



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

CIVIL APPEAL 229 OF 2001

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION APPELLANT

AND

SUM MODEL INDUSTRIES LIMITED RESPONDENT

(Appeal from the judgment of the High Court of Kenya Nairobi (Justice Mboghli) dated 16th day of February, 2000

in

H.C.C.C. NO. 3389 OF 1994)

JUDGMENT OF THE COURT

*Industrial And Commercial Development Corporation (ICDC), the appellant, was the defendant in High Court Civil Case No. 3389 of 1994, in which Sum Model Industries Limited, as plaintiff, sought declaratory orders and damages, special and general, among other reliefs, for alleged breaches of an agreement and debenture deeds executed between the parties on or about 23rd January, 1990. The aforesaid suit was heard by Msagha, J. and on 16th February, 2000, he delivered his judgment wherein he awarded the plaintiff, the respondent in this appeal, **K.Shs.8,515,060.30** special damages with interest at 18% per annum, **Kshs.5,000** per day from 22nd October, 1992 to 15th September, 1994, for loss of business and an order decreeing the discharge and release of securities the respondent had given to secure a loan to it by the appellant. So as at the date of judgment **Kshs.16,158,614.30** was found to be due to the respondent.*

It is against the above decision that this appeal relates to. Ten grounds of appeal have been preferred against the aforesaid decision, but in summary they may be compressed to six, as follows:-

(1) There was no valid summons to enter appearance served upon the appellant in terms of the provisions of Order V rule 1 of the Civil Procedure Rules.

(2) The summons served violated the provisions of Order IV rules (3) and (4).

(3) There was improper delay in effecting service of summons with the result that the award of interest to include the period of delay, viz between 22nd October, 1992 and 27th March, 1998, was erroneous.

(4) The award of Kshs.5,000 per day for loss of business had no factual basis for it.

(5) The respondent should have but did not take steps to mitigate its losses for the period 2nd October, 1992 and 15th September, 1994.

(6) Special damages should not have been awarded as the respondent did not specifically prove the same.

The respondent's case as pleaded in its plaint dated 15th September, 1994 may be summarized as follows:- By a debenture deed made on 23rd January, 1990, the appellant loaned it **Kshs.1,794,000** for purposes of setting up a bakery at Busia which was to be repaid within sixty months with interest at **18% per annum**. The respondent, thereafter, established the Bakery and commenced operations, but on 22nd November, 1992, the appellant, without any notice or prior warning sent its agents to the bakery, forcefully gained entry and seized all the equipment the respondent was using to operate the bakery, and placed the respondent company under receivership. It later on 15th September, 1993, sold the assets of the Company through a firm of Auctioneers known as Regent Auctioneers. As at the date of the sale, the outstanding loan stood at about **Kshs.3,499,831/10**. The sale realized **Kshs.3.59 million**, which the respondent averred, was far below their market value. The extent of the undersale was pleaded at **Kshs.3,921,644/30**, which the respondent claimed. In addition, the respondent claimed a further sum of **Kshs.2,615,416/=** allegedly being the value of its assets which the appellant did not account for during the auction, and a further sum of **Kshs.125,000/=** as the value of damage to the respondent's premises during appellant's forcible entry thereinto.

It was the respondent's case that notwithstanding that its assets were sold and the proceeds of sale exceeded what the appellant was demanding from it, the appellant did not close the loan account and continued to charge interest until long after the date of the suit. It demanded more money from the respondent on 30th September, 1994, amounting to **Kshs.394,913/20**, allegedly being the balance of the outstanding loan.

On the basis of the foregoing, the respondent prayed for a declaration that the decision to place it under receivership without proper notice was unjustified, null and void, a declaration that interest charged from 22nd January, 1992 when the respondent was under receivership was unjustified and a nullity, a declaration that the respondent's loan having been fully repaid by 16th September, 1993, its loan account be deemed to have been closed then, an injunction to restrain the appellant from charging, selling by auction or otherwise the securities of the respondent or from further charging any interest against its loan account, a declaration that any interest in excess of the agreed 18% per annum was unjustified, unlawful and refundable to it, special damages, general damages for breach of contract, an order for the unconditional release forthwith of the security documents, costs and interest where applicable.

Filed with the plaint was a chamber summons which, like the plaint, was dated 12th September, 1994, in which the respondent prayed for an order restraining the appellant from selling the respondent's securities or charging interest with effect from 30th September, 1993, and a further order that the appellant unconditionally release the security documents for the loan it had received from the appellant. We do not consider it necessary to say more on that application as it is not material in the determination of this appeal except to state that the application was served on the appellant which thereafter participated in the hearing thereof.

As we stated earlier, one of the appellants grounds of appeal challenges the propriety of service of the summons to enter appearance. A perusal of the record of appeal however, does show that the appellant filed a memorandum of appearance on 12th March, 1998, which bore the date 6th March, 1998 signed by

V.M.N. Wohoro, Advocate. According to the practice of the superior court, a memorandum of appearance is filed after service of summons to enter appearance and the plaint. Counsel for the appellant submitted that the summons to enter appearance was served about four years after issue. Yet the appellant did not raise any objection on the matter at the trial of the case. The appellant entered appearance unconditionally, proceeded on with the case without any complaint in that regard including filing a written statement of defence without any protest. It is now too late in the day to raise the issue. The appellant conceded that the issue was not raised before the trial court. That being so, we think it has been raised before us as an afterthought. Service of the summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on circumstances of each case. On the facts and circumstances of this case, we do not think anything turns on the issue.

The appellant's written statement of defence was struck out pursuant to an application by the respondent expressed to be brought under **Order 13 rule 1(a)** of the Civil Procedure Rules. The appellant has not raised any issue on this, quite properly so as it would have been inappropriate to raise the issue in this appeal. It was a matter for a separate appeal, if at all the appellant felt aggrieved by the decision. Consequently, only the respondent presented evidence. The respondent's director, Mr. Mwandale testified and called two witnesses.

In his evidence the respondent's director stated that indeed the respondent got a loan from the appellant and defaulted in repayment, but that the appellant neither gave it notice of its intention of exercising its rights under the debenture deed nor acted civilly when it decided to enforce its rights thereon. A representative of the appellant, one Bosire, invaded the respondent's bakery in the company of 20 or so people, ordered everyone out and forcefully took possession of the bakery despite protestations by Mr. Mwandale. Mr. Bosire did not produce any document to show he had been appointed the receiver manager of the respondent. That notwithstanding, he moved into the bakery and took possession of all machinery, which he caused to be sold by public auction. **Kshs.3,590,000/=** was realized from that sale, which was conducted by a firm of auctioneers known as Regent Auctioneers. The list of the machinery sold did not include all machinery which were seized. Mr. Mwandale testified that despite his complaint to the appellant about that discrepancy and although the internal investigations conducted by the appellant confirmed the discrepancy, the appellant refused to compensate the respondent. The value of all the machines seized as given by the supplier was **Kshs.5,614,970/=** when new (*see Exhibit 12*). The respondent did not, however, adduce any evidence to show the state of the machines as at the time of seizure. A valuation by one E.M. Shako, produced as *exhibit 5* assesses the value of the respondent's seized property at **Kshs.1,650,500/=** which was clearly a gross understatement considering that when some only of the said property was sold in a forced sale they realized **Kshs.3,590,000/=**, which was more than two times the value given by Mr. Shako in that valuation. The valuation if anything supports the respondent's case that the appellant was bent on underselling the seized property. The valuation report was produced as an exhibit merely to show the details of the property the appellant acknowledged it had seized from the respondent's bakery.

We earlier stated that the machines which were sold realized a total of **Kshs.3,590,000/=**. Mr. Mwandale subtracted that figure from the total value of all the machines sold when new as given by the suppliers, and got a figure of **Kshs.2,615,416/=** which it then claimed as the value of the unaccounted for machines. Likewise, the respondent took the total value of all the machines sold, when new, and subtracted their value at the auction and the difference of **Kshs.3,921,644/30** is what it claimed as the undersale.

The respondent was entitled to claim the value of the unaccounted for machines if it could be able to show that indeed there were unaccounted for machines. However, we have no clear evidence on that. Accordingly we disallow the claim on that head. Likewise it was entitled to claim the value of the undersold machines. The respondent gave the figure of **Kshs.3,921,644.30**, but our computation shows that the correct figure should be **Kshs.2,024,970/=** arrived at by subtracting **Kshs.3,590,000/=** which was realized at the auction from the value of all the machines, namely **Kshs.5,614,970/=**. We have taken this figure because as stated earlier there is no clear evidence to show there were machines which were unaccounted for.

As regards loss of business, the respondent led evidence to the effect that it based its claim of **Kshs.1.7 million**, on production and sales figures for the period pleaded in its plaint. No records were produced to support the production and sales figures relied upon. Its explanation was that the appellant through the receiver manager seized all books and had neglected or refused to release them to it. Consequently, it was not able to produce the records for the inspection of the Court.

John Ojwang, a building contractor, was called to testify on the extent of the damage caused to the bakery premises when the receiver Manager forcefully gained entry into it. His evidence was that he spent a total of **Kshs.120,000/=** to restore the bakery premises into the state it was in before the receiver took possession of it. This was not the amount of money the respondent pleaded in its plaint. It was short by about **Kshs.5,000/=**.

The superior court (Mbogholi Msagha, J) accepted the respondent's case, and gave judgment in its favour as prayed in the plaint except on two aspects. Firstly, the court declined to award general damages, quite properly so, for breach of contract. Normally, general damages are not awardable in breach of contract cases. Secondly, the court awarded **Kshs.120,000/=** for damage to the bakery premises, although **Kshs.125,000/=** had been claimed because it was on that lesser sum that proof was offered.

We earlier held that whether or not a valid summons to enter appearance was served on the appellant does not, on the facts and circumstances of this case, vitiate the proceedings subsequent to such service. The appellant without any hesitation or protestation filed a written statement of defence and participated in the proceedings of the case without any complaint. And whether or not the summons to enter appearance violated **Order IV rules (3) and (4)** of the Civil Procedure Rules is neither here nor there as the summons was not made part of the record of appeal. It was not available for inspection by us. Likewise, we have no material or sufficient material to determine whether or not the delay, if any, in effecting service of the summons to enter appearance was explainable or not, considering that there is no clear evidence on record to enable us, effectually determine the issue. The appellant did not challenge the validity of the summons nor its service before the trial court. Had it done so, perhaps the respondent would have offered some acceptable explanation for any delay in service. It cannot be ascertained, for example, whether or not the validity of the summons to enter appearance, if it had expired, was extended. Ruling on the issue without evidence, we think, will work injustice to the respondent and we eschew such an attempt.

The fourth ground of appeal relates to the award on the head of loss of business. The court awarded **Kshs.5,000/=** per day. This figure was not arrived at on the basis of documentary evidence on sales. The documents on record (**Exhibits 8 and 9**) which set out some figures on stocks of bread, does not show the price per loaf, units sold, overhead and other expenses or indeed the total return per given period on the basis of which an estimate could be arrived at. Besides they are for a period before the bakery was closed down. The learned trial Judge merely accepted the figure the respondent gave. May be he accepted the figure because Mr. Mwandale, who testified on that issue, was not cross-examined on it by Mr. Wohoro, who was then appearing for the appellant. The appellant having not challenged the figure at the trial is it justified in attacking it now? Mr. Mwandale orally testified that the respondent was making **Kshs.5,000/=** per day as profit, and that the appellant had seized its books of account which would have shown the basis of the claim. Although he was not challenged on this, he produced an internal memo of the appellant which shows that the factory had been closed down in **June 1992** because Kenya Power and Lighting Company Ltd. had disconnected electricity supply to the bakery. Since that date the factory had not been operating. Likewise the bakery lacked sufficient capital to continue operation. That is also clear from the same exhibit. On the basis of that evidence the award on the head of loss of business is not justifiable. In our view, therefore, notwithstanding Mr. Mwandale's explanation that the respondent's books of account and other records had been seized by the appellant and thus disabling the respondent from adducing documentary evidence on its daily losses, the two documentary exhibits he produced which we referred to above are self explanatory. The respondent had ceased operations before it was placed under receivership. It could not therefore have lost business if it was not operating.

Regarding the complaint that the special damages should have been specifically proved, we say this. As rightly pointed out by the learned trial Judge, special damages must not only be specifically pleaded, but they must also be specifically proved. Evidence with regard to the value of the machines and the number

and type of machines which were found missing, was adduced. However, the respondent did not adduce evidence as to their value as at the date of seizure. True, they had been bought new. They had, however, been used for sometime before the appellant seized and later sold them. The learned trial Judge did not take this into account. It is however important to note that as at the date this suit was filed, the respondent did not have access to the machines and could not therefore have had them assessed. In those circumstances how should a court arrive at their value where as here they are wrongfully seized and later sold in a forced sale?

Each case must be considered on its peculiar facts and circumstances. The value the trial Judge used was the value of the machines at the time when they were bought. Their value as at the time of trial was not given. As we stated earlier the appellant valued the machines soon after their seizure, but the valuation report when looked at side by side with the proceeds of sale at the forced sale, is clearly of no assistance in that regard. The report if anything shows the appellant evinced an intention of selling the property at an undervalue. A proper valuation would have given a reasonable estimate of their value as at the time of trial. So we have only two acceptable values. The value of the machines as at the date of purchase and their value as at the date of their auction. The latter value is a poor indicator of the market value of an item.

In ***TIMSALES LIMITED VS. UP & DOWN SAW MILLS (KENYA) LIMITED. (1985) KLR 557***, this Court in considering a related issue took the price of a new machine as a basis for computing damages for purchasing a replacement. In that case as in this one, the machine to be replaced was old. However, the court took the value of a new one for purposes of computing damages.

Having come to the foregoing conclusion, we have no proper basis for interfering with the award of special damages on the heads of undersale, and the excess funds after the proceeds of sale were applied to clear the respondent's indebtedness to the appellant. We wish however to add that on the last head the respondent had pleaded a figure of ***Kshs.158,000/=*** in its plaint. However, if the sums which were due from the respondent to the appellant is subtracted from the proceeds of the auction sale, the balance is not ***Kshs.158,000/=*** but ***Kshs.90,168.90/=***. With that adjustment, the total special damages comes to ***Kshs.2,235,138.90/=*** made up as follows:-

- 1) Undersold machines- Kshs.2,024,970.00***
- 2) Excess funds after proceeds of sale offset the loan - Kshs. 90,168.90***
- 3) Cost of repairing damaged premises - Kshs.120,000.00***

Kshs.2,235,138.90

The trial judge ordered interest at ***18%*** per annum from the date of the suit. As we stated earlier, it was contended by the appellant that summons to enter appearance were not served on it promptly. The respondent did not challenge this but contended through its counsel, Mr. Wamalwa, that interest is at the discretion of the court. In absence of any explanation regarding the said delay it is our judgment that interest was improperly ordered to run from the date of the suit. In the result, we vary downwards the sums awarded from ***Kshs.8,515,060/=*** to ***Kshs.2,235,138.90/=*** and order interest to run from the date of judgment until payment in full at the rate of ***18%***.

On the issue of costs, we award the appellant half of the costs of the appeal. It is so ordered.

DATED and DELIVERED at Nairobi this 8th day of June, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR