



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Kneller, JA, Platt & Gachuhi, Ag JJ A)

CIVIL APPEAL NO 56 OF 1986

BETWEEN

JAYANT K SHAH APPELLANT

AND

G S BAPAT RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Eldoret (V.V Patel, J) dated

20th February, 1986

in

Civil appeal No 21 of 1985

JUDGMENT OF THE COURT

Mr Bapat purchased an Akai video for Shs 23,500.00 from the firm Jayant K Shah in Eldoret on November 30, 1983.

Mr Shah wrote on the back of the cash sale receipt for Mr Bapat that the video was guaranteed by Musicraft Kenya Limited of Nairobi from November 30, 1983 to November 30, 1984.

The video broke down after 3 months so Mr Bapat returned it to Mr Shah who sent it to Musicraft to repair. It needed a new integrated circuit which Musicraft did not have. It ordered one from Akai in Japan which arrived six months later and then Musicraft replaced the defective one in Mr Bapat's video with it. The video was sent back to Mr Shah in Eldoret for Mr Bapat to collect.

By then Mr Bapat had consulted an Eldoret advocate, Mr Kamau, because Mr Shah would not replace that video with another one or repair it in a reasonable time or refund its purchase price.

Mr Kamau filed a plaint for Mr Bapat asking for judgment against Mr Shah for Shs 23,500.00, damages for breach of the guarantee, damages for loss of user, the costs of the action and interest on all those sums. The cause of action was in contract and based on the guarantee and its breach.

Mr Shah's Eldoret advocate, Mr AP Shah, filed a written statement of defence which, among other

matters, denied Mr Bapat had revealed any cause of action in his plaint against Mr Shah or there was any guarantee given by Mr Shah for the video's proper performance and or any breach of any such guarantee.

The trial magistrate recorded evidence from Mr Bapat, Mr Shah and two members of the staff of Musicraft.

He then framed the issues in the suit as –

1. Was there any contractual relationship between Mr Bapat and Jayant K Shah?
2. If so, was there any breach of the contract?
3. If so, what damages?

He found Mr Bapat proved Jayant K Shah had guaranteed that video would work properly until November 30, 1984, it broke down after three months and Jayant K Shah was liable to Mr Bapat for the refund of the Shs 23,500.00, Shs 500.00 for breach of the guarantee, Shs 500.00 for loss of use, costs and interest on each sum.

Jayant K Shah appealed and Mr Justice VV Patel rejected his appeal with costs. He upheld the magistrate's findings because in his view Jayant K Shah made the contract in his own name without disclosing the name of principal, Musicraft. Jayant K Shah has now come to this Court to reverse the High Court and trial court, dismiss Mr Bapat's claim and award it costs of the proceedings in all three courts.

The evidence revealed that Musicraft guaranteed the video for that year from its purchase and not Jayant K Shah whose Mr Shah made a note of the fact on the back of the receipt. The terms of the guarantee are unclear.

Jayant K Shah did not contract in any guarantee to refund the purchase price of that video or replace it with a new one or repair it within a reasonable time.

None of these obligations were pleaded or proved in any other form.

Mr Kamau did not apply to amend the plaint during the trial to set out any one or more these duties or their breach on the part of Jayant K Shah. Nor did he cross-appeal from the decision of the learned judge or file any notice of any grounds for affirming it on matters other than those selected by the judge.

Mr Menezes did what he could for Mr Bapat in this appeal but it was too plain for argument that Mr Bapat could not and did not prove that Jayant K Shah guaranteed the efficacy of that video for that year.

The appeal is allowed with costs, the order of the High Court and of the subordinate court are set aside with costs in each court and Mr Bapat's claims against Jayant K Shah are dismissed with costs.

The repaired video will now be returned to Mr Bapat and Mr Kamau must pay out the cash deposited with him to Mr A L R Shah, Jayant K Shah's Nairobi advocate. Orders accordingly.

Dated and delivered at Kisumu this 21st day of June, 1986.

A . A . KNELLER

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JUDGE OF APPEAL

H.G.PLATT

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AG. JUDGE OF APPEAL

J.M.GACHUHI

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR