REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU

CORAM: TUNOI, O'KUBASU & WAKI, JJ.A

CIVIL APPEAL NAI 332 OF 2001

BETWEEN

LULU DRYCLEANERS LTD……..……...…1ST APPELLANT

DISHON JUMBA……2ND APPELLANT

AND

KENYA INDUSTRIAL ESTATES...……...…1ST RESPONDENT

CHARLES O. KAMIDI……...…….……2ND RESPONDENT

(Appeal against the judgment and decree of the High Court of Kenya at Kakamega (Tanui, J) delivered on 19 th day of June, 2000 in H.C.C.C. NO. 376 OF 1992)
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JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiffs, the appellants in this appeal, from a judgment of the High Court of Kenya at Kakamega (T*anui, J*) delivered on 19th June, 2000 whereby the learned Judge dismissed the appellants' suit with costs. By a plaint dated 16th November, 1992, the appellants averred that in or about 1979, the 1st respondent, ***KENYA INDUSTRIAL ESTATES***, undertook after an elaborate consultation and extensive feasibility study, to finance the appellants in setting up a laundry business to be established within Kakamega Municipality. It was an agreed term of the contract that the appellants would identify the machinery and the equipment necessary to set up the project and the 1st respondent would meet the capital finance. It is the appellants' contention that they duly identified and sourced the machinery from Italy, to wit, one dry-cleaning machine make ***DONINI, Model D25/M*** special electrically heated complete with all its components and all accessories. Pursuant to the contract the appellants executed a debenture in favour of the 1st respondent on all the machinery thereby purchased using funds provided by the 1st respondent.

The machinery and its components were obtained from ***DONINI INTERNATIONAL OF ITALY*** and were accordingly shipped to the port of Mombasa and later transported to Kakamega. However, whether by design, deceit or through innocent omission at the source, the machinery was discovered during installation to be without the most vital components, namely, the ironing press and air compressor. The

result of this was that the functional capacity of the entire laundry machine was low leading to poor services and loss of income.The appellants further pleaded:-

> ***"1. In or about 1985 the 1st defendant undertook to purchase for and on behalf of the plaintiffs the unsupplied parts of the laundry machinery.***
>
> ***2. The plaintiffs aver that because of the failure on the part of the 1st defendant to finance the plaintiff operated and have been operating at a loss with the result that they have been unable to service the 1st defendant's loan.***
>
> ***3. In or about 1990 the 1st defendant undertook to finance the plaintiffs in the purchase of the ironing press as a means to revamp the project but in breach of that undertaking they have refused, failed and or neglected to fiancé the purchase of the same.***
>
> ***4. The plaintiffs further aver that their failure to service the loan advanced to them by the 1st defendant was occasioned by the failure on the part of the 1st defendant to fiancé and supply the plaintiffs with complete laundry machinery.***
>
> ***5. In further breach of the agreement the 1st defendant has appointed the 2nd defendant who is its employee as the receiver/manager in respect of the 1st plaintiff company."***

The plaint was amended in March, 1997, but without much departure from the substance of allegations of breaches by the respondents narrated in the plaint. The appellants further averred that the appointment of the 2ndrespondent as receiver of the 1st appellant was wrongful and without any justification. They therefore sought orders for recovery of the missing iron press ***DL/V/750*** ; general damages for loss of business and breach of contract; declaratory orders that the appointment of the 2ndrespondent as the receiver of the 1st appellant was wrong and exemplary damages for alleged high- handed manner in which the respondents breached the contract.

A defence was filed in which the appellants' claims were denied. They averred that the 1st respondent was under no duty whatsoever to furnish the appellants with a further loan to purchase the missing machinery components and that in any case they were not the supplier of the laundry machine. They contended that the 1st respondent appointed the 2nd respondent as the receiver of the 1st appellant because the appellants had failed to repay the loan advanced to them. The respondents also averred that the suit was time barred. The learned Judge in a reserved judgment held:

> ***"Turning to the first issue I note that this case was filed on 16th November, 1992.If there had been a contract between the first defendant and the first plaintiff for the supply of the said machinery and the first defendant was in breach of it the period within which the plaintiffs chould (sic) come to court was 6 years from the date of breach. The machinery the subject of this case were delivered in 1983. In my view this suit is time barred as it was filed after 6 years from the date of the cause of action."***

The learned Judge further held that the role of the 1st respondent in the establishment of the laundry business was only to finance the purchase of the machine after it had been identified by the appellants and that the 1st respondent was not concerned with the supply of the machine. In the circumstances, he held, it did not fall upon the 1st respondent to provide or source the missing components nor make grant of more or further finances or loans.

In resolving the issue on the appointment of the receiver and as to whether the appointment was lawful or not the learned Judge said:

> ***"Once the borrower became unable to service the loan as agreed the security becomes enforceable and in my view the security which had been executed by the first plaintiff had become enforceable in this case. The appointment of the second defendant as areceiver of***

the first plaintiff was in my view lawful"

The appellants complain in this appeal mainly that the learned Judge erred in holding that the suit was time-barred, an issue that was not pleaded. They further contend that the learned Judge ought to have found that the 1st respondent failed to comply with the conditions for an additional loan to purchase missing components and that it was responsible for ruining the appellant's business. This is a first appeal and it is trite law that where a trial Judge fails to evaluate the evidence, the appellate court has a duty to evaluate the evidence and draw its own independent conclusions. (See ***SELLE V. ASSOCIATED MOTOR BOAT CO. LTD [1968] E.A. 123.***

We note from the defence that the respondents failed to specifically plead the issue of limitation. As such they were not entitled to rely on that defence during the trial of the suit unless they amended their defence which they did not. We agree, therefore, with Mr. Odunga that the learned Judge erred in allowing the issue of limitation to be raised in the final submission when it had not been pleaded at all. See ***ACHOLA & ANOTHER V. HONGO & ANOTHER [2004] IKLR 462.***

The contract between the parties and the documents tendered in evidence limit the role of the 1st respondent to that of a financier only. The appellants were to source the machinery and install it and if any components were missing then that was a matter between them and the supplier, Donini.Moreover, the appellants did not join this Italian Company in the proceedings and yet it was the one withholding the missing ironing press ***DL/V/750***.Again, there was no privity of contract between the respondents and ***Donini*** and in the circumstances the respondents cannot be compelled to supply the missing components. In our view therefore, the prayers sought cannot be enforced against the respondents.

The appellants conceded that they were unable to service the loan due to poor performance of the laundry machine. It followed that under debenture the security became enforceable and the 1st respondent could appoint any person whether its officer or agent or not to be a receiver of the property and assets charged to it. We must agree with the learned Judge that the 2nd respondent was lawfully appointed as the receiver of the 1st appellant. The appointment was fully covered by clear provisions of the debenture.

We have examined the material placed before the learned Judge and it is clear to us that the appellants applied for a loan from the 1st respondent which loan was granted on terms and conditions specified in the debenture and the correspondence exchanged between the parties. The terms were accepted by the appellants as signified by their execution of the debenture. The default of the loan repayment is accepted but the same cannot be transferred into any acts of the respondents. The appellants sourced the machine and it was their duty to ensure that all its components were secure. That a faulty or incomplete machine was supplied was not the fault of the respondent. The resultant pecuniary damages cannot be visited upon the respondents.

Accordingly and for the above reasons, this appeal fails and is ordered dismissed with costs.

DATED and DELIVERED at KISUMU this 15th day of July, 2005.

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JUDGE OF APPEAL

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P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR