**Dharamshi v Karsan**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 1 February 1974

**Case Number:** 37/1973 (14/74)

**Before:** Law Ag V-P, Mustafa and Musoke JJA

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**Appeal from**: High Court of Kenya – Madan, J

*[1] Damages – Contract – Prevention of completion of works – Cost to plaintiff of completing – To be*

*allowed as a deduction.*

*[2] Damages – Contract – Damage qualified – Whether general damages can be awarded in addition.*

*[3] Damages – Detinue – Damages for detention may be awarded in addition to value of chattel.*

**JUDGMENT**

The following considered judgments were read. **Mustafa JA:** This respondent (who I will call the plaintiff) filed an action against the appellant (who I will call the defendant) for damages alleging that the defendant had prevented him from completing the construction of a building for the defendant in breach of an agreement entered into between them on 23 June 1970. In terms of the contract the plaintiff was to be responsible “for all masonry and carpentry labour work”, and was to complete such work on the building in nine months. The defendant was to supply all the necessary materials to the plaintiff. In the event of delay by the plaintiff in completing within the agreed period of nine months, he was to pay Shs. 50/- per day as liquidated damages; similarly if the delay was caused by the defendant, he would have to pay a similar sum as liquidated damages. The total contract price payable to the plaintiff was Shs. 92,500/-. The plaintiff had been paid a sum of Shs. 75,205/40 by 3 April 1971 on which day he alleged he was forcibly evicted from the premises by the defendant and was prevented from continuing with his work. The plaintiff alleged that by then he had nearly completed his work and that he needed only one more month to complete the rest. He claimed the balance of the contract price namely Shs. 17,294/40, a sum for extras and additional work, a sum he had paid to a watchman for and on behalf of the defendant, the value of his tools and equipment wrongly taken possession of and detained by the defendant, damages for such detention of his tools and equipment, and damages for breach of contract. The trial judge accepted the evidence of the plaintiff in preference to that of the defendant and awarded him various amounts of money under all the above heads. The defendant is only appealing against the award of damages under the following heads: (1) Shs. 17,294/40 – being balance of contract price. (2) Shs. 1,500/- – for breach of contract. (3) Shs. 3,500/- – damages for detention of plaintiff’s tools and equipment. (4) Shs. 9,550/- – being value of tools and equipment wrongly detained by the defendant. I will deal with the items one by one. (1) Shs. 17,294/40. The plaintiff in his plaint had alleged that he had nearly completed his work when, on 3 April 1971, in breach of the agreement of 23 June 1970 entered into between him and the defendant, the defendant wrongfully refused to permit him to continue and complete his work and repudiated the said contract. In his evidence in court he said, “I was pushed out before I could complete it,” and again, “If the defendant had not physically pushed me out I was willing to continue working. I would have completed it timeously”. He estimated that the work remaining to be done would have cost him Shs. 4,654/-, although the balance of the contract price still due and owing to him was Shs. 17,294/40. Obviously the sum of Shs. 17,294/40 would have included his profit element. That this was so was made clear in his evidence when he said, “I lost a profit of Shs. 13,000/- which I would have made under the contract if not prevented from completing it.” What is the measure of damages to be awarded in this case? In *McGregor on Damages*, 13th ed., p. 560, Art. 823, it is stated: “On the measure of damages where the owner acts so as to bar completion there are again, surprisingly, no English cases. General principles would put the normal measure at the contract price less the cost to the builder of executing or completing the work. . . .” In Volume 11, p. 233, para. 400, *Halsbury Laws of England*, 3rd edn., it is stated: “The fundamental principle by which the Courts are guided in awarding damages is restitutio in integrum. . . .” Is there any reason why I should not apply these principles to this item? Mr. Khanna for the plaintiff has submitted that these principles cannot apply because in this case, so he has alleged, the breach had occurred after the contract period had expired, not when the contract was subsisting. The short answer to that is that the plaintiff himself did not sue on that basis; he had sued on the basis that at the time of the breach, the contract was subsisting. Indeed that was the basis on which the case for the plaintiff was conducted throughout the trial The plaintiff, in his evidence, said, “I had nine months to complete the work, i.e. until about 15 April”. The breach took place on 3 April. I will not deal with the proposition put forward by Mr. Khanna that the plaintiff was entitled to the whole balance without deduction, as it was based on a false premise. I am of the view that the trial judge should have deducted the sum of Shs. 4,654/-, being, according to the plaintiff, the cost of the work not done by him, from the balance of the contract price of Shs. 17,294/40. That would have placed the plaintiff in the same situation as if the contract had been performed. I would allow the appellant’s appeal on this item. (2) Shs. 1,500/-: damages for breach of contract. I can see no reason for damages to be awarded under this head in this case. The plaintiff had quantified his claim for damages, and was awarded a sum on that basis as a result of the breach of contract on the part of the defendant. This appears to me to be a duplication. Mr. Khanna has supported this award again on the baseless ground that as the contract had expired before the breach this award must have been in relation to the 10 days or so that the defendant had worked after the end of the contract term. That argument is devoid of merit. I would allow the appeal on this item. (3) Shs. 3,500/-: damages for detention of plaintiff’s tools and equipment The plaintiff was awarded a sum which represented the value of the tools and equipment wrongfully taken possession of by the defendant. The plaintiff also claimed damages for the detention of the said goods, and was awarded Shs. 3,500/- as damages for such detention. In an action for detinue a plaintiff is entitled *prima facie* to the value of the goods, together with any special loss which is the natural and direct result of the wrong. The valuation of the goods should be assessed as at the date of judgment, see *Clerk and Lindsell on Torts*, 13th ed., p. 675, Articles 1150–1151. A plaintiff can recover the return or value of his detained goods as well as damages for their detention, see *McGregor on Damages*, 13th ed., p. 695, Art. 1032. If the goods are profit earning and are normally hired out, then a plaintiff can recover as damages the full market value of such hiring during the whole period of such detention. In this case there was no evidence at all as to whether the goods were profit earning or were ever hired out. There was no evidence by the plaintiff that he had suffered any loss by the detention of the goods. However in an action for detinue, if a plaintiff cannot prove loss of the market rental of his goods, he may still recover damages, as a claim for consequential loss is part of the basic claim in such an action, see *McGregor on Damages*, 13th ed., p. 701, Art. 1041. In this case the defendant had refused to hand over the goods, and in any event had detained the concrete mixer for a considerable period. It is true that the defendant had offered to return the other articles apart from the most important item, the concrete mixer, about tow months after the seizure. I am not convinced that the plaintiff, in such circumstances, was not entitled to refuse to accept back only part of his goods. The defendant had had the advantage of using the articles for a considerable period and profited by such use. The trial judge had, in his discretion, awarded damages for such detention, and I am unable to say that he had erred in law in so doing. I would dismiss the appeal in respect of this item. (4) Shs. 9,550/-: value of the tools and equipment detained. The plaintiff had claimed that the goods were worth Shs. 12,807/-, and the trial judge had assessed the value at Shs. 9,550/-. It is true that the trial judge in his judgment said, “In ordinary circumstances as for example between a willing seller and willing buyer, depreciation in value of machinery may be allowed for”. It was not clear whether the trial judge took into consideration the depreciation element, especially in relation to the concrete mixer, when he assessed the value of the goods at Shs. 9,550/-. The defendant had claimed that a sum should have been deducted for depreciation. The plaintiff had stated in evidence that he had taken away shuttering worth Shs. 1,000/- and 1,000 gum poles worth Shs. 750/-, and the defendant contended that these sums should have been deducted from the claim. In the plaint the plaintiff had described the articles taken away by the defendant as “concrete mixing machine, tools, timber scaffolding, drums, wheel barrows, poles, shuttering etc.” Despite the fact that the hearing of the case took some 15 days, so we were informed, the evidence adduced was imprecise as it was not made clear whether the shuttering and the gum poles recovered by the plaintiff were included in the articles wrongfully detained by the defendant. As I have pointed out earlier, the valuation of goods in an action for detinue should be taken as at the time of judgment, and whether the value has increased or decreased would be a matter of evidence. No relevant evidence in this regard was adduced. In the circumstances I am not prepared to say that the trial judge had erred in any material particular when he, as he said, “of necessity” fixed an arbitrary figure of Shs. 9,550/-. I believe he had taken into consideration the various factors and circumstances, and in view of the unsatisfactory evidence before him I am not prepared to interfere with the sum he had assessed as the value of the detained goods. I would dismiss the appeal in relation to this item. In the result I would allow the appeal on item (1) and reduce the sum awarded by Shs. 4,654/-, that is, I would reduce the amount awarded in that item to Shs. 12,640/40, I would also allow the appeal on item (2). I would dismiss the appeal on items (3) and (4).

**Law Ag V-P:** The facts are fully set out in the judgment of Mustafa, J.A. The contract between the parties provided for the work to be completed within nine months that is to say by 22 March 1971. Mr. Khanna for the respondent submitted that, in these circumstances, when the appellant prevented the respondent from completing the work under the contract on 3 April 1971, the nine months had expired and the respondent, who was not responsible for the delays which had occurred, was entitled to payment in full of the contract price. I am unable to accept this submission. Assuming time to have been originally of the essence, it became at large because of extra work ordered by the appellant and the various delays caused by him, for which the respondent has been compensated. The judge so found, and there has been no appeal or cross-appeal against this finding. The contract was mutually treated as having been extended, and the respondent himself pleaded that, on 3 April 1971, the appellant wrongfully repudiated the contract. He cannot now, at this stage, be heard to contend that the contract came to an end on 22 March 1971. This is in my view a case of what is called, in *Hudson’s Building and Engineering Contracts*, 9th ed., p. 450, prevention or wrongful termination of contract by the employer, in which case the builder is entitled by way of damages to the loss of profit he would otherwise have earned. It is common ground that, at the date of the prevention, Shs. 17,294/40 remained due to the respondent under the contract, and that the work remaining to be done would have cost the respondent Shs. 4,654/-. The respondent himself put his loss of profit at about Shs. 13,000/-. With all due respect to the learned trial judge, I am of opinion that Shs. 4,654/- must be deducted from the Shs. 17,294/40 awarded under this head, reducing it to Shs. 12,640/40. Nor do I know of any authority for the award of general damages in addition to loss of profit in a case of prevention, and I would set aside the award of Shs. 1,500/-damages for breach of contract awarded under this head. In my view the first two grounds of appeal succeed. The other grounds of appeal relate to the award of Shs. 9,500/- being the value of tools and equipment detained by the appellant, and Shs. 3,500/- damages for such wrongful detention. I agree with Mustafa, J.A. that a plaintiff can recover both the value of his detained property, and damages for its detention. The evidence adduced in this respect was unsatisfactory and imprecise, but the judge did the best he could on the material available to him, and although another judge might have awarded less, it has not been shown to my satisfaction that any interference with his awards is called for. I would dismiss those grounds. As Mustafa and Musoke, JJ.A. agree, this appeal succeeds in part, to the extent of reducing the principal sum awarded in the decree from Shs. 36,534/90 to Shs. 30,380/90 and it is so ordered. The order for costs made in the High Court will stand. **Musoke JA:** I agree and have nothing to add.

*Appeal allowed in part.*

For the appellant:

*SC Gautama*

For the respondent:

*DN Khanna* (instructed by *Khanna & Co*, Nairobi)