



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 384 OF 2007

ROMAGECO KENYA LIMITED..... PLAINTIFF

VERSUS

AUTOMOBILE PARTS CENTRE LIMITED.....DEFENDANT

J U D G E M E N T

INTRODUCTION

1. By a decree issued herein on 25th June 2013 pursuant to a Consent recorded by parties in court n 20th November 2012, Judgement was entered in favour of the Plaintiff against the Defendant for the sum of Kshs.880,248.08. in addition to the foregoing award, the Court also directed as follows:-

“4. The parties to file written submissions in respect of interest payable on the said sum and general damages for passing off.

5. That the parties shall rely on the documents already filed without calling any witness.”

2. The Plaintiff filed its submission on 3rd November 2013 while the Defendant has failed to do so despite repeated chances given by the court for the Defendant to file submissions. I will therefore proceed without the input of the Defendant.

3. The Plaintiff submitted that the prayer for interest is premised upon the provisions of **Section 26** of the Civil Procedure Act, Chapter 21 of the Laws of Kenya which reads as follows:

“26. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

4. The Plaintiff's counsel submitted that the Decree issued on 25th June 2013 is for the payment of a sum of **KShs. 880,248.08**. As such and in accordance with the provisions of section 26 of the CPA, the said Decree is for the payment of money to which interest may be applied.

Further, from the foregoing provisions, it is clear that interest is considered and calculated at three (3) different levels being:

- a. *Interest for the period before institution of suit;*
- b. *Interest for the period from the date of the suit is filed to date of judgment; and*
- c. *Interest from date of judgment until payment in full.*

5. It was further submitted that interest is a discretionary award and that rates of interest applicable to a particular case will invariably depend on the peculiar circumstances of each particular case. In view of the circumstances of this case, the counsel submitted that the rate of interest which should be applied is the prevailing commercial rate of 36% per annum in view of the following:

- a. *The Plaintiff through its Advocates on record, M/s Nyachoti & Company, served the Defendant with a demand notice dated 24th July 2007 (at pages 46-47 of the Plaintiff's Bundle of Documents filed in court on 18th June 2012) demanding payment of the sum of KShs. 880,248.08 which was the amount due and owing to the Plaintiff from the Defendant and which was the exact amount eventually awarded by the court in this case by consent of parties.*
- b. *Despite being served with the aforesaid demand notice, the Defendant failed to make good the Plaintiff's claim as demanded in the said letter dated 24th July 2007 and as such, the Plaintiff instituted this suit on 31st July 2007 after the expiry of seven (7) days. In the said suit, the Plaintiff prayed for interest on the aforementioned amount at commercial rates.*
- c. *By a letter dated 6th December 2006 (at page 49 of the Plaintiff's Bundle of Documents filed in court on 18th June 2012), the Defendant had already admitted owing the Plaintiff a sum of KShs. 1,800,000.00 even before the institution of this suit and had in fact undertaken to settle the same.*
- d. *This suit was eventually settled by consent of parties on 20th November 2012 meaning that five (5) years or so after the filing of this suit, the Defendant eventually conceded to owing the Plaintiff a sum of KShs. 880,248.08 which was in fact the exact same amount that the Plaintiff had demanded from the Defendant in 2007.*
- e. *Accordingly, it is clear that the Defendant has deliberately withheld the Plaintiff's monies without any reason and/or justification whatsoever while well aware that the Plaintiff is a profit-making commercial and/or business enterprise. The Defendant has therefore denied the Plaintiff the opportunity to profitably use and reinvest its monies in its business for a period of over five (5) years thereby occasioning the Plaintiff immense loss of profits which would have been realised had the money been utilised and invested in the business for the said period of time.*
- f. *Indeed, the Plaintiff is a well known going concern and an established commercial enterprise operating as an automobile garage not only in Kenya but also throughout the East Africa region with wide range of customers and/or clients. As such, if the Plaintiff had been allowed the opportunity to use its monies in the sum KShs. 880,248.08 throughout the said period of five (5) years, its profits and business in Kenya and in the East Africa region would have been boosted and enhanced tremendously.*
- g. *The Plaintiff is still in operation in Kenya and throughout the East Africa region and as such, still continues to suffer loss of profits by being deprived the use of its monies which would have otherwise been injected into the business to boost its operations thereby enhancing its*

productivity.

- h. *In view of all the foregoing, it is only just, fair and reasonable that the decretal amount awarded to the Plaintiff in the sum of KShs. 880,248.08 attracts interest at commercial rates of 36% and not at any other rates.*

Taking all the foregoing into account and applying interest at the rate of 36%, it was submitted that the interest payable to the Plaintiff for the period of **seven (7) days** from the date of demand to the date of filing this suit would be a sum of **KShs.6,161.75**.

6. On general damages, the Plaintiff submitted that by a letter dated 6th July 2007 (at page 48 of the **Plaintiff's Bundle of Documents filed in court on 18th June 2012**), one of the Plaintiff's corporate customer and/or client known as **Mohammed Kuno c/o Eco Logistics** wrote to the Plaintiff as follows:

"I went to Automobile Parts Centre (APC) at Rob's Magic Dealer about two weeks back to replace all shocks of my NISSAN HARD BODY registration number KAN 777N. On arrival they quoted to me a price of KShs. 24,000/- for 4 Nos. Magic shocks. They took the car in, shut the gates, and somebody was sent for the shocks.

After a little while, the shocks were brought and fitted to my vehicle. Today, two weeks later I brought my car in to ROMAGECO to have the alignment done and the mechanics have discovered that these are NOT Rob's Magic Shocks but an imitation.

The shocks have been labelled with almost identical labels of APC and upon removing the label the name underneath is KKL. AND THESE ARE DEFINITELY NOT ROB'S MAGIC SHOCKS.

I am extremely disappointed at this and have to bring this to your attention because your dealer is certainly damaging the reputation of Rob's Magic Shocks!!"

7. Further, by a letter dated 18th July 2007 (at page 50 of the **Plaintiff's Bundle of Documents filed in court on 18th June 2012**), another customer/client known as **McKenzi Sila Mutiso** also wrote a similar complaint to the Plaintiff s follows:

"I MCKENZI SILA MUTISO owner of Land Cruiser registration number KPQ 363 went to a Rob's magic Dealer, Automobile Parts Centre on Addis Ababa Road, Industrial area, to buy Rob's Magic Shocks in December 2006

Today, 18th July 2007, after a disappointing 6 months, I came directly to Rob's Magic on Road "A" to see them to complain that the Shock Absorbers had failed.

I was shocked to find that I had been passed off with some KKL Shock Absorbers from Kapu Kenya Limited that APC affixed a Rob's Magic label and sold to me as Rob's Magic Shocks.

I feel I have been cheated by Automobile Parts Centre since I certainly went to them to purchase Rob's Magic Shock Absorbers"

8. Pursuant to the foregoing complaints, the Plaintiff commissioned a test to be conducted by the Kenya Bureau of Standards (KBS) on the genuine shock absorbers supplied by the Plaintiff and also on the counterfeit shock absorbers which were being passed off by the Defendant as the Plaintiff's products and from the test results dated 25th July 2007 (at page 52-54 of the **Plaintiff's Bundle of Documents filed in court on 18th June 2012**), KBS determined and concluded as follows (see page 52 of the **Plaintiff's Bundle of Documents**):

“Sample ‘B’ above had 3 major non-compliances in the assembly, marking and visual inspection parameters. It was also noted that sample ‘B’ had an engraved trade mark “KKL” and a Rob’s magic striker on it.”

9. In view of the foregoing complaints by two (2) customers of the Plaintiff and the test results conducted on the genuine and counterfeit shock absorbers which were being sold by the Defendant, it is submitted that the Defendant was actually passing off counterfeit and poor quality shock absorbers as those of the Plaintiff contrary to the express provisions of the Agreement dated 30th April 2004 (at pages 1-7 of the Plaintiff’s Bundle of Documents filed in court on 18th June 2012) entered into between the Plaintiff and the Defendant. In particular, clause 10 of the said agreement (see page 52 of the Plaintiff’s Bundle of Documents) partly reads as follows:

“The agent is expressly forbidden to use/procure/fit any other products/component/system or any shock absorbers/kit/conversion inclusive of damping/springs/and allied mechanical that ordinarily supplied by Companies or any specific conversion produced by other Companies...”

10. The Plaintiff submitted that in a claim for passing-off, once misrepresentation and infringement have established, damages will be presumed. In **Orkin Exterminating Co. Inc vs. Pestco Co. of Canada Ltd** 50 O.R. (2d) 726 it was held *inter alia*,

“The third issue raised by the appellants is framed as follows: should damage to the property in the goodwill, if any, be presumed to have been incurred by Orkin and if so, was that presumption rebutted? ...Without damage there is no passing off. This argument is completely answered by the assertion that Orkin has suffered damage, sufficient to support a cause of action against Pestco, by virtue of its loss of control over the impact of its trade name in Ontario and the creation of a potential impediment to its using its trademark upon entering the Ontario market--both arising from Pestco's use of the name "Orkin" in Ontario.”

Similarly in **Triple Five Corporation vs. Walt Disney Productions** (supra) it was held (at pages 23-24 of the Bundle of Authorities annexed hereto);

“Having found that damages have been established on findings of fact made by the learned Trial Judge, I need not decide whether damages can be presumed, goodwill and misrepresentation having been proven. I note that there are authorities which support the statement made by the learned Trial Judge. These include *Draper v. Trist* [1934] 3 All E.R. 513; *Bow City Delivery Ltd. v. Independent Car Co. Ltd.* (1972) 10 C.P.R. (2d) 51; *The Noshery Ltd. v. Penthouse Motor Inn Ltd.* (1969) 61 C.P.R. 207; *Sund v. Beachcombers Restaurant Ltd.* (1960) 34 C.P.R. 225.”

11. Further, in the English Court of Appeal case of **Draper vs. Trist [1939] 3 All ER 513** at 526, Goddard, L.J reiterated (at page 7 of the Bundle of Authorities annexed hereto);

“In passing off cases, however, the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business. The law assumes, or presumes, that, if the goodwill of a man’s business has been interfered with by the passing off of goods, damages results therefrom.”

12. The Plaintiff submitted that from the above mentioned complaints made to the Plaintiff by its customers in month of July 2007, the Plaintiff’s goodwill and business reputation suffered tremendously as a result of the Defendant’s acts of misrepresentation which acts have not been controverted at all by the Defendants. Therefore, the Plaintiff’s right of property being the goodwill of the Plaintiff’s business was seriously damaged. Accordingly and as **the law presumes, where the goodwill of a man’s business has been interfered with by the passing off of goods, damages must result therefrom.** The Plaintiff, in its prayers, sought for general damages for passing off. In assessing damages in a tortious action, the Court has the discretion to determine the amount of damages, based on the assessment of the issues at hand and the circumstances of the particular case. In the instant suit, the Plaintiff’s claim is predicated upon the

Defendant's action of passing-off. The agreement between the Plaintiff and the Defendant commenced on 30th April 2004. Accordingly, damages should therefore be assessed based on the presupposition that they accrued from the date of the agreement. In light of the fact that there is no evidence defence whatsoever to controvert the Plaintiff's claim for passing off in essence is therefore admitted, and in view of the admission of owing the suit amount, the Plaintiff submitted that a sum of Kshs.7,000,000.00 will be fair compensation on account of General Damages.

13. I have carefully considered the Plaintiff's submission. It is the law that interest are invariably awarded to the winner of a suit at a rate which is discretionary to the court. However, the court in exercising its discretion in determining the applicable interest rate must consider the circumstances of the case, including the business, the parties, economic times and the reigning interest rates at the market when the transaction took place. The interest rate of 36% as proposed by the Plaintiff is punitive. The last time such rates appeared in Kenya were in the early 1990's, and even then, it was generally agreed that the rate was punitive and anti-business. The period after the year 2000 had seen a notable reduction on the applicable interest rates, such that today, a party seeking interest rate at a commercial rates would rarely, with approval of court, get over 20% per annum. The current transaction took place around the year 2007 when applicable interest rates were quite lenient. So the Plaintiff's submissions for a rate of 36% is not acceptable to me.

14. Secondly interest before institution of a suit is purely discretionary, and would be considered in situations where there was an agreement on the same, or money was borrowed from a lending institution and parties expected that it would be paid with interest.

15. It is noted that in the suit before the court the Applicant asked for costs of the suit and interests thereon. My understanding is that the interest which the Applicant prayed for was only in terms of the costs of the suit, and not in terms of the claim. Interests on the claim can be awarded purely by the discretion of the court under paragraph (e) of the prayers for further relief. Pursuant to the above, it is my view that one rate of interest shall be applicable before the filing of suit, after filing of the suit, and after the Judgement. I am also satisfied that there is no compelling need to award interest before the filing of the suit as this was not prayed for. The order which I am satisfied with is a rate of interest as from the date of filing of the claim on 27th July 2007. And that rate of interest shall be 18% per annum.

16. On the issue of general damages I am satisfied with the authorities cited by the Plaintiff. The Plaintiff suffered damages as a result of the said passing off by the Defendant. However, there is no criteria for assessing damages at Kshs.7,000,000/= as proposed by the Plaintiff. It is agreed that the Plaintiff suffered damages. It is difficult to quantify the said damages, but considering that the parties were in a business relationship where a claim of Kshs.880,248.08 was found due to the Plaintiff from the Defendant, I am prepared to assess general damages herein at roughly four times the said claim thus Kshs.3,200,000/=.

In the end I judge on both the issue of interest and general damages as follows:-

- i. ***The interest applicable pursuant to the decree herein on 25th June 2013 shall be 18% per annum from the date the suit was filed.***
- ii. ***The Plaintiff shall also be paid general damages by the Defendant for passing off, herewith assessed at Kshs.3,200,000/= with interest thereon at court rates from the date of this Judgment till payment in full.***
- iii. ***Cost of the suit shall be for the Plaintiff.***

That is the Judgment of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 6TH DAY OF MARCH 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Abidha holding brief for Nyachoti for the Plaintiff

No appearance for the Defendant

Teresia – Court Clerk