REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 160 OF 1988

TRANSLAND SHOE MANUFACTURERS LTD. ..... 1ST PLAINTIFF

WILSON WATUTUI KIIRU ..... 2ND PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LTD. ..... DEFENDANT

AND

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 301 OF 1992

KENYA INDUSTRIAL ESTATES LTD. ..... PLAINTIFF

AND

TRANSLAND SHOE MANUFACTURERS LTD. ..... 1ST DEFENDANT

WILSON WATUTUI KIIRU ..... 2ND DEFENDANT

GEOFFREY GIKONYO MATHU ..... 3RD DEFENDANT

BEATRICE NYAKWENYA GIKONYO ..... 4TH DEFENDANT

J U D G M E N T

Transland Shoe Manufacturers Limited, a Nyeri based company, hereinafter referred to as the 1st Plaintiff entered into an agreement on 13th December, 1984 with Kenya Industrial Estates Limited, the defendant herein, whereby the latter lent to it Shs.372,000/= to be utilised for the acquisition of capital machines and materials for the manufacture of shoes. The loan was secured by a charge on land property known as Thegenge/Ihithe/401 provided by Wilson Watutui Kiiru, the 2nd plaintiff in Nyeri H.C.C.C. NO. 160 OF 1988. Geoffrey Gikonyo Mathu and Beatrice Nyakwenya Gikonyo are the directors of the 1st Plaintiff company and also 2nd and 3rd defendants respectively in Nyeri H.C.C.C. NO. 301 OF 1992. These two defendants had also executed personal guarantees to the loan.

It is not in dispute that the shoe manufacturing project was carried out at the premises leased to the 1st Plaintiff by the defendant. It is alleged by the defendant that the 1st Plaintiff ceased operation, abandoned the premises and refused to resume production despite repeated requests and in the process, defaulted on payment of loan and rents so that as at 30th June, 1988, 1st Plaintiff owed it Shs.289,796/85

on loan and Shs.21,630/= in rent arrears. When the defendant closed the 1st Plaintiff's premises and instructed auctioneers to realise the security charged for the loan, the 1st Plaintiff responded by instituting suit, Nyeri H.C.C.C. NO. 160 OF 1988 in which it sued for the recovery of its goods allegedly illegally disposed of by the defendant, general damages and an injunction to restrain the sale of the charged land. An interlocutory injunction was granted to the 1st Plaintiff on 30th August, 1989; and, thereafter, it appears the suit lost its urgency until the defendant filed Nyeri H.C.C.C. NO. 301 OF 1992 against the 1st Plaintiff and the 3 defendants claiming Shs.289,796/85 being in respect of loan arrears, Shs.21,630/= for arrears of rent and mesne profits. These two suits were on 26th October, 1992 by consent ordered consolidated and heard together.

This suit has had a sad prolonged journey to its conclusion. There were protracted adjournments due to many events and circumstances as exhibited by the record. When I was "ordered" to conclude the case, a hearing date was agreed upon when the defendant would commence its defence. This was on 29th November, 1995. Unfortunately, Mr. Raballa was unwell and a further date, 6th December, 1995, was obtained in the presence of his clerk. However, on the said date Mr. Raballa's clerk who was in Court disowned knowledge of his employer's and the defendant's whereabouts. I then set down the suit for judgment.

As far as Nyeri H.C.C.C. NO. 301 OF 1992 is concerned, it was neither prosecuted nor was any evidence adduced to support the defendant's claims. It is thus hereby ordered dismissed with costs. The 1st Plaintiff called three witnesses, including its managing director Wilson Watutui Kiiru (PW 1). Considering their evidence in toto and in the absence of any evidence to the contrary, I am satisfied that the Plaintiffs have proved their case on the balance of probability. The agreed issues must be answered in the affirmative.

T he closure of the Plaintiffs premises was certainly unlawful and was done in the absence of its managing director. No inventory was availed to anyone including the court and the Plaintiffs' property spirited out of the premises is shrouded in secrecy. The Plaintiffs must definitely have suffered damage. It is trite law that special damages must not only be pleaded but must also be specifically proved. It was the duty of the Plaintiffs to put before the Court through their pleadings the claim for Shs.1,197,450/= and though the Plaintiffs had the services of counsel they had an opportunity to amend their Plaint before leading evidence on that issue but it chose not to do so and cannot succeed on this claim. In fact, it ought not to have been allowed to lead any evidence on special damages at all.

Exhibit No. 8, Profit and Loss Account for the Period October, 1985 to April, 1986 shows that the Plaintiffs were making good profit from its shoe manufacturing. For the six months period it made a profit of Shs.321,300/= at a monthly rate of Shs.54,000/=.

At the time of closure, there was plant and machinery installed as part of the loan by the defendant as well as other plant and machinery bought and installed by the Plaintiffs at their own cost. The defendant seized the raw materials, finished goods, tools and books of accounts. At the auction sale whose inventory as well as its details are missing and are unaccounted for, the Plaintiffs were absent. The realisation of the security must therefore be wrong.

What then in the circumstances is a fair measure of damages? In my view Shs.1,250,000/= is reasonably adequate and I award the Plaintiffs this sum.

I enter judgment for the Plaintiffs against the defendant for Shs.1,250,000/= with costs and interest. The defendant is restrained from selling the land title Thegenge/Ihithe/401 and must return it fully discharged and free from all encumbrances to the Plaintiffs.

Dated and delivered at Nairobi this 18th day of September, 1996.

P. K. TUNOI

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JUDGE OF APPEAL