



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
CIVIL CASE NO. 1744 OF 1995**

DAVID KAVYU MALOMBE PLAINTIFF

VERSUS

PAN AFRICA IMPEX LTD DEFENDANT

JUDGMENT

In this suit, based on an amended plaint, amended on 24th June, 1999 after the suit was filed in 1995, the plaintiff claims general damages, special damages of Shs 6,000, costs and interest, the cause of action being an alleged breach of a contract by the defendant to repair the plaintiff's tractor and trailer; but the defendant denies liability and in turn raises a counter-claim for storage charges at Shs50 per day from April 1992 until the tractor and trailer are removed from the defendant's premises.

The agreed facts which I find as established by agreement on pleadings and evidence are these. The parties agreed between them that the defendant would repair the plaintiff's tractor and trailer. The defendant asked the plaintiff to bring to the defendant the tractor and trailer for that purpose. The plaintiff delivered the tractor and trailer to the defendant for the repairs to be done. Spare parts were not immediately available and they had to be purchased before repair work would commence. Their cost was not immediately known. The plaintiff made a deposit of Shs2,000 to the defendant. He then went away. The tractor and trailer were not repaired and they remain so at the premises of the defendant to this day.

The points of dispute are these. According to the plaintiff, the defendant was to obtain the spare-parts availability from abroad, there prices, and then advise the plaintiff accordingly; the cost of the spares would then be added to the cost of airfreighting or shipping to Kenya the spares. After the arrival of the spare-parts the defendant was to inform the plaintiff so that he would know the total price. The defendant never did any of these things – it has never advised the plaintiff on costing; it never imported the spare-parts; and it never carried out the repairs. On its part, however, the defendant took the position that the plaintiff was asked to pay a deposit of 50% of the costs of spares, which worked to Kshs.19,897/60 cts to enable the defendant to purchase and import the spares, but the plaintiff paid Shs2,000/= only, promising to bring the balance which he has never done to this day, and has left the tractor and trailer occupying space in the defendant's premises thus attracting storage charges of Shs50 a day.

One issue, therefore, is: At whose fault have the tractor and trailer remained unrepaired, occupying space at the premises of the defendant?

The answer to that question is that the fault lies with the defendant. I have reasons for this answer. You see, the defendant did not tell the court what spare-parts were required. It did not tell the court the price of each spare-part. It did not tell the court where the spare-parts were to come from. It did not tell the court the time frame within which the spare-parts would be requisitioned. It did not say whether the

spare parts would come by airfreight or by sea and depending on the mode of freighting, the costs thereof. These pieces of information to enable the court to understand of what 50% was, in order to convert it to the sum of Shs19,867.60 as the sum required from the plaintiff.

In the absence of this information the court refuses to accept the defendant's side of the story on that aspect.

Then, there is this total absence of information to communicate to the plaintiff as to whether the defendant was making efforts to obtain the requisite spare-parts, and how its efforts (if any) were faring (if at all); and whether at any point in time in those efforts the defendant required the plaintiff to chip in anything towards meeting the costs required to bring in the spare-parts. You cannot pay any sum of money asked of you arbitrarily, as a certain per centage of a figure that is not disclosed. How did the defendant know that the sum of Shs19,867.60 was 50% of what the price and cost would be, before the defendant itself knew the spare-parts that would be required, their suppliers, the time required to get them, and the mode of transport for freighting them?

These are substantial questions which make the defendant's version of the story improbable.

It appears probable, on account of the foregoing difficulties in the defendant's story, that the plaintiff is right in maintaining that he paid a deposit of Shs 2,000 and waited to be advised of the availability of the spare-parts, their arrival and their total cost, plus labour costs. Indeed, it is only after the spare-parts would arrive, that the defendant would know how much labour would be required to repair the tractor and trailer, because I do not have evidence that any preliminary or provisional assessment was ever done to give an estimate of what would go into the repairing works. It was incumbent upon the repairer (the defendant) to furnish these estimates to the owner of the articles to be repaired.

There is no point in a repairer receiving goods for repair, sitting there doing nothing about what is needed to get the repair works to commence, proceed and be completed, unless he is prevented or frustrated by the owner of the goods. In the instant case there is no evidence of the owner doing or omitting to do anything frustrating to the defendant repairer.

On a balance of probability I find that the failure to repair the tractor and the trailer was owing to the defendant's failure to find the requisite spare-parts, and its failure to advise the plaintiff in a frank manner or at all. The plaintiff had no role at all in that omission on the part of the defendant. I find the defendant at fault and liable for breach of the contract of repair.

I do not find the plaintiff's alleged loss of earnings sufficiently pleaded and particularized, and there was no sufficient evidence to show any specific sum as lost in earnings. I have no basis on which to work out any particular figure as representing loss of earnings. I dismiss that aspect of claim.

With regard to the deposit of Shs2,000, this sum is admitted as having been paid, and it is rightfully demanded back, because the defendant, without any lawful excuse failed to do the repairs in respect of which that sum of money was paid to it by the plaintiff.

The sum of Shs4,000 was claimed as the cost of transporting the tractor and trailer from Kitui to Nairobi to the defendant's workshop. The defendant admitted the delivery of these items to its place, and there was no dispute that the plaintiff brought them from his home in Kitui. Given the distance between Nairobi and Kitui, the court accepts that it probably cost the plaintiff that amount of money in transportation expenses. Accordingly, the court awards to the plaintiff against the defendant that sum of shs4,000 as further special damages.

Concerning general damages, the court finds that the plaintiff did not take any steps to mitigate his losses. Yes, he made some inquiries as to what was happening, but these were very perfunctory attempts to find out from the defendant. He does not show why he did not make early or subsequent efforts to have the tractor or trailer or both repaired elsewhere. At the same time, the defendant's silence while holding somebody's articles brought for repair, and not being open about the failure to repair is also something

blameworthy. Taking into account these positions of the parties, but at the same time being conscious to the probability that the tractor and trailer could have been put to profitable use if they had been repaired in good time or at all, the court considers that a fair compensation in general damages is a sum of Shs200,000 (two hundred thousand).

There will, therefore, be judgment for the plaintiff against the defendant in the sum of Shs6,000 as special damages, and Shs200,000 as general damages.

With regard to the counter-claim, the court finds that it is true that the tractor and trailer have occupied space at the defendant's premises. At the same time, the court finds that those items have occupied space there because of the defendant's culpable failure to have them repaired and returned to the owner. It is the defendant who asked the plaintiff to trouble himself bringing them from Kitui for repair, and it is the defendant itself who has kept them there without effecting the repairs without any good reason for the failure to repair. It cannot in all fairness, benefit out of its own default. The counterclaim is dismissed.

All in all, therefore, judgment is entered for the plaintiff against the defendant for Shs6,000 special damages and Shs200,000 general damages, with costs and interest; and the counter –claim of the defendant is dismissed with costs and interest. A decree shall be made accordingly.

Signed and dated by me at Nairobi, this 9th day of April 2003.

R. KULOBA

JUDGE

9.4.2003

29.5.2003

Coram : R. Kuloba, J

Present, plaintiff in person

Mr Khamala for defendant

Court Clerk Anne in attendance

COURT

This Judgment is read out and delivered by me in the presence

of the plaintiff in person, and counsel for the defendant, this 29th day

of May 2003, at Nairobi.

R. KULOBA

JUDGE

29.5.2003