



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**  
**Civil Appeal 54 of 2004**

**KENYA INDUSTRIAL ESTATES LIMITED ..... APPELLANT**

**AND**

**LEE ENTERPRISES LIMITED ..... RESPONDENT**

**(Appeal from the judgment and decree of the High Court of Kenya at Milimani Commercial**

**Courts, Nairobi (Mbaluto, J.) dated 28<sup>th</sup> January, 2003**

**in**

**H.C.C.C. NO. 1060 OF 1999)**

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**JUDGMENT OF THE COURT**

The appellant Kenya Industrial Estates Limited (KIE) appealed against the judgment of the superior court (Mbaluto J) delivered on 28<sup>th</sup> January, 2003 whereby, the superior court awarded Shs.1,000,000/= general damages and Shs.2,004,420/= special damages to Lee Enterprises Limited (Company) in respect of damage to bakery machinery and dismissed the appellant's counter-claim.

The company cross-appealed against the award of Shs.2,004,420, and sought the enhancement of damages to Shs.10,047,505/=.

The appeal was ultimately listed for hearing for 26<sup>th</sup> November, 2008. By a letter dated 19<sup>th</sup> November, 2006 the appellant's advocates applied to the court to mark the appeal as withdrawn under **Rule 93** of the Court of Appeal Rules. On the hearing date, Mr. Masika, learned counsel for the appellant made an oral application for leave to withdraw the appeal which leave was granted and the appeal was withdrawn with costs under **Rule 93 (5)** of the Court of Appeal Rules.

The respondent nevertheless prosecuted the cross-appeal. This judgment relates to the cross-appeal.

On 14<sup>th</sup> July, 1987 the company started operating a bakery business at Kenya Industrial Estates premises, Busia Town. The bakery machinery such as ovens, mixers, moulders were financed by four loans advanced to the company by KIE between 1986 and 1991. The first three loans were secured by respective debentures over the machinery. The bakery operated smoothly until sometime in November, 1995 when Kenya Power & Lighting Company disconnected power over unpaid electricity bill of Shs.934,000/=. The bakery ceased operations after the power was disconnected. On 26<sup>th</sup> March, 1996 KIE appointed a receiver for the bakery and on 12<sup>th</sup> April, 1996 KIE removed some machinery from the

bakery and took the machines in two lots to Kakamega – apparently the provincial headquarters of KIE. Thereafter, the employees of KIE locked the factory and deployed their security guards. When Linus Echakara – the Managing Director of the Company inquired from KIE headquarters in Nairobi the reasons for receivership he was informed that the company owed KIE Shs.2,900,145. However, on reconciliation of the accounts at Echakara’s insistence, KIE confirmed that the company owed only Shs.124,145/=. On 27<sup>th</sup> June, 1996 the company paid a total of Shs.126,040/30 to clear the loan after which a loan repayment completion clearance certificate dated 3<sup>rd</sup> June, 1996 was issued to him.

Mr. Kikuvi, the managing director of KIE had later to explain by a letter dated 13<sup>th</sup> August, 1996 to the Provincial Commissioner, Western Province to whom Echakara had complained, that:

**“The fact of the matter is that the repossession of the bakery equipment had nothing to do with the “erroneous loan repayment calculation” but had to do with the closure of the bakery by Mr. Echakara for months and the reported sale of some of the equipment across the border without consulting KIE the debenture holder.**

.....

**In order to safeguard KIE’s interest in the project the company was placed under receivership and the receiver took possession of the machines for safe keeping at our Kakamega offices”.**

Meanwhile, the factory was broken into and properties worth Shs.550,000/= stolen. Sometime in June/July 1996 KIE authorized the company to collect the machinery, and the company collected some bakery machinery from KIE’s Kakamega premises as evidenced by a delivery note dated 20<sup>th</sup> June, 1996 and their own letter dated 20<sup>th</sup> July, 1996. The company, however, insisted that all the machinery should be serviced or repaired, that all the missing machinery and the stolen items should be replaced; that the company liability of Shs.3 million to Standard Bank be paid by KIE and that the factory be rehabilitated and made operational. The KIE ultimately commissioned M/s. D. K. Engineering Co. Ltd. (valuers) to inspect and value the machinery after which the valuers prepared a valuation report dated 10<sup>th</sup> June, 1997.

By a letter dated 25<sup>th</sup> November, 1997 addressed to the company, KIE agreed to finance the rehabilitation of the bakery, thus:

**“The financing of the rehabilitation process should be on both grant and loan basis as follows:**

**(a) Grant Basis will be for machinery repairs and commissioning costing Kshs.616,000,000/=**

**(b) Loan funds to the project should cover:**

**(i) Building re-electrification - 260,000.00**

**(ii) Power connection - 200,000.00**

**- 460,000.00**

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According to the evidence of Joshua Ochieng Obiero, the Business Development Services Manager at the hearing, the rehabilitation was to be done in three phases – first, electrical work would be undertaken; second, power supply would be restored and third, the refurbished machinery would be transferred and installed.

The Shs.460,000/= was disbursed to Linus Echakara but he failed to cause electrical works to be

undertaken or to pay re-connection of electricity. When the first two phases stalled KIE which had already offered a contract to repair the machines to D. K. Engineering Ltd. did not cause the machinery to be repaired.

On 11<sup>th</sup> August, 1999 the company filed a suit against KIE for a declaration that the receivership was unlawful and illegal, general damages for illegal receivership and closure of the bakery. Special damages of Shs.30,296,314/05 apparently comprising of Shs.12,243,500/= being the value of the machinery and properties; Shs.10,493,150.00 being loss of profits for 1996 – 1999, Shs.5,571,611/85 being the loan Linus Echakara owed to Standard Chartered Bank and Shs.1,961,050/80 being the total debts incurred as a result of closure of the bakery. KIE filed a defence denying liability and asserting, among other things, that the company had already voluntarily ceased operation of bakery business before the receivership and counter-claimed for Shs.460,000/= advanced to the company.

After the hearing of the suit, Mr. Ohaga, learned counsel for KIE stated in his submissions:

**“I acknowledge that the receivership was wrongful. Question then is what did the parties do? The parties entered into afresh arrangements with the intention of righting that wrong. Those fresh arrangements constituted a new contract ..... Having acceded to and participated in those new arrangements an estoppel clearly arises.**

**Defendant has pleaded the defence of estoppel. Plaintiff cannot now purport to go behind the new arrangement to which it had acceded and purport to found a cause of action, on the receivership and possession.**

**To go behind the new contractual arrangement the plaintiff would have had to satisfy the court that its agreement to the new arrangement was obtained by fraud deceit or misrepresentation. None of that has been placed before the court”.**

The superior court considered that submission as tantamount to admission that the receivership was unlawful and wrongful.

The superior court rejected the defence of estoppel or waiver and found KIE liable. The superior court awarded Shs.1,000,000/= as general damages for unlawful receivership and allowed the claim for special damages (apparently a claim for loss and damages to goods and machinery) to the extent of on Kshs.2,024,420/=. The superior court, however, rejected the claim for loss of profits as unproved. The loan owed by Linus Echakara to the bank and the debts owed to some creditors were rejected as not being connected with the company.

Lastly, KIE’s counter-claim of Shs.460,000/= was rejected on the basis that it would be unconscionable for KIE to recover the money when it had caused colossal loss and damage to the company.

Although the company had cross-appealed against the rejection of the claim for loss of profits, and for goods stolen and also against the operative date on interest on special damages the cross-appeal relating to those claims was withdrawn at the hearing of the appeal leaving only the cross-appeal against the award of Shs.2,024,420/=.

Since the appeal was withdrawn, we will, as we should do, strictly confine ourselves to the cross appeal.

The company by the cross appeal seeks the enhancement of the special damages from Shs.2,024,420/= to Shs.10,047,505/= and criticises the award by the superior court on two main grounds, namely, that the superior court having held that the company’s machinery was completely written off erred in awarding Shs.2,024,420/= which was the cost of repairs, and, second, that the superior court failed to consider that the company’s machinery could not be repaired given its state and that the company was entitled to replacement of machinery at a cost of Shs.10,047,505/=.

Mr. Nyamondi, learned counsel for the company contended, among other things, that the trial judge made a finding that it was the duty of KIE to restore the company to its original position; that some items were rendered useless and the company was entitled to recover their value, that the award of the sum of Shs.2,024,420/= awarded is the value of the machines in damaged state and that the appropriate reparation is the replacement value of the damaged goods in order to restore the company to its original position – that is having a functional and operating bakery at Busia.

Mr. Masika, learned counsel for KIE on his part contended that there was no clear proof of the value of each item such as invoices nor proof of the cost of replacement machines and that there is no material on which the court can award the over Shs.10,000,000/= claimed.

The company claimed compensation for the damaged machinery which had allegedly been rendered obsolete and the value of other goods which were allegedly lost as a result of the allegedly wrongful receivership. Thus, the company's claim was apparently in tort for destruction, damage and loss of goods. Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of goods has been diminished. The cost of repair is prima facie the measure of the diminution in value of the goods and therefore the correct measure of the loss suffered. Where, however, the goods are destroyed, the owner is entitled to *restitutio in integrum* and the normal measure of damages is the cost of replacement of the goods, that is, the market value at the time and place of destruction. The law is succinctly stated in paragraph 862, of **Halsbury's Laws of England 4<sup>th</sup> Edition. Re-issue Vol. 12 (1)** at page 327, thus:

**“The basic rule in case of damage to chattle is the cost of repair, but if it is unreasonable from a business point of view to repair the article or if the article is damaged beyond repair, then the basic measure is the cost of replacement in an available market. If there is no available market and it is reasonable to take steps to have a substitute made the cost of the substitute may provide the measure of damages; if there is no market and the making of a substitute is unreasonable, it would seem that the measure of damages is the value to the plaintiff at the time of loss”.**

And further on .....

**“If an article is repaired, but its value is still less than its pre-accident value, the difference may be recovered. No deduction may be made from damages if there is necessary betterment due to repair .....”.**

Those general principles of restitution would however be inappropriate if they produced an absurd result and the correct measure of damages will largely depend on the facts of each case. (**Bacon v. Cooper (Metals) Ltd.** [1982] 1 All ER 397.

In **Dominion Mosaics Co. Ltd v. Tratalgar Trucking Co.** (1990) 2 All ER 246 the proprietor of 11 carpet holding machines which he had bought at unique bargain of ?13,500 almost new and which were destroyed by fire and where there was no second-hand market was awarded ?65,000 as the replacement cost of the new machines Taylor LJ delivering the leading judgment said at page 254 paragraph j:

**“Restitution in integrum here does not mean restoring to the respondents the amount they paid for the machines. It means putting the respondents in the position they held before the fire. They were then not only the owners of the machines which could costs ?65,000 to buy new, but also in happy position of having paid ?13,500 for them”.**

The company's claim of Shs.12,243,500/= comprised the value of the machinery and accessories in paragraph 6 (1) – 6 XVII) of the plaint and the value of stolen goods in paragraphs 6 (XVIII) – 6 (XIV) (should be 6 (LVI). The value of each item of machinery and accessories is shown in the plaint – the total according to computation by the trial Judge being Shs.10,000,000/=. Similarly the value of each stolen item is shown in the plaint against each item. However, Linus Echakara did not give evidence of the value of machinery and their accessories or the value of the stolen goods or tender any documentary evidence to prove their value. The trial Judge indeed appreciated this and remarked:

**“With regard to the value of the various items, I think there is no clear evidence from the plaintiff as to the respective value of each item”.**

The trial Judge however relied on the valuation of Shs.2,024,420/= in the report of D. K. Engineering Company Ltd.

The finding of the trial Judge that the value of the machinery, their accessories and other goods as pleaded in the plaint was not proved strictly is undoubtedly correct and cannot be faulted. It follows that the claim of Shs.10,047,505/= in the cross-appeal has no basis.

Secondly, there was no basis for awarding the replacement cost of the machinery because they had not been damaged beyond reasonable repair. The valuation report by D. K. Engineering Co. Ltd. dated 10<sup>th</sup> June, 1997 states in paragraph 1 in respect of machinery located in Busia and Kakamega.

**“All equipment are in reparable (sic) condition with an expected working life of 5 – 8 years”.**

The report specifies the damage or the missing part of each machine and the cost of repairs of each machine or replacement of the part. The report further shows that nearly all the machines were manufactured in 1985.

The report summarises the valuation, thus:

**“TOTAL VALUE IN WORKING CONDITION – KSHS.2,024,420.00**

**TOTAL DAMAGE COST - KSHS.357,530.00**

**TOTAL VALUE OF EQUIPMENT**

**(As is where is basis) - Kshs.1,666,890.00”.**

It is clear from the valuation report that the cost of repairs or replacement of missing parts of each machine is relatively low compared to the value of each machine and that the cumulative cost of repairs of all machines (Shs.357,530/=) is relatively low compared to the total value of the machinery in the damaged state (Shs.1,666,890/=). There was evidence at the trial from **Joshua Ochieng Obiero** (DW1) that a contract to repair the machines had been given to D. K. Engineering Co. Ltd. whom he described as one of the reputable bakery machinery suppliers. In these circumstances, the company’s loss was the diminution in value of the machines measured by the cost of repairs which was valued at Shs.357,530/=. The company was not therefore entitled to (and there is no justification for awarding), replacement costs of the machinery.

Lastly, it is right to observe for clarity of the law, that in our view, the learned Judge in the peculiar facts of this case, erred in principle in awarding Shs.2,024,420/= which comprises of the current value of the machinery in the damaged state (Shs.1,666,890/=) and costs of repairs (Shs.357,530/=) and which is described in the valuation report as the “*total value in working condition*”. Indeed, the submission of Mr. Nyamondi that Shs.2,024,420/= was the value of the machines in damaged state is wholly incorrect.

The correct measure of damages in this case as we have already stated above was the cost of repairs which was valued at Shs.357,530/=. Nevertheless, since the appeal was withdrawn we have no justification for disturbing the award.

For those reasons, the cross-appeal is dismissed with costs to the appellant (KIE).

**Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2009.**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**