



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 138 OF 2008

PETER NDUNGU NGAE.....1ST PLAINTIFF

ANN WAITHERA NDUNGU.....2ND PLAINTIFF

NGAE'S ENTERPRISES LIMITED.....3RD PLAINTIFF

VERSUS

JOHN MUGANE KAROMO.....DEFENDANT

JUDGMENT

1. The First and Second Plaintiffs are the directors of the Third Plaintiff, a company incorporated in 1983 which carries on business at Industrial Area within Nakuru Municipality in the County of Nakuru. Their case is that on 18/11/2007, the Defendant unlawfully and without any right, broke into their premises and took away or converted into his own use the Third Plaintiff's property. As a result they suffered a loss of Kshs. 2,758,000/=. In addition the First Plaintiff suffered nervous shock on realizing that the premises had been broken into for which he sought general damages. Counsel for the Plaintiffs informed the court that following the death of this Plaintiff and the failure to substitute him, the claim for general damages for nervous shock should be regarded as abandoned. In their Amended Plaintiff dated 2nd December 2010 and filed on 6th December 2010 the Plaintiffs therefore seek judgment against the Defendant for-

(a) *The principal sum of Kshs. 2,758,000/=;*

(b) *Costs and interest of the said sum.*

THE PLAINTIFFS' CASE

2. The Plaintiffs are in the business of selling cereals and in particular beans which are stored in their godown at Industrial Area. There are several stores on the premises and each has its own gate. They also rented out two rooms to two tenants; one deals with agricultural chemicals and the other is an hotelier. The tenants only use the rooms to store their merchandise but carry out their business elsewhere.
3. PW3, the Second Plaintiff, testified that on 17/11/2007, she locked the main gate that they all use to access the property closed their business at about 5.00pm as is the norm. They left a guard from Bahati Security Guards who they had employed to guard the main gate through Sunday 18/11/2007 when the business remained closed.
4. When she returned with her husband PW2, on 19/11/2007 they realized that the main gate was opened and the padlocks and handles of doors to the store and the office were broken. The

burglars took property from the store worth Kshs. 2,758,000/= as particularised hereunder-

- (a) 480 bags of beans @ Kshs. 4,000/= per bag.....Kshs. 1,920,000/=
- (b) one complete hammer mill with accessories.....Kshs. 200,000/=
- (c) two posho mill motors.Kshs. 80,000/=
- (d) Avery weighing scale.....Kshs. 78,000/=
- (e) two sewing machines.....Kshs. 100,000/=
- (f) one small radio.....Kshs. 1,000/=
- (g) one computer with its software and printer.....Kshs. 100,000/=

5. In addition the Plaintiffs incurred a cost of Kshs. 100,000/= for repairing the broken and damaged doors and locks. Their claim was for an all inclusive sum of Kshs. 2,758,000/=.
6. PW2 produced the Goods Received Notes (GRN) (PEX2) and the summary (PEX 3) showing that they purchased about 600 bags of beans between 14/10/2006 and 14/12/2006. The receipts for the other items were produced as "PEX 4-12". PW2 collapsed when he heard the news the store had been vandalized and was left to recover in the office while PW3 and her daughter searched the stores which sell beans in bulk in Nakuru.
7. Their search led them to the Defendant's store where they found beans similar to those that had been stolen from the stores scattered outside. PW3 testified that their beans were of the type known as 'wairimu' and are generally red in colour. However they did not sell them because the prices had depreciated greatly in the year 2007 and they were waiting for the prices to rise again. Therefore, because of being stored for so long, the beans had turned brown and she was able to identify them by this colour.
8. They immediately informed the Police who guarded the Defendant's store for four days until it was opened on 22/11/2007. PW3 identified her beans and the old sacks in which they had been stored earlier. The owner of the premises, the Defendant, was arrested later after being identified by the driver and the turn- boy of the lorry that had ferried the goods from the Plaintiff's stores. He was then charged with the offence of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code and an alternative count of handling stolen property contrary to Section 322 (2) of the Penal Code. He was found without a case to answer and acquitted under Section 210 of the Criminal Procedure Code, (*Cap 75, Laws of Kenya*).
9. PW1 was the driver of the lorry that was alleged to have carried the Plaintiffs' goods from the stores. He testified that as at 17/11/2007 he was employed as the driver of the lorry registration number KAA 249B. On this day he was in the vehicle with his turn-boy at about 5.00pm when the Defendant who he had known for about three years approached him with a proposal to hire the lorry.
10. After agreeing on the price of hire with the owner, PW1 and the Defendant agreed to meet the following day which was on 18/11/2007. Together with other persons who were with the Defendant in a small vehicle and a canter, PW1 drove to an unfamiliar place in Industrial Area situate after the Highway. The Defendant was in the company of other persons in a small vehicle and a canter.
11. On reaching the place where the goods were located, his vehicle was loaded with 270 bags while other items like the weighing scale, mortars, mills and other items were loaded into one of the other vehicles. He was then directed to take the goods to the Defendant's store using a different route from the one they had used to the place. He complied and after off-loading the goods and receiving his pay he left. He was arrested on 20/11/2007 but later released on giving his statement.
12. In his Defence dated 29th August 2008, and filed on 1st September 2008, the Defendant denied the Plaintiff's averments. He stated that on the said date, he was in Naivasha with his children all day and not at the Plaintiffs' store. Like the Plaintiffs he is also in the business of selling cereals for

- which he had been issued with a business permit by the Municipal Council of Nakuru (DEX 2(a) and receipt DEX 2(b)). The beans that were taken from his store were his for sale. He explained that he did have in his store two types of beans “nyayo” and “wairimu”. Those impounded from his store, were of the “wairimu” type that had been harvested the previous year. He had no receipt to prove purchase because in many instances he obtains the produce directly from the farmers.
13. The Defendant denied that he knew PW1 before his arrest and arraignment in court. He maintained that the testimony against him was false. He produced as DEX 1 the proceedings before the lower court wherein he was acquitted of all the charges against him. He also contended that he could not be asked to refund the beans to the Plaintiffs because those that were impounded by the Police from his store were sold during the pendency of the criminal proceedings by the order of the court. Even after being acquitted of the charges, the money realized from the sale was not given to him. He prayed for dismissal of the suit against him.

SUBMISSIONS

14. In the submissions filed on behalf of the Plaintiffs on 10th November 2014, it was submitted that the Plaintiffs' evidence proved to the required standards that the Defendant broke into the Plaintiffs' store at Industrial Area on 18/11/2007 and took away their property. PW3 was able to identify the stolen beans in the Defendant's premises by the colour and also identified the old sacks in which they had been stored. PW1 whose lorry was used to ferry the goods gave consistent evidence which remained unshaken during cross-examination on the circumstances under which he was hired, went to the Plaintiffs' property and transported the goods under the instruction of the Defendant to his store.
15. This evidence remained and was not controverted or challenged. The Defendant's allegation that he was on the material day in Naivasha with his children was an after-thought. It was contended that this defence should not be considered by the court because it was not raised in the pleadings contrary to Order 2 Rule 3(1) and 4(1) of the Civil Procedure Rules. Counsel considered this to be a material fact which could not be raised for the first time during the defence hearing after the Plaintiffs had closed their case.
16. Counsel also argued that the Defendant had not presented any documentary evidence that the beans that were impounded from his store belonged to him. The fact that he had been acquitted of the criminal charges against him was not material as those proceedings are different from these proceedings both in terms of the nature of evidence and the standard of proof that is required to prove the cases.
17. With regard to damages Counsel submitted that the Plaintiffs had specifically pleaded and proved their claim for the special damages by producing the Goods Receipt Notes and receipts issued on purchase of the various items also stolen from their premises. He further submitted that the costs should follow the event which in turn should lead to the Plaintiffs being awarded the costs of this suit.
18. On his part, the Defendant relied on the submissions filed by his Counsel on 10th November 2014. Their position was that the Plaintiffs had failed to prove that there was any burglary that took place on 18/11/2007 as alleged. There was no report made to the Police by the security guard who had been stationed to guard the main gate to the premises or PW1 who was with the Defendant at the time of the alleged burglary. The evidence of PW1 did not show any connection between the premises from which he took the goods and the Plaintiffs' store as no description was offered by either party.
19. The Defendant's conduct also supports his contention that he was not involved in the alleged crime, for he willingly submitted himself to the Police and undertook to find the person who was driving the lorry that transported the Plaintiffs' goods.
20. The Defendant also raised two points of law which in his view proved that the case herein was vexatious, scandalous and an abuse of the court process filed with the intention of unlawfully extorting him. The first was that the 3rd Plaintiff was not authorised by its Memorandum of Association to carry out the business of buying and selling grains. Further, PW3 who testified in the Criminal Proceedings, did not mention that the beans were owned by the 3rd Plaintiff or that she was a co-director with her husband.
21. The second point of law was that the First and Second Plaintiffs did not have capacity to bring

these proceedings as directors because the Third Plaintiff being a company vested with the legal capacity to bring these proceedings in its own name, is the only proper Plaintiff in this matter. In summary, the Defendant's position was that the Plaintiffs had not proved their case and the suit should therefore be dismissed with costs.

ISSUES FOR DETERMINATION

22. From the foregoing, there are two issues for determination in this case-

- (a) *whether the Defendant unlawfully entered into the Plaintiffs' premises, took possession of and converted their property;*
- (b) *whether the Defendant is liable for damages for conversion; and*
- (c) *who should bear the costs of this proceedings.*

WHETHER THE DEFENDANT IS LIABLE FOR CONVERSION OF THE PLAINTIFFS' PROPERTY

23. Before embarking on this issue, there are two questions of law that were raised by the Defendant which I wish to dispense with. The first was the 3rd Defendant who is alleged to carry on the business of buying and selling cereals at the premises where the items were allegedly stolen by the Defendant, was not authorised by its Memorandum to carry on such business and whether the First and Second Plaintiffs could not bring these proceedings in their capacity as directors of the Third Plaintiff and also include it as a party to the proceedings.
24. In my view, these are issues which do not go to the root of the case and are therefore not material in these proceedings. The fact of whether the Third Defendant was authorised to carry on the business was not in issue and therefore not one that needed to be proved. The question was whether the Plaintiffs' property was vandalized on 18/11/2007 when their property was unlawfully taken by the Defendant. But even if it were an issue, the Memorandum of Association is its Constitution. The Articles of Association are rules of management. The Memorandum of Association is so widely expressed that empowers the company to buy and sell.
25. In addition the fact of the inclusion of the First and Second Plaintiffs as directors of the Third Plaintiff did not affect the substance of the case because the proper parties to the suit had been enjoined. This is particularly in regard to the First Plaintiff who had an independent claim for damages for the nervous shock he suffered when he realised that his property had been stolen. I find that the objections raised by the Defendant to be without merit and dismiss them in their entirety.
26. I now turn to the primary issue raised in the proceedings, of whether the Plaintiffs have proved their case for conversion. Conversion is a common law remedy for the unlawful interference with the goods of another. **Winfield and Jolowicz on Tort 15th edn, Pg 588** says that conversion may be committed by *wrongfully taking possession of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded*. The said authors assert the fact that mere taking of possession of another's goods may amount to trespass but will only be constitute conversion if it is accompanied by the intention to assert the rights over the goods, inconsistent with the rights of the owner.
27. In **Halsbury's Laws of England, 4th Edition Pg 355 Para 548**, the authors elaborate on the essence of conversion and exists in three forms-

***“To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights and an intention in doing so to deny the owner's rights or to assert a right inconsistent with them. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else; nor need there be any positive intention to challenge the true owner's rights. Liability in conversion is strict and fraud or other dishonesty is not a necessary ingredient in the action.*”**

A second form of conversion is committed where the goods are detained by the Defendant. A wrongful detention gave rise to an action for detinue before detinue was abolished (by the Torts (Interference with Goods) Act 1977) and now gives rise to an action in conversion. The normal method of establishing a wrongful detention is to show that the claimant made a demand for the return of the goods and that the Defendant refused after a reasonable time to comply with the demand.

The third form of conversion lies for the loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor.”

28. To succeed in their claim, the Plaintiffs must establish that the Defendant unlawfully took possession of their property with the intention of asserting a right over them inconsistent with theirs as the owners of the property. From the evidence, the Plaintiffs accuse the Defendant of committing a direct conversion, which is defined in Black's Law Dictionary, 9th Ed, as the **act of appropriating the property of another to one's own benefit or to the benefit of another.**
29. The Plaintiffs allege that the Defendant broke into the godown and without their authority took their property for which they seek compensation. PW3 testified on how her investigations led her to the Defendant's store wherein her stolen beans were recovered. She says that together with her daughter and while in possession of a sample of some of her beans that had been left behind, they went around all stores that deal in cereals in an attempt to find a vendor who was selling beans similar to hers. When she reached outside the Defendant's premises, she found some beans which were scattered outside. She immediately identified them from their peculiar brown colour sustained from being in storage for a long period of time. When the Defendant's store was later opened, she was able to identify her old sacks which she alleges that she had sewn herself.
30. This evidence, is not on its own sufficient to impute liability on the Defendant. The Defendant is also in the business of selling cereals (see DEX 2(a) and (b)) and it would therefore not be peculiar for him to be in possession of beans and old sacks. However, taken together with the other Plaintiffs' evidence, the only inference that can be drawn was that in fact they are those that had been unlawfully taken from the Plaintiffs' store.
31. The evidence of PW1 in particular placed the Defendant at the Plaintiffs' premises on the date of the break in. He was the driver of the vehicle registration number KAA 249 D that was used to transport the goods from the Plaintiffs' godown to the Defendant's store. He also testified in the criminal case that had been instituted against the Defendant in the lower court. His evidence in these proceedings and those before the lower court was consistent in substance. Further it was corroborated by his turn-boy Paul Kimani Ngate who also testified in the lower court.
32. Their narration as to the circumstances under which they were hired by the Defendant was similar. They both knew the Defendant well prior to the date of the incident. They stated how he approached them the day before the break-in and hired the lorry for purposes of transporting goods from Nakuru Industrial Area to **Bargain**. With two other vehicles, a white saloon car and a canter, they went to the place from which they were supposed to take the goods.
33. What is material is that they both stated that they did load 270 bags of beans into their lorry and saw the other men who were with the Defendant loading into the canter other items. The turn-boy saw a posho mill, welding machine, weighing machine and 2 motors and PW1 saw a welding machine, 2 motors weighing platform and a grading mill being loaded into the canter.
34. Although they could not positively identify the Plaintiffs' stores, this evidence placed them at that place for it was the Plaintiffs' stores from which these items were stolen on this day. Their evidence placed the Defendant in the scene of the crime and showed that he was the brainchild of the unlawful act. This finding is further corroborated by the evidence of one Javan Ngala Akala who also testified in the criminal case. On that Sunday, he was hired by the Defendant, a person he had known for seven years, to help off-load some bags of beans from a lorry into his store. He testified that the Defendant's store was empty at the time.
35. The above evidence establishes on a balance of probability that on the material day, the Defendant went into the Plaintiffs' store without their consent and took away the beans and other items as alleged. The Defendant's case that he was not involved in the burglary was not satisfactory and did not in my view displace the Plaintiffs' case. He alleged that he was in Naivasha National Park on that day with his children but this averment was not contained in the defence. It was introduced at

- the hearing together with a receipt issued to the Defendant.
36. This was a material fact and one which should have been raised in the pleadings. By raising it at the defence hearing after the Plaintiff had closed his case was an ambush and in my view an after-thought.
 37. Further, the fact that he was acquitted of the criminal charges of stealing or being in possession of stolen goods, does not discharge him of liability in these proceedings. Although both proceedings are rooted on the same act they are different in terms of the standard of proof which in this case is merely on a balance of probability which is a lower threshold than the standard of beyond reasonable doubt required in criminal proceedings. They are premised on independent evidence as submitted therein and the findings of the one court are not binding on the other. However the proceedings and particularly the testimony of facts by witnesses may be relied upon because it constitutes evidence made on oath before a court of law.
 38. On the above evidence and analysis, I find that the first ingredient of the tort of conversion being the unlawful taking was established by the Plaintiffs. The second ingredient was also satisfied from these set of facts. The Defendant intended to convert the items for his own use and in fact as at the time of the hearing some of the properties had not been recovered.
 39. For the above reasons I find that the Plaintiffs successfully established their case on a balance of probability against the Defendant.
 40. The issue that then follows for determination is on the question of damages to be awarded to the Plaintiff. In determining this question, I am guided by the passage in **Halsbury's Laws of England** (*supra*) at Pg 389 Para 616 on the measure of damages. The authors state -

615. Nominal measure of damages. ... In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss.

616. Conventional measure: value of goods. The conventional measure of damages in conversion is the value of the goods converted together with any consequential loss which is not too remote. That measure normally applies where the conversion takes the form of a wrongful deprivation or misappropriation and the goods are not later returned.

41. The Plaintiffs are therefore entitled to compensation for the value of the property as at the time of the conversion. In addition to reimbursement of the cost of the goods, they are also entitled to an award for the profit they could have made save for the unlawful acts of the Defendant. In this case, the Plaintiffs evidence was that although the Goods Receipt Notes produced showed that the beans were purchased at the approximate figure of Kshs. 2,500 as at the 18/11/2007 when they were taken by the Defendant, their retail value was Kshs. 4,000/= per bag. In the circumstances I allow the claim for the loss 480 bags of beans.
42. The claim for the loss of the rest of the properties and the cost of repair of the doors and locks was proved by way of PEX4-10 and is therefore allowed as pleaded.
43. In summary I enter judgment in favour of the Plaintiffs and against Defendant for the sum of 2,758,000/= computed as follows-

- (a) 480 bags of beans @ Kshs. 4,000/= per bag.....Kshs. 1,920,000/=
- (b) one complete hammer mill with accessories.....Kshs. 200,000/=
- (c) two posho mill motorsKshs. 80,000/=
- (d) Avery weighing scale.....Kshs. 78,000/=

- (e) two sewing machines.....Kshs. 100,000/=
- (f) one small radio.....Kshs. 1,000/=
- (g) one computer with its software and printer.....Kshs. 100,000/=
- (h) repairing broken doors and locks.....Kshs. 100,000/=

TOTALKshs. 2,758,000/=

44.The Plaintiffs are also awarded the costs of this suit together with interest at court's rates.

45.There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 5th day of December, 2014

M. J. ANYARA EMUKULE

JUDGE