



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 155 OF 2011

MUSTAFA MOHAMED ISSA.....PLAINTIFF

VERSUS

GATEWAY MARINE SERVICES LIMITED.....DEFENDANT

J U D G M E N T

Introduction and factual background

1. The two parties to this litigation entered into equipment hire agreement dated 14/9/2010 by which the Defendant leased its two generator sets (gensets) to the defendant at costs of USD 1,500 per genset for 10 days. The common facts are that the hire was for a period of 10 days; in the event of failure to return the gensets within the agreed period, the defendant would pay a sum of USD 100 per day per genset and that the defendant paid a deposit of USD10, 000. As security the logbooks for the defendant's truck and trailer were deposited with the defendant as additional security for the due performance of the plaintiff obligations in the agreement in particular the return of the gensets in good working conditions.

2. The plaintiff on the basis of the agreement took possession of the genset mounted upon his motor vehicle Registration **No. T456AMP** hauling trailer **No. T672 ANE** which then proceeded to Juba, South Sudan. While in South Sudan the motor vehicle carrying one of the gensets was involved in an accident and the plaintiff was financially unable to return it to Mombasa together with the genset. Having failed to have a discussion with the plaintiff's executive director, the defendant took the liberty to, having feared that left unattended in Juba the genset would be vandalized, have the genset and the motor truck as well as its trader retrieved and brought back to Mombasa at an alleged cost of USD 52,624. Parties did not agree on how to settle the alleged costs of retrieval and the defendant thus detailed the truck, unless paid for which reason the plaintiff filed this suit claiming a permanent injunction against the continued detainer and general damages for loss of use together with crew salaries since December 2011. The defendant on its side denied the plaintiff's claim and instead filed a counter claim in the sum of USD 52,624.

3. By the time the hearing commenced the reigning pleadings were the amended plaint dated 8/6/2011 and amended on 14/3/2012, the Amended statement of defence and counter-claim dated 4/8/2011 and amended on 23/3/2012, the defence to counterclaim dated 8/7/2012 and a document called to Reply to the counterclaim dated 23/5/2012. Parties also filed witness statements and bundles of documents and even after filing separate issues both did file a list of 6 agreed issues dated 30/3/2016 on the 13/4/2016.

4. At trial and pursuant to the case conference directions given on the 6/9/2016, each side called one witness who adopted their witness statements as evidence in chief, produced the documents filed and were cross examined.

Evidence by the plaintiff

5. PW 1 adopted his witness statements dated 8/6/2011 and 24/4/2017 and pointed out that the difference between the two was a clarification that the gensets were loaded in two trucks, one genset per truck, and that one genset was safely returned but the second was not due to an accident on the way to Juba and in fact strayed there for about two months before the defendant had the vehicle and the genset towed back to Mombasa without consulting him.

6. The witness also produced two lists and bundles of documents dated 7/8/2012 and 27/4/2017 which were by consent marked P1 & 2. There was also a set of photographs of the suit motor vehicle produced as PEXH 3 largely to show to the court what its apparent condition was. Part of Exhibit P2 were two transport agreements; one between parties here and another between the plaintiff and a third party as well as the two cheques each for USD 5000 in favour of the defendant. The witness also produced invoices at pages 25 – 37 to his customers to show that he was in fact trading and not in hiding. He said he had offices at Diamond Trust Building and had a presence in social media like google hence could not go into hiding never to be traced.

7. His complaint against the defendant was that it had no right to tow the motor vehicle and keep it since he had no lien over it because he had a security by way of USD 10,000 in two cheques which the defendant opted not to bank. He confirmed that in the agreement he was obligated to pay USD 100 per day and that there was a delay of 2 – 3 months.

8. While admitting liability for the contracted sum of USD 25,000 in case a genset was lost, he disputed the claim on the grounds that the motor vehicle was towed back to Kenya without his consent or information. He insisted that he paid the hire charges but that the genset were never handed over to him upon execution of the agreement on 14/9/2010 till 17/9/2010. He said that he was ready to return the genset to Kenya but were stopped by the South Sudanese military on account of heavy rains and bad roads and that in March 2011 the defendant went and brought back the genset mounted on the truck to Mombasa and has been keeping the same. In his evidence he admitted being bound to pay only 22,000 USD out of which he had given a deposit of USD 10000 hence only 12000 USD was due for him.

9. In cross examination the witness admitted that one of the gensets stayed in Juba for about 5 months. He also confirmed having given the motor vehicle log books and transfer to the defendant as security. He said that a meeting between him and the defendant's director was arranged by an employee of the defendant who met at the bank. He also admitted having not paid the uncontested sum for delayed return all the time the matter has been in court.

10. On the documents exhibited to show contracts with third parties, the witness confirmed that the document at page 13 is not signed by the client and does not show the cost of transport. However the one at page 19 had costs and said he would earn USD 4,400 for a journey MOMBASA-KAMPALA-MOMBASA within 4 days. He however confirmed that the agreement did not guarantee him work. On his income he said he did file tax returns but had not exhibited the same in this suit.

11. On re-examination, the witness told the court that the plaintiff's core business was clearing and forwarding as well as transport and that the defendant should pay for the losses occasioned by detention of the truck. When asked questions by the court the witness said he did return the first genset on a date he could not remember and that he could not remember the truck which returned it. On why he had not paid the admitted sum of USD 20,400 he said he could not pay because the defendant was unfairly holding onto his truck.

Evidence by the defendant

12. The defendant equally adopted the two witness statements dated 4/11/2015 and 12/6/2017 as his evidence in chief and produced the two lists of documents dated 13/11/2015 and 8/6/2017 as DEXH. 1-8 He said the defendant operates trucks to Juba on a daily basis and the drivers reported to him the suit truck striped of wheels and tyres for which reason he asked his driver to get a low loader to bring back the genset and the truck back to Mombasa. He said he tried reaching the plaintiff on phone but was informed the managing director was sick in hospital and since he did not know the physical location of the office he had no way of locating him

13. The gist and effect of the defendants evidence was that between 7th October 2010 and 15th March 2011 the plaintiff stopped all communication with the defendant and was not reachable on phone and that the truck was damaged to be incapable of being driven back to Kenya hence the need to be towed. He said that before the suit was filed an amicable settlement was proposed by reduced demurrage charges and a payment plan including a proposal that the vehicle be repaired by the defendant and the costs thereof recovered from operation of the same by the defendant. He said that the cheques issued as deposit were never banked when it became apparent that the plaintiffs had financial challenges. The witness then said the plaintiff suit should be dismissed and the counter-claim allowed as prayed.

14. When cross-examined the witness told the court that the agreement was that incase a genset was lost the plaintiff would pay the sum of USD 25,000 and that there was no agreement for the defendant to go for the genset in Juba. He admitted that prior to going for the truck and genset from the Sudan, they had not informed the plaintiff. On the photographs said to be of the truck on arrival in Mombasa, the witness confirmed that the same did not have dates and that no assessors report was produced.

15. On the cost of transport he admitted that he had nothing other than the invoices, to show how the costs of transport from Juba to Mombasa was computed and that there was no agreement to transport the truck from Juba to Mombasa. He admitted that as a transporter if anybody held his truck he would be losing.

16. On re-examination he said the plaintiff would have insured the truck and the trailer and that the decision to bring the truck from Juba to Mombasa was necessitated by inability to reach the plaintiff on phone. He said that had he been paid, he would not hold the truck.

17. When asked questions by the court, the witness said the sunrise date for delay should have kicked off on 29/9/2010 and therefore the delay was for a period of 187 days. He then admitted that he had not exhibited evidence of dishonour of the cheques given as security. He said the maximum he would get if the genset was lost was 25,000 USD but that the demurrage would stop once it was declared lost.

18. With the two witnesses dealt with, the production of evidence was closed on both sides and the parties then filed written submissions. Submissions by the plaintiff are dated 8/3/2018 while those by the defendant were dated 10/5/2018 and filed the same day. I have had the benefit of reading both submissions and the decided cases cited by both sides and I have reminded myself that parties did agree on issues for determination in the list filed in court on the 13/4/2016. Even then the said issues could have been framed better which in my view in the following fashion:-

- i. Whether the plaintiff and the defendant each performed their respective side of the bargain in the contract of hire of the gensets?
- ii. Whether there was breach by either side and if by such breach a loss had resulted?
- iii. How much is the loss to which party and the quantum thereof?

iv. What order should be made on costs?

Duties and obligations under the contract of hire gensets?

19. It is agreed in evidence by both sides that even though the contract sued upon concerned two gensets, the dispute is only over one genset and the truck and trailer upon which it was loaded when being transported back to Kenya.

20. It is also a non-contested fact that the two cheques issued by the plaintiff in the sum of USD 10,000 were never cashed. The other uncontested issue is the fact that the plaintiff did in fact delay in returning the suit genset and therefore the agreed demurrage charge of USD 100 per day is due and recoverable.

21. With those conceded or common ground facts, the rest of the dispute remain to be determined not so much on what the parties said in evidence but rather on what they agreed to be their respective obligations under the contract. It is thus important to find out what the parties agreed upon pursuant to the agreement dated 14/9/2010. The clauses I consider pertinent and helpful in this determination are the **recital a & b and clauses 1, 2 & 3.**

22. Those provisions read:-

a) The Company is the owner of Two (2) Generator which forms the subject matter of this agreement, is in good and serviceable working condition with a replacement value of USD 25,000 per genset.

b) The Company is willing to hire out the said generators for 10 days to the LESSEE company for business uses in JUBA and, with effect from 14th, September 2010 and the Lessee company is willing to take hire of the Generator at a consideration of USD 1500 per generator, (excl VAT). Demurrage as from the 11th day and onwards will be USD 100/- per day. A cheque of USD 10,000 is hereby received as Deposit and Guarantee of the above generators plus a cash of USD 3000.00 for hire of the above mentioned gensets.

NOW IT IS HEREBY AGREED as follows:

1. That Hiring company having had the opportunity to inspect the generator, confirms generator is in a good and serviceable working condition, and shall take hire of the same from the Company, for 10 days with effect from 14th September 2010.

2. The LESSEE company undertakes to return the generator in a good and serviceable working condition that is satisfactory to the Company, upon the expiry of 10 days and accepts to pay delay charges of USD Dollar 100 per day per genset, if the generator will not have been returned upon expiry of the said same.

3. The Company herein undertakes to indemnify the Company against all losses, damages, claims, costs, demands and expenses arising hereunder and further undertakes to pay the full replacement value if the Generator are rendered a total loss.

23. The summary of the terms are that the hire was over two gensets at USD 1,500 per genset for a period of 10 days with a cheque deposit of USD 10,000 on the understanding that the replacement value of the each genset was USD 25,000. In case of delay in delivery by the hirer, plaintiff agreed and covenanted to pay USD 100 per each day of delay.

24. All the pertinent terms of this agreement are not in dispute hence nothing much for interpretation or application. The only term that could have been in issue is the effective date of the hire but there is uncontroverted evidence that the gensets were loaded on the 19/9/2010 and in his evidence to court the defendant said the delay should have kicked off on 27/9/2010 thus tacitly admitting that the commencement date was not the contractual 14/9/2010. That disparity on dates notwithstanding, I take the defendant's evidence that the delay commenced on 29/9/2010 as a concession that the delivery to the plaintiff was never made on the date of the contract.

25. I do find that the plaintiff in failing to return the genset by the 29/9/2010 was in breach of contract and then became liable to pay the agreed demurrage charge of USD 100 per day till the date the genset was returned to the defendant. To the contrary the defendant performed its part of the contract by availing the genset as agreed and cannot be said to have committed any breach of the contract.

26. There having been a breach by the plaintiff the next issue for determination is whether any loss had resulted. Indeed parties agreed and anticipated their losses to include delay and loss of the genset. Here there was never loss of the genset because it is agreed that the same was recovered by the defendant and brought back to Mombasa. However, the remedy for delay and measure thereof was agreed at USD 100 per day. In his evidence the plaintiff admitted that the suit genset was not brought back up to March 2011. On the other hand the defendant said the delay having commenced on 29/9/2010 it lasted 187 days suggesting a period of up to the same March 2011.

27. That confirms the evidence given during cross examination that the defendant had the possession of the truck and the genset since March 2011. I do find on the evidence on record that the delay was for a period of 187 days for which the defendant is entitled to a sum of 18,700 USD and not the sum of USD 20,400, even if the plaintiff admits that sum.

28. In terms of the contract that is the sum the defendant can legally claim and the sum the plaintiff is bound to pay. For that sum I enter judgment for the defendant as counter-claimed

28. That determination leaves one other question for determination whether the defendant was entitled under the contract to go for the genset

and truck and once in Kenya, whether the defendant was entitled to retain possession.

29. The indisputable fact is that the contract of 14/9/2010 did not give to the defendant the right to go for the truck in Juba. However there is a document dated 14/9/2010 and referenced **CONTRACT ACCEPTANCE** by which it is said that the defendant had accepted a cheque no. 000048 dated 21/8/2010 for USD 5,000 and logbooks for Scania Truck Reg. No. T456AMP and Trailer Reg. No. TC672ANE to undertake as Lean (*sic lien!!*) for genset No. 35. The document provided further that:-

“Please not that we shall hold above mentioned truck and trailer in case you fail to return the gensets in good working condition”.

30. That document was apparently meant to be an addendum to the hire agreement because instead of the two cheques amounting to USD 10,000 it was now only USD 5,000/=. That document filed with the defendants bundle dated 13/11/2012 was also produced as evidence without objection for the plaintiff.

31. I do consider the document an addendum to the agreement of 14/9/2010 and find that the parties agreed that the defendant would be entitled to hold the logbooks as security and that if the plaintiff would fail to return the equipment in good working condition, the defendant would be entitled to hold the truck and trailer. The language of the document notwithstanding, I do find that by that document parties agreed that the defendant would have a lien over the truck and its trailer. Accordingly, when the same were brought to Kenya by the defendant, it was entitled to retain the same as lien for its claim against the plaintiff. I therefore find that the detainer of the truck and trailer by the defendant was contractual and thus lawful and not tortious.

33. One may seek to consider the plaintiffs position that there was no agreement that the defendant goes for the motor vehicle in Juba. I wholly agree that there was no agreed term to the effect, but the defendant had a legal duty to mitigate own losses. I do find that in seeking to have the motor vehicle towed back to Kenya the defendant committed no wrong but rather acted in the best interest of both by mitigating possible total loss of the genset and the motor vehicle.

34. The foregoing findings lead me to the final summary in this judgment follows:

a) The plaintiff suit against the defendant is dismissed with costs.

b) Judgement is entered for the defendant on the counterclaim in the sum of USD.18, 700, being the agreed demurrage charges for the period of delay in returning the genset, together with costs and interest thereon. Interest will run from the date of the suit till payment in full

c) Upon payment of this sum the plaintiff shall be at liberty to take back the motor vehicle and its trailer together with its documents of title.

Dated, signed and delivered at Mombasa on this 22nd day of May 2019.

P.J.O. OTIENO

JUDGE