REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: W. KARANJA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 280 OF 2008

BETWEEN

SMALL ENTERPRISES FINANCE COMPANY LTD …..... APPELLANT

AND

THOMAS ADONGO ONUKO T/A

KISUMU EXPERT TAILORING HOUSE .....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at

Kisumu (B. K. Tanui, J) dated 4th June 2004

in

KISUMU HCCC No. 110 OF 1996

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JUDGEMENT OF THE COURT

In the amended plaint filed on 5th June, 1996 at the High Court of Kenya, Kisumu, the respondent Thomas Adongo Onuko trading as Expert Tailoring House ("the plaintiff") sued the appellant Small Enterprises Finance Company Limited ("the defendant") for alleged breach of contract. It was alleged that the plaintiff borrowed from the defendant a sum of Kshs. 80,500/= payable by agreed monthly installments on security of the plaintiffs chattels and that the defendant seized the said chattels because there was default in meeting some of the installments.

It was further alleged that upon seizure of the said chattels the plaintiff met the unpaid arrears but that the defendant did not return the said chattels and this led to the plaintiff suffering loss of income or profit. For this the plaintiff prayed for judgement for alleged breach of contract; a declaration that the attachment was unlawful; a prayer for return of the seized chattels or their market value; damages for loss of income or profit and goodwill and costs of the suit.

The defendant in a statement of defence admitted seizing the chattels and pleaded a statutory power of

sale as per contract therefore denying that seizure of the chattels was unlawful. The defendant further pleaded that upon repayment of arrears it (the defendant) could not return the seized chattels because they were stolen from a store and upon recovery were held by police as exhibit in a subsequent criminal case. The plaintiff had, in any event, pleaded the defendant, refused to collect the recovered chattels even after being asked to do so. For this the suit should be dismissed.

A hearing commenced before Wambilyangah, J (as he then was) but later proceeded before B. K. Tanui, J (as he then was) who in a judgment delivered on 4th June, 2004 held in favour of the plaintiff and ordered a return of a 20U Singer Sewing Machine or its current market value and awarded the plaintiff Kshs. 600,000/= general damages for loss of use of the machines from 6th February, 1995 to 27th January, 1997 and a further Kshs. 480,000/= for loss of use of the said machine from 1997 to the date of judgement. The plaintiff was also granted costs of the suit and interest on the damages awarded.

The defendant was dissatisfied with part of the judgement where the plaintiff was awarded damages for loss of user and for loss of business hence this appeal.

Being a first appeal we are duty bound to re-examine the whole matter and reconsider the evidence to reach our own conclusions but must bear in mind that we lack the benefit of seeing and hearing the witnesses, an advantage only the judge who heard the case has – see the case of **Selle & Another v Associated Motor Company Limited [1968] EA 123** where it was held:

> **"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohammed Sholan[1955], 22 EACA. 270)."**

In the Memorandum of Appeal drawn by counsel for the appellant M/s Behan & Okero Advocates five grounds are taken as follows:

"1. THAT the Learned Judge erred in failing to appreciate that on the evidence presented there could be no justification in the making of any award for loss of user.

2. **THAT the Learned Judge erred by awarding the plaintiff general damages in the sum of Kshs. 600,000.00 for loss of user.**
3. **THAT the Learned Judge erred in failing to appreciate that the deficiency in the evidence of alleged lost use could not justify the making of any award at all or for such awards as were made for lost use.**
4. **THAT the Learned Judge erred by awarding the plaintiff general damages in the sum of Kshs. 480,000.00 for lost use.**
5. **THAT the Learned Judge erred in fact and in law in failing to consider submissions and arguments of the counsel for the defendants and in failing to consider and apply or distinguish case law cited which are precedents binding upon the court."**

Before the learned Judge the plaintiff who called two witnesses in support of his case testified that he borrowed money from the defendant and purchased six sewing machines over which the defendant held a chattels mortgage as security. The plaintiff testified further that he started repaying the loan as agreed on 3rd November, 1991 but was involved in a accident leading to failure to meet some installments. His request for a rescheduling of the loan was denied and the defendant attached the mortgaged chattels.

The plaintiff was then able to pay all the outstanding arrears but his machines were not returned even after the defendants' manager wrote a letter to the defendants agent instructing return of seized chattels.

On 27th January, 1997 the defendant returned four sewing machines to the plaintiff but a Singer 2OU machine was not returned. Such a machine cost Kshs. 180,205/= in the market at the time of the trial. The plaintiff further testified on earnings from the sewing machines ranging from Kshs. 1500/= to Kshs. 5,000/= per day and produced documents to show various orders he had received from potential customers which orders he could not meet when the sewing machines had been seized. Also tendered in evidence were audit reports for 1991, 1992 and 1993 showing performance of the plaintiffs business during the relevant period.

In cross examination the plaintiff stated that he had paid tax for the relevant period.

Awiti Agandi (PW2) testified on quantities of clothing machines like the plaintiffs' machines could produce when employed for sewing.

John Erick Ouko Rero (PW3), an accountant, produced as evidence trade accounts for the plaintiffs business for the years 1991, 1992 and 1993. The net profits were respectively Kshs. 880,460/=, 462.490/= and 476,101/=.

The defendant did not call any evidence in rebuttal.

In the course of the judgement the learned judge observed that:

> **" It is not denied that on 8th March 1994 the 1st defendant instructed the 2nd defendant to repossess the plaintiff's sewing machines and that on 16/3/94 the 2nd defendant seized 5 sewing machines shown on exhibit P9 as 2 Pfaff sewing machines S/Nos: 5842252 and 41676420, one 20U Singer machine and two 188 Singer sewing machines all valued at Kshs. 257,000/=. The plaintiff appears to have made payments as there is evidence that on 28 /7/94 the 1st defendant wrote to the 2nd defendant requesting him that the machines be released to the plaintiff. It is also noted that by a letter dated 6th February 1995 that the 1st defendant gave a certificate to the effect that the plaintiff had repaid the loan in full but the machines were not released to him until 27/1/97 when only 4 sewing machines were returned to the plaintiff less 20U Singer sewing machine. As the defendants did not offer any evidence all the above facts were not challenged."**

The learned judge therefore held:

> **"In the circumstances I find that as at 8th March 1994 when the 1st defendant instructed the 2nd defendant to repossess the plaintiff's sewing machines the plaintiff was in fact in default of the repayment of the loan and that the 1st defendant was justified in taking the action. There was a copy of a hand written note dated 28th July, 1994 from K. Njoroge to another Njoroge requesting the latter that the machines be released to the plaintiff but this appears to have been done in a hurry in that the letter was not typed. There was no other instruction to the 2nd defendant until a certificate was issued by the 1st defendant on 6th February, 1995 addressed to whom it may concern to the effect the loanee had repaid the loan in full. It appears that while the 1st defendant had been quick to give firm instructions for repossession of the plaintiff's machines it did not bother to direct the 2nd defendant its agent to release the machines after accepting the repayment of the loan in full.**
>
> **I therefore hold that the 1st defendant is liable to the plaintiff for damages for not ensuring that the seized machinery was released to the owner immediately after the loan**

had been repaid in full. The 2nd defendant was the agent of the 1st defendant and could not have returned the seized sewing machines until it was properly instructed by the Principal. I also find that if there was any negligence on the part of the agent the defendant which is the Principal is vicariously liable."

The learned Judge entered judgement for the plaintiff as we have shown in this judgment.

The appeal came for hearing before us on 4th December, 2013 when the appellant was represented by learned counsel Mr. I. E. N. Okero while learned counsel for the respondent was Mr. J. A. Mwamu. Learned counsel for the appellant submitted that the award in respect of loss of user was wrong and unreasonable because according to counsel, no audited accounts were produced in evidence to show performance of the respondents business. For this, argued counsel, the learned judge erred in using non-existent figures to compute the respondents losses. Counsel further submitted that the respondent had a duty to mitigate loss which he had failed to do and for which the appellant could not be held to blame. For this proposition counsel cited the case of **Timsales v Up & Down Saw Mills (Kenya) Limited [1976 -1985] EA 572** where it was held inter alia that there was a duty to mitigate damages and damage could only be allowed for a reasonable period. Also cited was the case of **Allan Njuguna t/a Mwireri Mbao Stores v Veronica Nyambura Karuga & Others Civil Appeal No. 165 of 1993 (ur)** for the proposition that the learned judge erred in relying on unaudited accounts on which no taxes had been paid.

Learned counsel for the respondent in opposing the appeal submitted that the appellant continued to hold the respondents sewing machines two years after the loan had been repaid in full. Counsel was of the view that the trade accounts were duly audited by PW3 who testified as such and the learned judge was entitled to rely on the figures therein. Counsel therefore submitted that the awards should not be disturbed as they were neither inordinately high nor inordinately low. Reliance was laid for this proposition on the case of **Hon. C. A. M v Royal Media Service Limited Civil Appeal No. 283 of 2005 (ur).**

We have perused the record of appeal, considered the submissions by counsel and the applicable or relevant law.

It was alleged in the amended plaint that the appellant by its letter of 8th March 1994 instructed its agent to attach the respondents trade machines which was duly done; that the respondent paid outstanding arrears on 28th July, 1994; that on 6th February, 1995 the appellant wrote a letter confirming that the loan had been repaid in full but that the attached chattels were still not returned. These averments were repeated by the respondent in evidence in court but as we have stated were not rebutted as the appellant did not call any evidence.

In a letter dated 8th March, 1994 the appellant instructed its agent to attach the respondents trade machines which was done on 16th March, 1994. In another letter dated 6th February, 1995 the appellant confirmed that the respondent had paid the loan in full. This followed a letter dated 28th July, 1994 where the appellant instructed its agent to release all the attached chattels.

The respondent testified that four of the seized machines were only returned on 27th January, 1997 but one Singer Sewing Machine make 20U was not returned at all.

The learned Judge held that the appellant was liable to the respondent for not ensuring that the attached machines were returned to the respondent as soon as the loan was repaid in full. The learned judge assessed damages for loss of use of the machines at Kshs. 300,000/= per year for 2 years and Kshs. 480,000/= for loss of use of the 20U Singer Sewing Machine from 1997 to the date of judgement.

We note that the respondent testified and produced various documents showing orders which he received from various customers but which orders he could not meet when the machines were held by the appellant even after the loan had been repaid in full. Trade accounts were also produced showing performance of the respondents business for three years 1991, 1992 and 1993. These accounts were

prepared and audited by an accountant PW3. The respondent testified that he met his tax obligations during those years.

As has been held in various decisions of this court an award of damages is a matter of judicial discretion by the trial court and this court should be slow to interfere with awards of damages by the lower court. In **Bhutt v Khan [1981] KLR 349** this court differently constituted held:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate; it must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low."**

In another decision of this court in the case of **Gicheru v Morton & Anor [2005] 2 KLR 333** it was held:

> **"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."**

On the submission by counsel for the appellant that the respondent should have mitigated damage we note that the respondent either directly or through his advocate wrote various letters demanding return of the attached chattels and the respondent despite writing to its agents letters for release of the same the attached goods remained unreturned for a period of about two years.

In **Timsales Limited (supra)** the defendant borrowed a cross -cut saw from the plaintiff and failed to return it for two years when it was returned damaged. The trial judge awarded damages at a daily rate for the entire two year period. This was reversed on appeal where damages were ordered for a reasonable period of 90 days. The position in the instant appeal is different and clearly distinguishable from the decision in **Timsales Limited (supra)**. As we have shown the appellant took steps to assure the respondent that his seized chattels were being returned but the appellant was negligent in not ensuring that its orders to its agent to return the machines were complied with.

Allan Njuguna (supra) is inapplicable because it was proved in that case that the accounts relied upon by the respondents were fraudulent prepared to mislead tax authorities contrary to law.

We hope we have said enough. The respondent proved that his sewing machines were seized and were not returned even after repayment of the loan. The same were held unlawfully for a period of about two years while one machine was not returned at all.

On the evidence adduced the learned judge was entitled to make the awards which he made which were neither inordinately high nor inordinately low as to call for our interference. The appeal has no merit and is accordingly dismissed with costs.

Dated and Delivered at Kisumu this 21st day of February, 2014

W. KARANJA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR