IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Owuor & Waki JJ A)

CIVIL APPEAL NO 225 OF 2001

GULTHAMED MOHAMEDALI JIVANJI T/ A JIVANJI AGENCIES ….APPELLANT

VERSUS

SANYO ELECTRICAL COMPANY LTD…….....….... RESPONDENT

(An appeal from the judgment of the High Court at Nairobi

(Khamoni, J) dated 25th May, 2001 in HCCC 1628 of 1998)

JUDGMENT

Sanyo Electrical Company Ltd (hereinafter "Sanyo" or "the respondent") is registered under the Trade Marks Act (Cap 506) Laws of Kenya as the owner of the trade mark "Sanyo" for televisions and cookers sold in this country. It is a Japanese company which manufactures those items for marketing worldwide, and in Kenya through its locally registered subsidiary and agent. Sanyo – Armco (K) Ltd (hereinafter "Sanyo Armco"). The Trademarks were registered in 1987.

In July 1998, Sanyo-Armco found one Gulthamed Mohamedali Jivanji t/ a Jivanji Agencies (hereinafter "Jivanji or the "the appellant") selling televisions and cookers under the trade mark "Sanyo". They were of inferior quality and were definitely not manufactured by Sanyo. A complaint was laid to the police and Jivanji was arrested, charged and convicted on 1st July, 1998 on his own plea of guilty to the offence of selling goods with falsely applied trade marks. Sanyo went further and filed a civil suit in the superior court on 23rd July, 1998 pleading the damage already suffered and continuing to be suffered as a result of reduced sales of the two items. They prayed for the following orders:-

"(a) An injunction to restrain the defendant his servants or agents or any of them from doing any of the following acts or any of them; that is to say, importing, selling supplying, distributing, offering for sale or distribution any product bearing the plaintiffs trade mark and not manufactured by the plaintiff and specifically television sets marked as models numbers 3507 and 3503, and gas cookers so trade marked and marked as model GC4701PMC;

(b) That the defendant deliver up to the plaintiff all equipment trade marked as aforesaid and verify on oath that he has no further goods which infringe the plaintiff's trade marks as aforesaid.

(c) An enquiry as to damages or at the plaintiff's option on (sic) account of profits and payment of all sums found due on the taking of such inquiry or account;

(d) Costs and interest."

With the filing of the plaint, Sanyo took out a Chamber Summons seeking

interlocutory orders under prayers (a) and (b). A consent was recorded on

30th July, 1998 and was extended thereafter until the hearing of the suit and further order of court, for:

"Interim orders to issue in terms of prayer (a) of the plaint".

Other than filing a Memorandum of Appearance on 6th August, 1998, Jivanji did not file any defence to the action. The suit was instead set down for formal proof. Khamoni J who heard the matter found the one witness tendered on behalf of Sanyo credible and awarded Kshs 10,865,480/= under prayer (c) as well as final orders under prayers (a),

(b) and (d). Jivanji sought to challenge that judgment and the ensuing decree on six grounds of appeal which were ultimately argued as three. They may be paraphrased:-

(1) No damages could be awarded to Sanyo the owner of the trademarks since the company that allegedly suffered damage was, on the evidence on record, a totally different entity which was not a party to the proceedings.

(2) No special damages could be awarded since none were prayed for in the pleadings, the only prayer for damages having been made in the alternative and no election having been made to claim special or general damages.

(3) Even assuming that any damages could be awarded to the plaintiff, there was no credible proof tendered and there was therefore a totally wrong exercise of the Court's discretion.

The submission made before us by learned counsel for the appellant Mr Hira on the first ground, as it was by Mr Jeevanjee before the superior court, was that the owner of the trade mark "Sanyo" suffered no loss since the goods belonged to a Kenyan Company, Sanyo-Armco, which through its employee who was the sole witness said it suffered loss. There was no nexus between the two legal entities.

With respect, though this is an attractive argument, it cannot avail the appellant. We need not go further than the pleadings made by Sanyo that it was the manufacturer and distributor of the goods the subject-matter of the suit. Sanyo-Armco was its subsidiary and agent for purpose of marketing the goods. There was no denial of that pleading and it is therefore deemed to have been admitted. Order 6 rule 9(1) Civil Procedure Rules is clear on that. The trial judge indeed relied on that pleading and the evidence relating to it to make a finding of fact which we cannot interfere with without violating hallowed principles and practice of this Court.

That the sole evidence was tendered through an employee of Sanyo-Armco is of no adverse consequence to Sanyo. Sanyo's presence in court was not necessary so long as it was able by other means to prove its case. We see nothing objectionable about the Sales and Marketing Manager of Sanyo- Armco testifying on behalf of Sanyo. There is no substance in the first ground of appeal and we reject it.

The challenge on the second ground was the pleading made under prayer (c) of the plaint which is obviously two prayers in the alternative. The law on such pleadings as correctly submitted by Mr Hira is that the party so pleading should make an election. Considering the issue in *Brooke Bond v Chai Ltd* [1971] EA 10 at page 15, Spry, AG P stated:-

"It is well known that, both in trade-mark cases and patent cases the plaintiff is entitled , if he succeeds in getting an injunction, to take either of two forms of relief, he may either say, 'I claim from you the damage

I have sustained from your wrongful act,' or 'I claim from you the profit which you have made by your wrongful act.'

No election according to Mr Hira was made. He further submitted that there was a pleading made in paragraph 8 of the plaint which was the basis for such prayer but no inquiry as to damages was carried out or credible evidence tendered on proof of special damages.

The pleading alluded to is admittedly sloppy and is not without some difficulty in construction. We shall revert to it as we consider the third ground of appeal. It is as follows:-

"(8): The plaintiff has suffered and continues to suffer damages by the sale of television sets being reduced by 1,000 at the profit of Ksh 1,550/= per set and the sales of cookers having been reduced by Kshs 500 at a profit of Kshs 1,500/= each and the damages continue".

It relates to profits lost by Sanyo as a result of the transgressions of Jivanji. We do not accept the submission that there was no election made. The respondent had obtained an injunction on 30th July, 1998. When the matter was set down for formal proof on 14th May, 2001, counsel for the respondent (the plaintiff there) opened the case and stated *inter alia*:

"Prayer (c) for damages and witness (sic) will give evidence about this to show what the company suffered."

In our view that was sufficient election that the respondent was abandoning the alternative prayer and chose to prove loss of profits. We find no merit in that ground of appeal also.

Finally, the third ground challenges not only the total lack of pleading of special damages but also lack of strict proof thereof. Those are the twin requirements of law where a party seeks special damages. Further submission was made by Mr Hira that there was no mitigation of damages by the respondent.

We shall deal with the latter submission first. Mitigation of damages is a matter of fact and ought therefore to be raised in the pleadings. As it did not arise before the superior court, we need not deal with it here, except to say that the guiding principles on the law of mitigation of losses have been severally stated by this Court. In *African Highland Produce Ltd v Kisoria* EALR [2001] 1 EA 1 (CAK), for example, the Court stated:-

"It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum, which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendants. He is, however under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages, or embark on dubious litigation.

The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant. See *Halsbury's Laws of England* (3 Ed) volume II at 289, 1955."

So that, the burden of proof was on Jivanji. He said nothing in his defence.

But he now says Sanyo ought to have insisted on the destruction of the goods. The circumstances surrounding the case were that Sanyo applied for and obtained an injunction soon after discovering the infringement of their trademark. They went further and demanded the destruction of the offending goods once they were accounted for. Jivanji was recalcitrant.

He counter-suggested the obliteration of the trademarks and insisted on selling the goods. He said destruction did not arise. Sanyo then embarked on a campaign of advertising in newspapers to alert

customers about what was happening. Only then did the deleterious effect on sales subside. There can be no validity in the charge that there was no mitigation of loss in these circumstances, and this contention was obviously for rejection, were we bound to deal with it.

We now come to the issue of damages. The amount in excess of Shs 10 million awarded to Sanyo is said to be excessive. Is it so, and should it be interfered with?

We are alive to our duty on a first appeal as stated by Sir Clement De

Lestang VP in *Selle v Associated Motor Boat Company* [1968] EA 123 at page 126;

".....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 appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that 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."

As we are being asked to interfere with the trial judge's award of damages, we are also guided by settled principles as stated by Law JA in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) 1 KAR 1, at page 5:-

"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 either inordinately high or low..."

Bearing those principles in mind, we have stated above that we are persuaded that paragraph 8 of the plaint pleaded special damages. The quarrel was that they were not particularized before proof thereof was offered. But the degree of certainty and particularity depends on the circumstances and the nature of the acts complained of. This Court in CA 192/92 *Coast Bus Service Ltd v Sisco E Murunga Ndanyi & 2 others* (UR) has this to say:-

"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council v Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Ltd and Another v Samson Kipruto Chebon*, Civil Appeal No 22 of 1991 (unreported). In the latest case, Cockar, JA who dealt with the issue of special damages said in his judgment:-

"It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded. In *Ouma v Nairobi City Council* [1976] KLR 304 after stressing the need for

a plaintiff in order to succeed on a claim for specified damages, Chesoni, J quoted in support the following passage from Bowen, LJ's judgment on pages 532, 533 in *Ratcliffe v Evans* (1892) 2 QB 524, an English leading case of pleading and proof of damage:

The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

No complaint was raised in the superior court about paragraph 8 of the plaint and we must take it, therefore, that the pleading was clear to the defendant and caused no prejudice. What remains is to consider whether there was strict proof of the pleading.

The trial judge relied on the sole evidence of Raja Valiathan (PW 1) which he said was not seriously challenged even in cross-examination. The witness produced exhibit 1, a letter from the appellant admitting that he entered into the market in March 1998 by importing some 400 units. There was no breakdown of those units to show the number of televisions and cookers imported. The witness also produced exhibit 2 which was a schedule of one model of (black and white) televisions and two models of cookers marketed under the Sanyo trademark. In his evidence, the figures contained in the summary were obtained from monthly invoices showing the number of items sold, the number expected to be sold and the shortfall which represented sales lost to the defendant and the attendant loss of profits. Between April and June 1998 there was no marked effect on the sales of televisions whose monthly average was 1000 items. The effect on the two models of cookers was also minimal as the average monthly sales for one model was 500 and the other 250 respectively. The witness then dealt with the period of six months from July to December 1998 and stated:-

"After June 1998 our sales dropped by about 50% (half). Black and white television No 14 TBG 92B and also two Sanyo gas cookers model GC 7300 P2, GC 7200 PC. We advertised in newspapers to alert customers of what was happening. Now the sales have come back by the year 2000."

That evidence was recorded on 14.5.2001. It was assailed by Mr Hira firstly on the ground that it mentions only "two gas cookers" and makes no mention of the number of televisions. Secondly because losses were calculated over the period after 30.7.98 when an injunction was already in place and no more goods were being sold by the appellant.

With respect, the first complaint was not made seriously. Exhibit 2 clearly listed two models of cookers and the oral evidence could only have been making reference to those two models and not the number of cookers sold. The exhibit also gives the number of items sold and expected to have been sold. It was tested in cross-examination when the witness stated:-

"What I have here are not mere estimates but actual figures."

The second complaint was also tested in cross-examination and the witness stated:-

"On 30.7.98 an injunction stopping sale was granted.

But we still expected sales to out (sic) in August, September, October, November, December because their goods were still in shops."

The trial judge believed that evidence, and we think justifiably so. The appellant had refused to have the offending goods identified and destroyed.

He did not deny the pleading that he continued to sell and to cause damage to the respondent. The evidence that there were no other importers who could affect the respondent's sales by selling the inferior quality goods at half price, was not challenged. On that score we agree with learned counsel for the respondent Mr Kiragu that the period of six months over which the loss was claimed was reasonable. The trial judge found nothing wrong with it stating that there was no serious challenge to the evidence. We affirm that assessment.

Did the loss of profits amount to Shs10,936,911.25 as proved in exhibit 2 or Shs 10,865,480 as found in judgment by the Court? We do not think so. The former figure includes a sum of Shs 71,431.25 being advertising charges which were not pleaded under paragraph 8 of the plaint or at all.

The latter figure was based on a "gross profit" figure of Shs 1,940/= per item of television, Shs 1,370 for the first model cooker and Shs 1,440/= for the second model cooker. Those margins are not pleaded under

paragraph 8 of the plaint or at all. The exhibit proves a higher figure for loss of profits and the figure must therefore be adjusted downwards.

Furthermore the figure represents gross profits lost over the period. Mr Hira laid before us *"Words and phrases judicially defined"* Vol 4 pages 367, 368 and 369 to persuade us that the the "profits" recoverable are

"Net profits" and not "Gross profits". To sample only two of the definitions:-

"The difference between what a thing costs and the large sum it sells for is not profit if the buying and selling are attended with expense to the trader"-*Dobbs v Grant Junction Waterworks Co* (1883) 9 App Cas 49"

"The word "profit" generally speaking means the excess of returns over outlay, but in commercial agreements its meaning may be and often is restricted to annual pecuniary profits or such profits as would ordinarily appear in a profit and loss account."

We agree with Mr Hira that the profits recoverable are net profits. Attendant trading expenses were not taken into consideration in this matter and the respondent provided no figures for them. It leaves it open for us to award what is reasonable.

The gross profit pleaded on an item of black and white television is Shs 1,550/=. We think the net profit on that would be 2/3 or Shs 1,033/=. We do not disturb the number of televisions found to have been lost to the defendant's criminal dealings. The net loss suffered would therefore be Shs 3,494,639/=.

The proved loss on gross profit on one cooker unit model GC 7,300 was Shs 1,370/=. The net profit discounted by 1/3 would be Shs 913/=. We accept the number lost and work out the loss of profit at Shs 1,787.654.

Gross profits proved for cooker model GC 7200 was Shs 1,440. The net profit will similarly be discounted to Shs 960. The net loss works out at Shs 1,080,000/=. The total figure for loss of profits would thus be Shs 6,362,293/=.

To that extent only this appeal succeeds. We would otherwise dismiss it with 3/4 of the costs payable by the appellant here.

Those will be our orders.

Dated and delivered at Nairobi this 27th day of June, 2003

R.S.C OMOLO

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JUDGE OF APPEAL

E. OWUOR

…….

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