on 13th June, 2005. It was stamped at the back with the rubber stamp of *M/s Masore Nyang'au & Co. Advocates*, dated 27th May, 2005. Service had been effected by counsel himself and he swore an affidavit of service in these terms:-

“I *PETER O. NGOGE* an advocate of this Honourable court having the conduct of this matter on behalf of the plaintiff, do hereby make oath and state as follows:-

(1) **THAT** on 27th May, 2005 at about 10.30 a.m. I proceeded to AGIP HOUSE, 3rd Floor and effected service of the Hearing Notice dated 26th May, 2005 upon the firm of MASORE NYANG'AU & CO. ADVOCATES who received and acknowledged service by stamping and signing at the back of my original copy returned [herewith] as duly served.

(2) **THAT** what is deponed [herein] is true to the best of my knowledge information and belief”.

Mr. Ngoge indicated readiness to proceed with one witness. He noted that this was an old case of 1995, and that the defendant has in the past not been in the habit of appearing in court whenever the matter has been on the cause list; the defendant had been absent and unrepresented by his advocates on record for something like five different occasions. Being allowed to proceed, counsel introduced his case as resting primarily on contract. The plaintiff had rented his trailer, ZA 8411 to the defendant on 23rd May 1994, and he was now seeking its return, with payment of hire-charge arrears.

PW1, *Frederick Nakhulo Wamalwa*, was sworn and taken through the examination-in-chief. He testified that he was in practice as an advocate, even though his suit against John Ogeri was in relation to a commercial matter. He averred that the defendant had approached him seeking the use of his trailer, registration No. ZA 8411. At that time the suit trailer was not actively engaged, as the prime mover with which it was operated was under repair. The trailer was his property and he produced as plaintiff's exhibit No.1 the official registration book, C No. 153012 showing him as the owner.

After negotiating, the plaintiff and the defendant signed an agreement (plaintiff's Exhibit No.2) dated 23rd May, 1994 – with the plaintiff referred to as lessor, and the defendant as lessee. The agreement provides that:

- (i) the lessor leases, and the lessee takes lease of all that trailer registration No. ZA 8411 at a monthly rental of Kshs.160,000/= payable in arrears at the end of each month;
- (ii) the lessee shall undertake the repair of the said trailer and inspection, and deduct the cost thereof from the rent due; (iii) the lessor shall thereafter be responsible for the regular maintenance of the said trailer;
- (iv) at the termination of the lease, the lessee shall deliver to the lessor the said trailer, in as good a state and condition of repair as at the commencement of the lease;
- (v) the lease may be determined by either party by two months' notice.

PW1 testified that there had been difficulties in the defendant's compliance with the terms of lease payment. In April, 1995 the defendant had paid Shs.40,000/=-, and he had taken possession of the trailer rather belatedly, on 29th December, 1994. Although the defendant had made promises to pay up accrued leasing fees, he had failed to honour these. So on 1st August, 1995 the plaintiff issued a written threat (plaintiff's exhibit No. 3) to terminate the lease; but thereupon, the defendant responded (plaintiff's exhibit No.

4) by charging that the plaintiff himself had taken over both the suit trailer and the defendant's prime mover, which he, the plaintiff, was now managing. The plaintiff had a meeting with the defendant in November, 1995 at which it was agreed that the defendant would *continue to use the trailer*, except that he would pay to the plaintiff immediately the sum of Kshs.80,000/=-. What does this imply? Was the trailer, at this time, in the custody of the defendant? It does not appear to be so. But was it in the custody of the plaintiff? The plaintiff did not give that impression.

In the run-up to November, 1995 the trailer must have been in the custody of *someone other than the plaintiff or the defendant*. But with whose authority? Authority of the plaintiff or the defendant? PW1 testified that in November, 1995 the defendant gave him a letter (plaintiff's Exhibit No.5) to take to a Ms. Grace Wangari at Nakuru; she had the custody of both the prime mover and the trailer. On the strength of

the defendant's letter, the plaintiff was to be paid by Ms. Wangari the agreed immediate payment of Kshs.80,000/=. However, Ms. Wangari only paid Shs.20,000/=. and, the plaintiff testified, the balance was not paid at all.

It becomes clear that the trailer was in the hands of Grace Wangari in Nakuru. She had possession of both the plaintiff's trailer and the defendant's prime mover. Grace Wangari, it emerges, considered herself under obligation, at the request of the defendant, to make payment (of Kshs.80,000/-) to the plaintiff. Therefore Grace Wangari must have known she was using a trailer which was the property of the plaintiff. The fact that the plaintiff needed the defendant's letter of introduction to Grace Wangari, I think, may be taken as evidence that as at November, 1995 the defendant, instead of using the plaintiff's trailer as agreed under the lease agreement of 23rd May, 1994 had, with or without the approval of the plaintiff placed it in the hands of Grace Wangari, and she on her part was indeed using the trailer for business – as otherwise she would not have been ready to pay Kshs.80,000/= to the plaintiff, Shs.20,000/= of which she actually did pay. The fact that the plaintiff did at the request of the defendant introduce himself to Grace Wangari, and the fact that he received the sum of Kshs.20,000/= from her, would suggest that he, the plaintiff, was at least aware that about November 1995 his trailer was in the possession of and was being utilized by Grace Wangari, and it was not in the possession of the defendant.

In the plaintiff's letter of complaint to the defendant, dated 1st August, 1995 (plaintiff's Exhibit No.3) he says:

“Following an agreement between you and the undersigned for hire by you of our trailer registration No. ZA 8411 you have had the use of the trailer for upwards of seven (7) months from 29th December, 1994”.

The defendant responded (plaintiff's Exhibit No.4) on 14th August, 1995 saying

: “..... I am surprised why you have turned around and [are] writing to me a letter and yet you are up-to-date managing the vehicle..... [G]oing by your figures and excluding the month of August which is not yet ended, you have had the vehicle for now over two months which makes a minimum of 8 trips a month.....”

The circumstances emerging from the conflicting facts, would show that *in the several months running right upto November, 1995 the suit trailer was not in the hands of the defendant*, and also possibly not directly in the hands of the plaintiff. For at least some of that time, the trailer was in the hands of Grace Wangari in Nakuru. It is also apparent that Grace Wangari was better known to the defendant than she was to the plaintiff.

The plaintiff in his evidence testified that the defendant had paid to him the sum of Kshs.40,000/= in April, 1995; and that in November 1995 Grace Wangari at the request of the defendant paid him Kshs.20,000/=. This would then make a total of Kshs.60,000/= as the total sum of money the plaintiff was ever paid, a figure that coincides with the defendant's pleading that in April, 1995 he had paid Kshs.60,000/= to the plaintiff for just a few days of use of the plaintiff's trailer.

PW1 testified that after the payment to him of Shs.20,000/= by Grace Wangari there was a growing accumulation of hire charges for the trailer which the defendant did not pay, and he also refused to deliver up possession of the trailer. The plaintiff gave testimony that the unpaid lease arrears had accumulated right from December, 1994 when the defendant had taken possession of the trailer. He averred that the defendant had **“worked with [the trailer] for 118 months at the rate of Kshs.160,000/=, the agreed monthly rate”**. He conceded that, as pleaded in paragraph 8 of the amended statement of defence, the defendant had paid Shs.60,000/= as leasing charges for the suit trailer.

The plaintiff prayed for (i) hire charges; (ii) possession; (iii) costs; and his rough calculation was Kshs 18,880,000/= less Kshs.60,000/=, coming to Kshs.18,820,000/=

. At the submissions stage, which was on 12th July, 2005 learned counsel, *Mr. Ngoge* reverted to the written agreement of 23rd May, 1994 which he urged should be the basis of calculation of moneys payable as prayed in the plaint. He submitted that the plaintiff's evidence was uncontroverted. He submitted that as the lease agreement of 23rd May, 1994 *had not been terminated* the suit trailer was still in the possession of the defendant, and the only leasing charges he has ever paid is the limited sum of Kshs.60,000/= . He urged that the court do interpret the terms of the contract, and award damages for breach thereof. He urged that the defendant was in breach of contract, as he did not perform his obligations under the same. In certain respects, this is an unusual case. For reasons that will remain unclear, the defendant who has by his advocates on record, consistently filed papers from 1999, has not turned up in court at this final stage of hearing. There is abundant evidence that his advocates on record were duly served, but they did not attend court. I would have expected that the plaintiff would seek dismissal of the defence case in limine, by virtue of Order IX B of the Civil Procedure Rules – but this was not the choice of the plaintiff's advocate.

He preferred to prove his client's case in the absence of counsel for the defendant. Since service had been duly effected, and the stage was set for a hearing, it was in my view, charitable for the plaintiff to submit himself to judgment on the basis of his pleadings, his documentation and his testimony, take together with the defendant's pleadings in the bare form. The record brings before me useful evidence and documentation, from which I will now attempt a final analysis, leading to specific decrees. Although the defendant has not been present to canvass any factual or legal position, his pleadings, considered in the context of the plaintiff's pleadings, documentation and testimony, are a basis for judgment to be delivered. Final Analysis and Decree

Assessing testimonies for veracity is always problematic when full representation is on one side but not the other. While being mindful of that pitfall, I have made a scrutiny of the pleadings and the evidence placed before me, and on that basis I will make the following assessments of fact:

(i) There was an agreement entered into by the parties on 23rd May, 1994. At the beginning, this agreement was *contractual*, and all indications are that it was the intention of the parties to be bound thereby

. (ii) It is, however, clear from the pleadings on both sides, and from the evidence and documentation emanating from the plaintiff, that there was *little compliance*, on a long-term basis, with the terms of the said agreement.

(iii) Although the agreement provided that "the lease may be determined by either party by a two months' notice", there is no evidence of any serious notice being given by either party as had been contemplated.

(iv) The plaintiff pleads at paragraph 5 of the amended plaint:

"On or about 1st August, 1995 the plaintiff gave the defendant notice in writing terminating the said hire agreement and demanding the return of the said trailer and payment of Kshs.1,280,000/= arrears of hire charges at the agreed rate of Kshs.160,000/= per month from 29th December, 1994 to August 1995 and thereafter Shs. 30,000/= mesne profits per day for trespass and unlawful use until delivery – up".

(v) It was not averred in evidence that the demand made by the plaintiff, as set out in the foregoing paragraph, was in any way *part of the contract between the parties*. I have to observe that it was not; and this would suggest that an element was now being introduced into the agreement which was not part of the contractual consensus

. (vi) If a notice was given by the plaintiff as indicated in paragraph (iv) above, this could not have been notice in the terms of the termination clause of the agreement.

(vii) In any case, the said notice referred to in paragraph (iv) above was not adhered to, as the plaintiff has given evidence that in *November, 1995* he had a meeting with the defendant at which the defendant was allowed to *continue using the suit trailer*;

(viii) At the said November 1995 meeting, immediate payment of Kshs.80,000/= by the defendant was demanded; but it was not clear from the evidence how this demand coincided with the original agreement of 23rd May, 2004.

(ix) Under the agreement of 23rd May, 2004, Who had the contractual right to use the suit trailer and to pay for such use? From the text of the agreement, only the defendant would have had such a right. But from the plaintiff's evidence, it is clear that in the run-up to November, 1995 the suit trailer was, at least for sometime, in the possession and use of one Grace Wangari, a third party.

(x) In the run-up to November, 1995 the suit trailer was certainly not in the hands of the defendant. For part of that period at least, the defendant has stated in letters exhibited as part of the plaintiff's evidence, the suit trailer was with the plaintiff rather than with the defendant

. (xi) Since there is no reliable evidence showing who had possession of the suit trailer over considerable lengths of time, and the exact duration of such possession, it is not possible to say for how long the defendant was using the trailer uninterrupted, in accordance with the terms of the agreement of 23rd May, 1994

. (xii) It follows, therefore, that a *reading of the said agreement by itself is not a basis upon which the court can calculate leasing – charge arrears*, payable by the defendant to the plaintiff.

(xiii) The plaintiff's claim, nevertheless, is primarily founded on contract, and on the said agreement of 23rd May, 1994. (xiv) For reasons that emerge clearly from the fact-scenario herein set out, it must be stated that the parties, in practice, chose to conduct their affairs entirely outside the framework of the agreement of 23rd May, 1994. They, in effect, abandoned their contract. The said agreement, thus, does not provide a reliable basis in contract, on the basis of which the plaintiff's prayers can be granted.

(xv) I

(xvi) Therefore, the plaintiff cannot be properly claiming lease-charge arrears from the defendant for the period running from 5th March, 1997 to date. For that period a claim can only be made in the torts of conversion and detinue – and the remedy would be in damages

. (xvii) For the period between December 1994 to 5th March, 1997 the mode of use of the suit trailer is so uncertain, that it would be unsafe to grant the plaintiff's prayer for lease – charge arrears. It would have been the plaintiff's task to conduct that proof; but this was not done.

(xviii) As already stated, the agreement of 23rd May 1994 is an abandoned contract, and it cannot be the basis for granting the plaintiff's prayers in respect of unpaid rentals

. (xix) From the evidence, it is certain that the plaintiff was the owner of the suit trailer, No. ZA 8411; and it is also certain that this trailer is not in the possession of the plaintiff, and the defendant bears responsibility for its unavailability or loss.

(xx) The justiciable wrong which the plaintiff brings before this court is the non-delivery of his trailer, and the defendant bears responsibility for the same

. (xxi) In law and in equity, the defendant must give reparations, by delivering the plaintiff's

trailer, or paying its value to the plaintiff.

On the basis of the foregoing assessment of facts, I will make a decree as follows:-

1. Judgment is hereby given in favour of the plaintiff, against the defendant, for delivery up of possession of the suit trailer, Registration No. ZA 8411 complete with tools, accessories and a 40-ft tarpaulin, and in a roadworthy state of repair and condition. 2. In addition, the defendant shall pay damages to the plaintiff for loss of use of the said trailer in the sum of Kshs.15,000,000/=, bearing interest at court rates as from 5th March, 1997 until payment in full.

3. As an alternative to Order No. 1 hereinabove, and subject to a professional valuation of the suit trailer as at 5th March, 1997 effected at the instance of the plaintiff, the defendant shall pay to the plaintiff the full value of the same as at that date, with interest at bank rates with effect from 5th March, 1997 until payment in full. 4. In the event that the defendant shall prefer the alternative mode of recompense set out in Order No.3 above, he shall also pay in full any such costs as the plaintiff shall incur in effecting the valuation of the suit trailer.

5. The defendant shall pay the plaintiff's costs in this suit, the same to carry interest at Court rates with effect from the date of filing suit.

DATED and DELIVERED at NAIROBI this 26th day of September 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk : Mwangi

For the plaintiff: Mr. Ngoge, instructed by M/s O.P Ngoge & Associates,

Advocates

Defendant absent and unrepresented.