IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 601 OF 2007

BETWEEN

JAMES WATENGA KAMAU.....PLAINTIFF

AND

CMC MOTORS GROUP LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. At the time material to this suit, the plaintiff was a large scale wheat and barley farmer within Narok and Nakuru. The defendant is a company dealing in farm machinery. The plaintiff claim against the defendant is set out in the plaint dated 12th November 2007. The plaintiff claims that the defendant sold to him a defective and unmerchantable new NewHolland tractor and model TSI2R4(120) registration number KAV 538F ("the tractor") at a price of Kshs. 4,505,000/- under a Deferred Payment Agreement dated 15th February 2005. As a result of the loss and damage he sustained, he seeks the following reliefs in the plaint:

i) The replacement of the tractor KAV 538F with a brand new tractor of similar make and description

ii) In the alternative and without prejudice to the above, the refund of the deposit of Ksh.2,500,000/-

iii) Special damages for the loss of user in the sum of Ksh. 8,460,000/-

iv) General damages for breach of contract

v) Costs of the suit

vi) Any further or other relief that this Honourable Court may deem fit and just to grant.

Plaintiff's Case

2. The plaintiff's case is set out in the plaint. He testified as PW 1 by adopting his witness statement. He called an expert witness, Dr Hannington Juma Mcrota (PW 2). PW 1 produced documents to support his case.

3. PW 1 stated that after he paid the deposit, he took possession of the tractor and started using it. The tractor performed well but the operator noticed that the temperature gauge was giving a constant warning sign. In April 2006, he noted that the performance of the tractor was below par and informed the defendant of the defects which included the following; loss of power, regular drop in engine oil level, emission of excessive smoke through the engine breather, short circuit on engagement of power take off, short circuit on engagement of the four-wheel engagement switch, short circuit on pressing the four-wheel engagement switch and spool valve failure.

4. PW 1 recalled that he informed the defendant's workshop manager in Nakuru of these defects and after some delay, a mechanic was sent to check on the tractor. The mechanic informed him the tractor was okay after clearing the radiator with high pressurized water. The

problems continued despite the defendant sending mechanics to the farm to check on the tractor. PW 1 once again complained to the workshop manager and they agreed that he deliver the tractor to the defendant's workshop for inspection and repairs on 22nd May 2006. PW 1 addressed to the defendant a letter dated 23rd May 2006 highlighting his concerns about the tractor and proposing it should be replaced and that the payments due to the defendant be deferred.

5. After two weeks, the tractor was driven to the farm in Mau Narok by the defendant's driver where a test was done by cultivating a piece of land in the presence of a team of the defendant's mechanics. PW 1 observed the tractor was losing power and emitting excessive smoke through the engine breather. He refused to accept the tractor and after one of the senior mechanics present communicated with Mr. Griffiths, a senior manager with the defendant in Nairobi, the tractor was ferried to the defendant's workshop in Nairobi.

6. PW 1 sent a reminder dated 22nd September 2006 to the defendant on the extension of deferred payment and warranty he had requested in the letter of 23rd May 2006. By the letter dated 19th December 2006, the defendant agreed to reschedule the plaintiff's payments by one year.

7. On 27th December 2006, the defendant delivered the tractor back to the plaintiff. When the PW 1 tried to use the tractor again, he observed the same problems. He communicated to the defendant who dispatched a mechanic to look into the problem. The mechanic promised to replace the water radiator which he detected was the cause of the overheating (as per the field service of 27.03.2007 job number 3457).

8. On 16th May 2007, PW 1 wrote to the defendant outlining the problems with the tractor. The defendant sent a mechanic to replace the water radiator with a new one but this did not resolve or improve tractor. On 15th June 2007, the defendant took the tractor back to its workshop in Nairobi for further repairs. PW 1 recalled that he was informed that his operator was blamed for failing to take care of the tractor. After repairing the tractor, the defendant undertook to place tamper proof seals on the critical points as a precautionary measure to avoid the blame game should the problem recur. PW 1 stated that he was requested by the defendant to pay Kshs. 35,000/- for the service because it claimed that no fault was detected. He accepted to pay on condition that should the problem recur, the defendant would refund him. The tractor was delivered back to him on 22nd July 2007, but the problems persisted.

9. On 30th August 2007, PW 1 wrote to the defendant to inform it of recurring defects as evidenced by the high engine oil consumption. He stated that no service was to be done until they agreed on the next course of action. On 4th September 2007, the defendant emailed him to follow up on an earlier telephone conversation regarding confirmation of the engine oil drop by their mechanics sent twice at different times. The defendant also requested to be allowed to carry on a further test by toping up the engine oil and monitoring the interval of the oil drops.

10. On 13th September 2007, PW 1 wrote to the defendant declining the request and demanded a new replacement tractor. At this point he decided not to use the tractor again to avoid further problems. On 17th September 2007, the defendant wrote to him requesting to be allowed to carry out further tests on the tractor. He did not answer the letter but forwarded the matter to his advocates who proceeded to write a demand letter to the defendant for selling him a defective tractor.

11. On 9th July 2008, the defendant repossessed the tractor due to the outstanding balance. By a letter dated 18th March 2008, the defendant's advocate demanded Kshs. 2,339,999/- being outstanding arrears under the deferred payment agreement. Since the defendant was not willing to have the tractor replaced as demanded by the plaintiff through his advocates letter dated 14th May 2008, PW 1 hired the services of Dr. Hannington Juma Mcrota (PW 2) and Prof. G.M.N. Ngunjiri renowned agricultural engineering consultants to do an examination and do report on the tractor which was produced in evidence.

12. PW 2 testified that he was a lecturer at Egerton University and had been a lecturer in Agricultural Engineering for 49 years. He also stated that he had a PHD in Agricultural Engineering. He told the court that he was instructed by PW 1 to examine the tractor and prepare a report. He prepared a report dated 19th October 2007 in conjunction with Professor G. Ngunjiri.

Defendant's Case

13. The defendant filed a Statement of Defence dated 7th January 2008. It denied the plaintiff's claim. It stated that the tractor sold to the plaintiff was in sound and merchantable condition without any manufacturing defects as alleged. It also stated that the plaintiff was not entitled to the reliefs sought in the plaint.

14. Robert Ochieng Mukwenyu (DW 1) testified on behalf of the defendant. He adopted his witness statement as his evidence. He stated that he was a Workshop Supervisor of the defendant's Nakuru Branch. He had been employed by the defendant since 1998. He told the court that the defendant entered into a sale agreement with PW 1 for the purchase of a tractor at an agreed price of Kshs. 4,845,000.00. That PW 1 paid half the purchase price and agreed to pay the balance later but he did not make any other payment.

15. DW 1 stated that before the tractor was delivered to PW 1, proper inspection and checks were conducted by the defendant's well qualified technicians and mechanics to the satisfaction of PW 1. During the pre-delivery inspection, a delivery/acceptance certificate form was issued to PW 1 which he signed and accepted that the tractor was in good and perfect condition.

16. DW 1 explained that once a customer purchases the defendant's products, they are provided with an operations manual. In order to reassure the customers of the good quality of the tractors, which are sourced from Brazil, the defendant gave a 12-month warranty so long as the tractors are used properly and well maintained.

17. Regarding PW 1's complaint, DW 1 further explained that once the defendant received PW 1's complaint concerning unsatisfactory performance of a tractor, it was taken to the company's workshop for repair and radiator fitting. The defendant's engineers monitored the performance of the tractor and it was evident that the tractor had been mishandled. He also stated that it was apparent that the customer had a negative perception towards the tractor as evidenced by his correspondence to the defendant. DW 1 further stated that from the

correspondence, it was evident that the defendant kept in constant touch with PW 1 whenever an issue arose.

18. DW 1 explained that in regard to the complaint by PW 1 that the tractor had dropped oil levels, it was noted that this was as a result of the tractor having exceeded its normal services mileage. He also noted that despite the tractor's oil having dropped, the tractor was still in operation. He further stated that following a technography performance test, the tractor was noted to have dropped in oil levels and this was as a consequence of exceeding normal mileage interval by 400 hours and once the oil drop was noted, PW 1 gave instructions to one of the company's mechanics who was at the customer's farm not to touch the tractor yet the tractor was in proper operation.

19. DW 1 further claimed that once PW 1 was informed that the defects in the tractor were as a consequence of his mishandling, he abandoned the tractor at the defendant's premises with instructions that no further observations should be done on the tractor. By that time, he had used the tractor for up to 2104 hours which exceeded the warranty hours.

Issues for determination

20. At the close of the hearing both parties filed written submissions. It is not in dispute that the plaintiff bought the tractor from the defendant on agreed terms. The tractor was later repossessed. The plaintiff's main complaint is that the defendant sold him a defective tractor hence he was entitled to consequential relief claimed in the plaint.

21. Although the parties agreed on 9 issues for determination, from the pleadings and evidence it clear that the issue revolves around the terms of the agreement between the parties and the obligations of the parties and in particular whether the defendant supplied to the plaintiff a tractor that was of merchantable quality and fit for purpose under the ***Sale of Goods Act (Chapter 31 of the Laws of Kenya)*** ("the ***SGA***"). The defendant takes the view that the ***SGA*** does not apply to the circumstances of the case. I shall deal with that issue first.

Whether the Sale of Goods Act applies

22. In his submissions, the plaintiff called in aid **sections 16(a), (b)** and **(c)** of the ***SGA*** which states as follows;

> *16. Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—*
>
> *(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:*
>
> *Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;*
>
> *(b) where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:*
>
> *Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;*
>
> *(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade; an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;*
>
> *(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.*

23. Counsel for the plaintiff submitted that on the basis of the aforesaid provision, the defendant was aware of the purpose for which the plaintiff required the tractor and was under a legal obligation to ensure that the tractor was fit for the purpose it was required for by the plaintiff and that it was of merchantable quality. Counsel referred to ***Scapex Communication Limited v Trendy Automobiles Limited*** **[2019] eKLR** and ***Wilfred Irungu Ndirangu v CMC Motor Group Ltd*** **[2020] eKLR** to support his position that the defendant was indeed liable for supplying a defective tractor.

24. The position taken by counsel for the defendant is that the subject matter of this suit is not governed by the ***SGA*** as the agreement between the parties was in the nature of a hire purchase agreement prescribing a deferred payment of Kshs. 2,000,000/- to be paid over a period of 12 months. Counsel cited the case of ***Eunice Kanugu Kingori v NIC Bank Limited*** **[2018] eKLR where the** court described the nature of a Hire Purchase Agreement as follows:

> *Hire purchase Agreements are Agreements whereby, an owner of goods allows a person, known as the hirer, to hire goods from him or her for a period of time by paying instalments.* ***The hirer has an option to buy the goods at the end of the Agreement if all instalments are being paid****. However,* ***it is not a contract of sale*** *but contract of bailment as the hirer merely has an option to buy the goods and* ***although the hirer has the right of using the goods, he is not the legal owner during the term of the agreement****, the ownership of the goods remains with the owner."* [Emphasis provided]

25. Counsel further submitted that even if the agreement was a contract for sale of goods, the ***SGA*** would still not be applicable as there are express contract terms and conditions clearly set out in the Agreement, the Warranty and the Delivery/Acceptance certificate. Counsel cited the case of ***Haul Mart Kenya Limited v Tata Africa Holdings (Kenya) Limited*** **[2017] eKLR** where the court held that the ***SGA*** was

applicable only in the absence of express contract provisions.

26. Whether the **SGA** applies in this instance is governed by **section 2** thereof which states that: *""a contract of sale" includes an agreement to sell as well as a sale""*. In a contract for sale there is an actual sale of the goods while in an agreement to sell, there is an intention to sell the goods a time in the future or until some conditions are satisfied. A hire purchase agreement as defined in ***Eunice Kanugu Kingori v NIC Bank Limited*** **(Supra)** is a conditional sale in that property only passes once the option to purchase is exercised by payment of the final installment. For purposes of the **section 2** of the ***SGA***, a hire purchase agreement is an agreement for sale and I therefore hold that the agreement between the plaintiff and defendant was covered by the ***SGA***.

27. Assuming that the ***Hire Purchase Act (Chapter 407 of the Laws of Kenya)*** was applicable, being a matter that was not argued, **section 8** of thereof provides for conditions and warranties implied in hire purchase agreements as follows:

> *8. (1) In every hire-purchase agreement there shall be implied—*
>
> *(a) a condition that the owner will have a right to sell the goods at the time when the property is to pass;*
>
> *(b) a warranty that the hirer shall have and enjoy quiet possession of goods;*
>
> *(c) a warranty that the goods will be free from any charge or encumbrance in favour of a third party at the time when the property is to pass;*
>
> *(d) except where the goods are second-hand goods and the agreement contains a statement to that effect, a condition that the goods will be of merchantable quality; and*
>
> *(e) a condition that the legal ownership of, and title to, the goods shall automatically be vested on the hirer upon payment by the hire-purchase price in full:*
>
> *Provided that no such condition shall be implied by virtue of this subsection as regards defects of which the owner could not reasonably have been aware at the time when the agreement was made or, if the hirer has examined the goods or a sample of them, as regards defects which the examination revealed or ought to have revealed.*
>
> *(2) Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be implied a condition that the goods will be reasonably fit for that purpose.*
>
> *(3) The conditions and warranties set out in subsection (1) of this section shall be implied notwithstanding any agreement to the contrary; and the owner shall not be entitled to rely on any provision in the agreement excluding or modifying the condition set out in subsection (2) unless he proves that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him.*
>
> *(4) Nothing in this section excludes or prejudices the operation of any other law whereby any condition or warranty is to be implied in an agreement.*

28. From the aforesaid provisions, I reject the defendant's position that the ***SGA*** is not applicable to the agreement between the parties. **Section 16** of the ***SGA*** relied on by the plaintiff is a mitigation of the common law rule of caveat emptor. It lays down certain exceptions to the general rule which the plaintiff relies on. On the other hand, the defendant submitted that the even if the provisions of the ***SGA*** applied, these were excluded by express contract terms and conditions including the Warranty and the Delivery/Acceptance certificate. **Section 55** of the ***SGA*** allows the parties to exclude the implied terms and it provides as follows:

> *55. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.*

29. In light of the foregoing provisions, I turn to determine whether there was a breach of the agreement as alleged by the plaintiff.

Whether there was breach of contract

30. PW 1 narrated how the tractor had mechanical problems from the time he purchased it. He gave an account of the instances the tractor was taken to the defendant's workshop both in Nakuru and Nairobi and the correspondence he wrote to the defendant expressing his concerns about the mechanical defects in the tractor. To support his case, he relied on the expert testimony of PW 2. On the basis of this evidence, counsel for the plaintiff submitted that from the testimony of PW 1 and PW 2, the tractor sold to the plaintiff was defective.

31. Since the plaintiff relied on the testimony of PW 2, the defendant attacked his competence and credibility. Counsel for the defendant submitted that PW 2 was a mere academic based at the Egerton University, Faculty of Agriculture. That he did not have any demonstrated experience or at all in so far as motor vehicle engineering is concerned and neither did he provide a methodology applied in coming up with the report. Counsel for the defendant further submitted that PW 2 confirmed that he had not taken out an engineer's practicing certificate for the year 2007 when he prepared the report and that in fact he has never been licensed to practice as an engineer contrary to the mandatory provisions of **section 12A** of the ***Engineers Registration Act (Chapter 530 of the Laws of Kenya)*** ("the ***ERA")*** which requires every registered engineer, who intends to practice in his professional capacity, to take out an annual licence. In counsel's view, PW 2, as a lecturer in a public university, was not exempted from taking out a licence under **section 12A(6) (b)** of the ***ERA***. The defendant's position was

therefore that PW 2's report could not be relied on particularly in view of the fact that PW 2 did not take into account the provisions of the agreement between the parties.

32. Expert opinion us admissible under **section 48** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which provides as follows:

> *48. (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.*
>
> *(2) Such persons are called experts.*

33. The aforesaid provision was elucidated in ***Mutonyi v Republic*** **[1982] KLR 203** as follows:

> *Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by his tests, measurements and the like.*
>
> *In Cross on Evidence 5th Edition at page 446, the following passage from the judgment of President Cooper in Davie versus Edinburgh Magistrates (1933) SC 34,40, is set out as stating the functions of expert witnesses:*
>
> *"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."*
>
> *So an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:*
>
> *1. Establish by evidence that he is specially skilled in his science or art.*
>
> *2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.*
>
> *3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.*

34. On the weight a court of law should attach on expert opinion, the court in the case of ***Stephen Kinini Wang'ondu v The Ark Limited*** **NYR HCCA No. 2 of 2014 [2016] eKLR** held that:

> *Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.*

35. The decisions I have cited set out the principle that the evidence of an expert is not decisive and it should be considered in light of all the other evidence. The qualifications, standing and level of learning of the expert are all matters that the court may take into account when weighing the evidence of the expert. In my view, the fact that PW 2 was not a registered engineer did not disqualify him from giving evidence on the matters of his expertise. The defendant did not dispute that PW 2 was an academic and well qualified in agricultural engineering. His evidence, as a matter of law, was admissible as opinion evidence.

36. In summary, the testimony of PW 2 and his report was that PW 1 approached him and told him from his past experience, the tractor's exhaust system had problems and while in the field engine overheating developed within a short period of operation and that the tractor had developed abnormal engine oil consumption after 2 months of purchase. PW 1 informed him that the defendant had replaced the radiator with wider one, overhauled the engine but the problem persisted hence he required a technical assessment report.

37. When PW 2 examined the tractor's external features they appeared to be excellent and there was no fuel oil leak. According to the report he observed the following on close scrutiny:

> *a) The radiator looked new and apparently the company replaced other one purchased with the tractor which was smaller.*
>
> *b) A joint between the exhaust and the muffler was welded in spite of the inclusion of the stay.*
>
> *c) The exhaust had been replaced once.*
>
> *d) The draft lever was close to being severed off.*
>
> *e) Ram cylinder for the steering drive system had busted and welded.*
>
> *f) Hydraulic pipes busted*

g) The exhaust had abnormally thick soot.

h) The tractor had worked for 2601 tractor hours. It was not possible to read the tractor hours of KAT 396E for comparison as the plastic used to cover the odometer exhibited opacity.

i) The engine oil was at the extreme minimum level.

38. PW 2 explained that on starting and running the engine there was sky blue smoke indicating that the engine oil was actually being burnt in the cylinders. He stated that one major cause for oil consumption for an internal combustion engine thus the mysterious disappearance of the engine oil. PW 2 concluded in his report as follows:

a) Apart from what looked like design or material problems, it is our expertise submission that the cause of oil loss from the engine is leakage into the cylinders where it is burned.

b) That there was a possibility of an inherent fault in the manufacture of the engine as exhibited by abnormal oil consumption after only 2 months of use. This explains why the other tractor which was bought earlier and of a similar make has not exhibited similar faults except for the radiator and the exhaust system.

c) Even with precautions, it seemed dangerous to operate the tractor as there is a risk of engine seizure due to loss of lubrication oil.

39. PW 2 concluded the report by stating that the defendant should have replaced the engine right at the beginning when the fault was noticed and that the attempt to overhaul the engine after 2 months of work did not rectify the problem. He was of the view that the fault started right at the manufacturing stage.

40. DW 1 denied that PW 2 was an expert on NewHolland tractors. When the report was put to him in cross-examination, he confirmed that the radiator and half the engine had been changed as it was found to have been mishandled and was indeed replaced in order to maintain the good working relationship with the plaintiff and this was done within the warranty period.

41. There is no dispute that the tractor started having problems within a period of four months after purchase. The defendant does not dispute the fact that it was taken for repair to its garage several times and attended to by the defendant's mechanic in the field. PW 1 documented the nature of the problems in several letters to the defendant. The common problem running through the plaintiff's complaints is that the tractor engine was overheating and losing a lot of oil. The plaintiff's evidence, which I accept, is that this continued despite various interventions by the defendant.

42. The defendant ordinarily sells tractors hence under **section 16(b)** of the ***SGA*** there is an implied condition that the tractor shall be of merchantable quality except where the buyer has examined the goods for patent defects. The plaintiff signed a delivery and acceptance certificate No. 126448 dated 20th February 2006 and accepted that the tractor was, *"in a satisfactory condition and that the items listed overleaf have been checked in my presence…"* It is clear that the acceptance was in respect of patent or apparent on reasonable examination.

43. The defendant alleged that the defects in the tractor were as a result of mishandling of the tractor by the plaintiff's operator. The defendant's witness, DW 1, did not demonstrate how the plaintiff's operator mishandled the tractor leading to the defects complained of.

44. I am satisfied that the plaintiff has proved that the defendant sold him a defective tractor. From the testimony of PW 1, it is evident that problems with the tractor only became apparent when it was in operation. Those problems were outlined by PW 1. He took the tractor to the defendant for repairs several times but the problem was not resolved. His testimony was corroborated by PW 2 who noted the physical defects which were apparent from the repairs and the fact that the when the tractor was turned on it emitted blue smoke indicative of engine oil being burnt in the cylinders. I further agree with PW 2 that the abnormal oil consumption so soon after the purchase of the tractor all but pointed to defects.

45. I now turn to consider the effect of the warranty. The tractor was subject to the dealer's warranty which stipulated that for a period of 12 months or for 1200 hours, whichever comes first, from the date of the agreement, under normal use and service of the tractor, the defendant would carry out repairs, replace any defective parts including at its expense.

46. Under **section 2** of the ***SGA*** a *""warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."* Ordinarily the plaintiff would be entitled to claim damages for the defective tractor but the warranty varied the statutory provision to the extent that the defendant was obliged to carry out repairs free of charge for a period of one year.

47. In ***Rogers & Another Parish (Scarborough) Ltd & Others*** **[1987] 2 ALL ER 232** which was cited with approval in ***Wilfred Irungu Ndirangu v CMC Motor Group Ltd*** **(Supra)** it was held that the warranty was in addition to the statutory rights in the following terms;

The manufacturer's warranty did not require the buyer to accept defects of which he could otherwise complain, since the warranty was in addition to his rights and not a subtraction from them, so that the existence of the warranty did not indicate that the buyer was expecting, or ought reasonably to have been expecting, a vehicle of a lower standard than that which he would have been entitled to expect without the warranty...

48. Beyond the warranty period, the defendant was liable for defects which as I have held the defendant is liable as the plaintiff had proved its case on the balance of probabilities. I now turn to consider the reliefs.

Whether the plaintiff is entitled to relief

49. The plaintiff's claim is for breach of contract. In ***Consolata Anyango Auma v South Nyanza Sugar Company Limited*** **MGR HCCA No. 53 of 2015 [2015] eKLR** I stated as follows:

> *[15] The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitutio in integrum (see* ***Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR****,* ***Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR****). The measure of damages is in accordance with the rule established in the case of* ***Hadley v Baxendale (1854) 9. Exch. 341*** *that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see* ***Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR****). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see* ***Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others****,* ***NRB CA Civil Appeal No. 192 of 92 (UR)*** *and* ***Charles C. Sande v Kenya Co-operative Creameries Ltd****,* ***NRB CA Civil Appeal No. 154 of 1992 (UR)****).*

50. The plaintiff prays for a replacement tractor or in the alternative refund of his deposit of Kshs. 2,500,000/=. The plaintiff would only be entitled to the tractor if the property in the tractor had passed to him after paying the full purchase price and exercising the option to purchase. It is not in dispute that the plaintiff had defaulted in paying the installments hence the tractor still belonged to the defendant. The court therefore cannot order the defendant to provide a replacement tractor.

51. The alternative prayer is for refund of the deposit. The plaintiff relied on the case of ***Associated Motors Limited v Blue Sea Services Limited*** **MSA HCCA Nos. 51 & 53 of 2017 [2019] eKLR** to submit that the he was entitled to the deposit paid as he was denied the use of the defective tractor. The defendant was of the view that the plaintiff was not entitled to any sum as he was to pay Kshs. 2,000,0000/- over a period of 2 months and having admitted that he breached the agreement, he was disentitled from claiming the deposit paid. Counsel for the defendant cited the case of ***Alghussein Establishment v Eton College*** **[1991] 1 All ER 267** and submitted that a party in default under a contract cannot take advantage of his own wrong

52. The fact that that the plaintiff had paid the defendant, Kshs. 2,500,000/- through cash and a trade in is not dispute. It is also not in dispute that the plaintiff did not pay the loan. By a letter dated 18th March 2008, the defendant demanded Kshs. 2,339,999.90 due and owing as at 28th February 2008. Since the defendant supplied a defective tractor which it has now sold to recover what was due to it, it follows that the plaintiff is entitled to its refund which I now award.

53. The plaintiff has also claimed Kshs. 8,460,000.00 for loss of user following persistent breakdown of the tractor. At para. 16 of the plaint, he claimed that this affected productivity of the tractor which led to heavy losses due to hire of an alternative tractor and delayed farming. He stated that the amount claimed was made up as follows:

a) Loss of user Kshs. 4,960,000/-

b) Hire of alternative tractor Kshs. 1,500,000/-

c) Loss of earnings from leasing out tractor Kshs. 2,000,000/-

54. It is beyond dispute that this head of claim being one for special damages, including a claim for loss of user, must be specifically pleaded and proved (see ***David Bagine v Martin Bundi*** **NRB CA Civil Appeal No. 283 of 1995 [1997] eKLR**, ***Associated Motors Limited v Blue Sea Services Limited*** **(Supra)** and ***Wilfred Irungu Ndirangu v CMC Motor Group Ltd*** **(Supra)**). The plaintiff claim was founded on the fact that he had a contract dated 15th April 2006 with East Africa Maltings Limited for, *"Growing and Sale of Malting and Seed Barley; 2006 -2007"*.

55. In his testimony, the plaintiff did not lead or produce any evidence that he hired an alternative tractor and from whom or how much he paid. He also did not produce any evidence for lost earnings or evidence of losses attributable the fact that the defective tractor was out of service. In short, the plaintiff did not prove the claim for Kshs. 8,460,000.00.

56. On the claim for general damages, it is now settled law in this jurisdiction that general damages are not recoverable in cases of alleged breach of contract (see ***Dharamshi v Karsan [1974] EA 41*** and ***Kenya Power and Lighting Company Limited v Abel M. Momanyi Birundu*** **KSM CA Civil Appeal No. 30 of 2013 [2015] eKLR**). As the plaintiff's claim was founded on breach of a contract of sale of goods, the prayer of general damages is dismissed.

Conclusion and disposition

57. I have found the defendant liable for supplying a defective tractor. The plaintiff is therefore entitled to the deposit paid it paid to the defendant.

58. I therefore enter judgment for the plaintiff against the defendant for the Kshs. 2,500,000/- together with interest at court rates from the date of filing suit until payment in full.

59. The defendant shall pay the plaintiff's costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY 2020.

D. S. MAJANJA

JUDGE

Mr Mubea instructed by Kimondo Mubea and Company Advocates for the plaintiff.

Mr Okoth instructed by Oraro and Company Advocates for the defendant.