IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OMOLO, GITHINJI & ONYANGO OTIENO, JJ.A.)

CIVIL APPEAL NO. 74 OF 2007

BETWEEN

CENTRAL FARMERS GARAGE LIMITED.....APPELLANT

AND

RIFT VALLEY OUTLEST LIMITED……...….....…RESPONDENT

*(Appeal from a Judgment of the High Court of Kenya at Kitale (**W. Karanja, J.**) dated 31st October, 2005*

in

H.C.C.C. No. 122 of 1997)

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JUDGMENT OF GITHINJI, JA.

This is an appeal from the judgment and decree of the High Court (***Karanja, J***.) as she then was dismissing the appellant's suit with costs.

By a plaint dated 26th May, 1997 the appellant claimed shs.603,566/15 *"being the amount due and owing from the defendant to the plaintiff for goods sold delivered and/or services rendered at the defendant's specific request during the year 1995..."*

The respondent filed a statement of defence and counterclaim, denying liability and counterclaiming for a total of shs.350,000/= comprising of shs.50,000/= being the cost of repairs of respondent's motor vehicle registration No. KAE 033J which the respondent's employee had allegedly damaged and shs.300,000/= being consideration for motor vehicle Reg. No. KAE 856C sold to the appellant.

The respondent subsequently filed an application for leave to amend the defence and counter-claim. The effect of the amendment was to delete the counter-claim and introduce a positive defence to the appellant's claim. The application was disposed of by a consent letter dated 23rd November, 1998 by which the respective advocates consented to the application being allowed and a consent order was

accordingly recorded on 24th November, 1998.

By an amended defence the respondent averred *inter alia* that the respondent maintained a cordial relationship with the appellant prior to the dispute; that respondent sometime in 1994 entrusted the appellant with the overhaul of the engine of motor vehicle Reg. No. KWY 635; that it was the appellant's contractual or trust duty to both advise the respondent of the estimated costs of repairs and whether it was economically viable, cost-effective or economically reasonable to carry out the repairs before carrying out the repairs; and that in breach of those duties, the appellant proceeded to carry out the repairs and to levy a bill of shs.570,139/95. The respondent gave four particulars of the breach of contract and of trust.

The respondent pleaded in the alternative that the appellant's claim was fraudulently exaggerated. The particulars of fraud stated included seeking to recover costs which were not properly incurred, exaggerating the costs of spare parts and levying charges for parts not fitted.

The facts giving rise to the suit were not largely in dispute.

The appellant was operating a garage as well as selling motor vehicles. It was an agent for Isuzu vehicles. It had a cordial business relationship with the respondent since 1991. The respondent, which is based in Eldoret, used to take its vehicles including tractors to the appellant for repairs. The respondent also used to buy motor vehicles and take them to the appellant for sale apparently on a commission basis.

The chairman of Board of Directors of the respondent ***Kiprono Kittony*** (DW2) and ***Paul Kiprono Kittony*** (DW1) the Resident Director of the respondent were well known to ***Mr. Njenga,*** the Chairman of the appellant.

On 25th January, 1995 ***Paul Kiprono Kittony*** (Paul) took a detached engine of a lorry to the appellant. He informed ***Joseph Kamande Kimani*** [PW2] (Kimani), the workshop clerk, that the engine belonged to Isuzu lorry Reg. No. KWY 635 TXD 55 and gave verbal instructions to him to overhaul the engine and assemble it with new parts. Kimani opened a job card No. 17277 and recorded the instructions on it as 'ENGINE OVERHAUL'. However, Paul did not ask for estimate of the cost of repairs and Kimani did not volunteer any information. The appellant overhauled the engine and assembled it with new parts after which it raised an invoice dated 10th May, 1995 for shs.570,139/95 comprising of;

Labour	- shs.23,050/00
Accessories	- shs.2,871/80
Parts	- shs.444,809/40
Fuels & Oils	- shs.2,259/00
Sublets	- shs.10,403/25
VAT	- shs. 86,623/00

The job done on the engine, the spare parts fitted and the charges were recorded on the job card. The job card had a printed clause thus:

"In the event that I/we fail to make payment for the repair to be carried out by you or fail to remove vehicle from your premises for any reason whatsoever within a period of three months from today, I/we expressly authorize you to recover the cost of repair and reasonable storage charges."

The signature of Paul appears below the clause. The appellant also carried out repairs for the respondent's tractor and raised an invoice of shs.341,890/00. The appellant further repaired the respondent's motor vehicle Reg. No. KAE 033S for shs.31,055/10.

By a letter dated 26th June, 1995 the appellant claimed a total of shs.903,566/15 including the shs.570,139/50 for engine overhaul from the respondent. The appellant sent a reminder to the respondent dated 7th August, 1995 to which the respondent replied partly as follows:

"We do agree that the repairs of the Ford tractor was to our satisfaction. We are in the process of settling this without delay. However, you did not deduct shs.50,000/= we paid as advance for TX 55 engine. Kiprono feels that the repair costs are too high as one can get a fully reconditioned engine complete for less than shs.300,000..."

Indeed, the respondent produced a letter dated 10th June, 1995 at the trial from Karibu Motor Enterprises indicating that a used Isuzu TXD 35 engine was available at shs.250,000/=.

According to the evidence of ***Mathew Mukhwana (Mathew)*** (PW1) the appellant's accountant, the respondent was later given a credit of shs.350,000/= leaving a balance of shs.603,566/15 which was claimed in the plaint. The respondent did not pay nor collect the overhauled engine and the engine was still in the custody of the appellant at the time of the hearing of the suit.

The main issue framed for determination was whether the appellant was in breach of any duty, either contractual, customary or arising from usage in the motor vehicle repair industry in failing to advise the respondent on the economic viability of repairing the engine.

Although the respondent pleaded that the appellant fraudulently exaggerated the cost of spare parts and labour charges, and that appellant was levying charges for parts not fitted, the respondent failed to prove any fraud.

Indeed Paul testified in cross-examination thus:

"The complaint is that the cost of repairs was excessive. We are not saying that the work was not done to my satisfaction".

Further, ***Kiprono Kittony*** admitted in his evidence that the engine was repaired and stated that he had no evidence that some parts charged for were not fitted in the engine.

It is apparent that the respondent's case was that the cost of overhauling the engine was too high; that it was not economically viable to repair the engine and that the appellant should have given that advise to the respondent before repairing the engine.

It was the appellant's case that it had no duty to advise on the economic viability of repairing the engine and further, that such advise was not sought.

Both Mathew and Kimani testified to that effect. Paul admitted that he did not ask for an estimate of the cost of repair and that the appellant did not volunteer any advice. He further testified in evidence-in-chief thus:

"There is no rule that a customer has to give a brief history of the estimate before they commence repairs. We have never asked for an estimate before repairs.....There is no rule or tradition that garages must give estimate of repairs in costs..."

The High Court was satisfied that the appellant had a duty to advise the defendant on the economic viability of repairing the engine and it held:

"Although the defendant's agent signed the job card, the same was blank in as far as it did not indicate the costs of parts to be fitted. He was not therefore bound by the said job card. He had very good reasons to rescind the purported agreement. As stated earlier also the plaintiff was in breach of an equitable duty in failing to advise the defendant on the economic viability of repairing the said engine. The court as a court of equity cannot aid the plaintiff to exploit or to take advantage of the defendant after failing to exercise reasonable care to do what was right in the circumstances."

The main legal issue raised in the appeal, is whether the High Court erred in finding that the appellant had a legal/equitable duty to advise the respondent on whether it was economically viable to repair the lorry

engine before commencement of the repairs.

Whether or not such a duty arose depends on the nature of the contract entered into and also on the nature of the business relationship between the parties. It is clear that this was a contract for the overhaul of a lorry engine. The respondent signed the job card which in this case constitutes a contract. Although the costs of repairs were not agreed, the respondent by signing below the liability clause in the job card referred to above, agreed to make payment for repairs to be carried out and expressly authorized the appellant to recover the cost of repairs in case of default in payment. The implication was that the respondent would pay the computed costs of engine overhaul. The respondent did not impose any condition to be complied with before the commencement of the engine repair such as that the repair should not commence until the costs of parts and labour charges has been ascertained and agreed upon.

The fact that the parties had a cordial relationship or that the directors of the two companies were friends, does not *per se* impose any duty in law or in equity on the appellant either to provide an estimate of costs of repairs or to advise the respondent on the economic viability of repairing the engine. If any duty is to be imposed on the appellant, it has to be based on law or equity. The respondent did not prove that there was duty or a trade usage in garage business for the garage owner to provide an estimate of cost of repairs of a motor vehicle or part of motor vehicle or to give advice on economic viability of repairing a motor vehicle or part of a motor vehicle before the commencement of repairs. The appellant's witnesses testified that there was no such duty. The respondent's witnesses testified that there was no such practice. Indeed Paul stated categorically the respondent has never asked for estimates before repairs.

Generally speaking a term will be implied into a contract if it is necessary to give efficacy to the contract and if in addition it is reasonable. In the absence of proof of custom or usage, a term cannot be implied into the contract that the appellant had the obligation to give costs of repairs or advice on economic viability of repairing the engine.

The High Court invoked an equitable duty to advise on the economic viability of repairing the engine.

It is true that a court can set aside a contract which has been entered into through undue influence or which amounts to unconscionable bargain. However, it is not necessary to consider the two equitable doctrines in detail because the respondent neither pleaded that, either of the two doctrines applies to the contract nor proved that the doctrine applies to that contract.

There was no evidence that the appellant knew the price at which the respondent had bought the lorry or that the cost of repairs of the engine would exceed the value of a second hand reconditioned engine. Further, the finding that the appellant knew that it was dealing with laymen or that the appellant took advantage of the respondent, are not with respect supported by evidence. The appellant was dealing with the respondent as a company. In any case, Paul appears to be an astute businessman and Kiprono Kittony has a Bachelor of Commerce degree in Marketing and was pursuing a law degree at the time of the trial. These were not laymen.

The overhauled engine was assembled with new parts. If fitted to the lorry the value of the lorry will be greatly enhanced. Perhaps its value is not comparable to the reconditioned engine referred to by the respondent.

Lastly, it is appropriate to say that equity will not rewrite an improvident contract where there is no disability on either side nor relief a party from the harsh consequences of unforeseen events occurring after the date of execution of the contract.

From the foregoing, I am satisfied that the learned Judge with the greatest respect, erred in law in finding that the appellant had an equitable duty to advise the respondent on the economic viability of repairing the engine and in dismissing the appellant's suit.

It is just and reasonable in the circumstances of this case that the respondent should pay for the cost of repairs of the engine in accordance with the contract.

As Onyango Otieno, JA. agrees, the appeal is allowed, the judgment of the High Court dismissing the appellant's suit is set aside and substituted therefor with a judgment for the appellant for shs.603,566/15 against the respondent with costs and interest at court rates as prayed in the plaint. Costs of this appeal to the appellant.

This judgment has been delivered under **Rule 32(3)** of the Court of Appeal Rules as Omolo, JA. is not currently performing judicial functions.

Dated and delivered at Eldoret this 20th day of September, 2012.

E.M. GITHINJI
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***JUDGE* IN THE COURT OF APPEAL**

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JUDGMENT OF ONYANGO OTIENO J.A

I have had the opportunity to read the draft form the judgment of Githinji, J.A, and I do agree with it entirely. I have nothing to add. Let the judgment be in terms proposed by my brother.

Dated and delivered at Eldoret this 20th day of September 2012

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

OF APPEAL