



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 5157 OF 1989

GIUSTOBATOCHI PLAINTIFF

VERSUS

RICCARDO LIZZIER DEFEDNANT

JUDGEMENT

This is a very old suit which the plaintiff claims a sum of Shs.420,000/= being charges of Shs.5,000/= per month for a generator which he claimed he hired to the defendant from June, 1983. There is also a claim for the return of the generator but this has been overtaken by events as the generator was returned to the plaintiff after he obtained an exparte Judgment against the defendant on the 17th may, 1983. This judgment was set aside on terms.

It is not in dispute that he generator the subject matter of this suit came into the defendants possession in June, 1983. it is the Plaintiff contention that the generator was hired to the Defendant who did not have a Three phase generator which the Defendant required to operate his machine for making cement blocks. The Plaintiff and defendant agreed the defendant would hire the generator for his purpose for Shs.5,000/= per month. The Plaintiff produced in evidence Ex. 1 and 2 to show that he had purchased the generator in November, 1997. The Plaintiff alleges he requested the Defendant to pay the hire when he got money from a container of items he was bringing from Italy. The Plaintiff asked for his generator but the Defendant refused.

In October 1989 he instructed his advocate to sent a letter of demand Ex. 3 No reply was received and this suit was filed.

The plaintiff produced a copy of an agreement (Ex.4), which is a written agreement between a company called Timber Manufacturers & Dealers Limited and the Defendants company Ivrea Kenya Limited. This agreement shows that eh Defendant through his company hired the generator to the hirer together with a circular wood saw for Shs.100/= per day, for the generator and Shs.50/= per day for saw. The agreement is dated 5th December, 1988 and expressed to be for 30 days although it was found in the hirers premises some time after the period of 30 days had expired by the plaintiff.

The defence filed alleges in paragraph 5 that in or about June, 1983 the Plaintiff took his generator to the defendant for repair and storage whilst he looked for a place to store it.

In paragraph 6 the Defence alleges the Defendant took possession of the generator for repair, which were completed in his two weeks, and the Plaintiff was advised of the repair charges. No particular were given and were any asked for.

Paragraph 7 alleges the Plaintiff was unable to meet the repair charges annually and it was agreed the

Defendant would charge Shs.500/= per day for storage on top of the repair charges.

Paragraph 8 alleges that the Plaintiff has failed to remove the generator without any justification although the generator is in working order. There is a counter-claim for storage charges of Shs.500/= per day and the cost of repair to be supplied at the hearing.

The defendant gave evidence and stated he only came to know about the generator being with timber manufacturers very late. He gave evidence that he was arrested at Nakuru Airport in connection with the importation of some goods which he blames on the Plaintiff not having given him the correct information on importing goods. Although the plaintiff and he were friends when he came from Italy and they had a company Ivrea the relationship was not good later. He also stated the generator stopped working because it was 30 years old. In cross-examination the defendant agreed he did not have three phase electricity but needed it for his tractors and carpentry machine. He denied he had a block making machine or that he hired the Plaintiff's generator.

He also stated that when the Plaintiff moved from Kasarani to Westlands he used the Defendants transport, when they arrived at the new house the Plaintiff asked the Defendant not to remove it as he did not have enough space for it. The Plaintiff wanted the generator repaired and to be stored in the defendant's garage.

He hired the generator to Timber Manufacturers as agreed in Ex.4. he stated he could do what he liked with the generator. He maintained the generator after it got when but ever agreed to the repair of the machine with the Plaintiff. In examination he said he had four generator and had never used the Plaintiff's generator. The Plaintiff called Joseph Musau who had formerly worked for The defendant between 1977 and 1987 as a mechanic. It was his evidence that he went with two other workers to the Plaintiff property at Roysambo. The Defendant was in Italy and he was sent to collect the generator by a European with the Defendant. It was to be used to making blocks. When the Generator got to the defendant premises he started it up. It was still working when he left in 1987. The defendant called Pietro ... who worked for company on the Ivrea groups.

He said that in 1983 he remembered the Plaintiff was away living in Kasarani Round About a half a kilometer from the Defendant's place and that he asked the Defendant to keep the generator. The plaintiff told him he didn't have a place for the generator and if he the witness could find a buyer for Shs.150,000/= for the generator. In cross-examination he denied that there was a concrete making machine. He knows the generator had been hired out by the defendant but that it broke down and the hirer came to complain. It was then registered by the Defendant. Having heard the evidence I reject entirely the Defendant's evidence. His evidence did not go in anyway to prove the allegation made on the defence. No repair charges were put forward nor did the Defendant even allege that he was to charge the Plaintiff 500/= a day for storage. I accept the evidence of PW2 that the generator was collected from the Plaintiff's premises when the Defendant was in Italy and that it worked and was used for making concrete block.

Although I think the Plaintiff was at fault in not possession having charges for some six years or so (see Ex.3) I accept that his was not claimed, as both he and the Defendant were friends. I am of the view that the problem arose when the Plaintiff discovered that the defendant had hired the generator to Timber Manufacturers with regard to D.W.2. He stated that he was away from Nakuru a lot of time and although he denied that he Defendant had a block making machine I prefer the evidence of P.W.2 on this, as he was a machine working for the Defendant at the material time.

I accept the Plaintiff's evidence that there was an agreement between the Plaintiff and Defendant that the generator be hired for Shs.5,000/= per month and found therefore that on a balance of probabilities the Plaintiff has proved this claim for Shs.420,000/=. I will also award the Plaintiff the costs of the suit. I do not award any interest in the sum claimed as in my view the Plaintiff should have taken steps long before 1989 to either recover the generator or the hire charges. His delay is a major contribution to these proceedings having had to be brought. There will be Judgment for Ss.420,000/= plus costs only.

Dated and delivered at Nairobi this 18th day of April, 2002.

P. J. RANSLEY

COMMISSIONER OF ASSIZE