



**Leah Distributors Limited v Leah Africa Limited (Civil Case E021 of 2018)  
[2023] KEHC 125 (KLR) (Commercial and Tax) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E021 OF 2018  
A MABEYA, J  
JANUARY 20, 2023**

**BETWEEN**

**LEAH DISTRIBUTORS LIMITED ..... PLAINTIFF**

**AND**

**LEAH AFRICA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 23/4/2018, the plaintiff sought judgment against the defendant for damages for expectation of loss/loss of bargain of Kshs 26,600,000/- together with damages for breach of contract in the sum of Kshs 4,200,000/=.
2. The plaintiff's case was that 1/3/2016, the plaintiff and the defendant entered into a lease agreement whereby it leased five trucks to the defendant for a period of three years. That the agreement contained a termination clause by which any party thereto could terminate the lease by giving three months' notice.
3. That on 23/8/2017, the defendant terminated the agreement without any notice and was therefore in breach thereof. As a result of the said breach, the plaintiff suffered loss of business expectation of Kshs 26,600,000/- for terminating the lease before its full term and breach of clause 12 of the contract for Kshs 4,200,000/-.
4. The defendant did not enter appearance or file any defence and the matter was fixed for formal proof. The court allowed the hearing to proceed by way of document evidence.
5. The plaintiff filed written submissions which I have considered. It was submitted that the defendant breached the contract by failing to give a three months' notice for the termination of the lease agreement. That the plaintiff had expected to earn a total sum of Kshs 26,600,000/- at the end of the



three year period. It had therefore suffered loss of business expectation. Further, that it was entitled to damages for breach of contract in the sum of Kshs 4,200,000/= in respect thereof.

6. I have considered the entire record. In *Samson S Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule, J observed thus: -

“..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

7. From the foregoing, it is clear that in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. The party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. In a full hearing, the court must determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law.

8. In the present case, the plaintiff's claim is on breach of contract whereby it claims that the defendant breached clause 12 of the lease agreement by failing to give a three months' notice upon termination.

9. Clause 12 of the agreement reads that: -

“If either party wishes to terminate this contract, they may do so by giving a Three months' written notice.”

10. From the above, it is clear that the contract required the parties to give notice before termination thereof. The uncontested allegations by the plaintiff is that, on 23/8/2017, the defendant called and asked that the plaintiff do send its drivers to collect the trucks as the defendant no longer needed them. There was no notice in terms of the aforesaid Clause 12 of the contract. In this regard, I find that the defendant was in breach of the subject agreement.

11. As to whether the plaintiff was entitled to damages for the expectation of loss, it was contended that the projected income before termination of contract was Kshs 26,600,000/= and the plaintiff had legitimate expectation that it would make economic gain of the contract.

12. In *African Highland Produce Limited v John Kisorio* [2001] eKLR, the Court of Appeal stated: -

“The guiding principle of law in mitigation of losses is as follows. 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 defendant. 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.”

13. In [South Nyanza Sugar Co Ltd v Donald Ochieng Mideny](#) [2018] eKLR Majanja, J held that: -

“Mitigation of damages is not a question of law, but one of fact dependent on the circumstances of each particular case, the burden of proof being on the defendant (See African Highland Produce Limited v Kisorio [1999] LLR 1461 (CAK). Since the appellant did not contest the respondent’s claim, it did not show how the respondent could mitigate the loss.”
14. In the present case, it was not disputed that the contract was breached by the defendant. It is trite that for breach of contract, the remedy available to the innocent party is the actual damage suffered. In [Chitty on Contracts](#), Sweet & Maxwell Vol 1, 1994 at pg 1198, the learned writer observes: -

“Damages for a breach of contract committed by a defendant are a compensation to the plaintiff for the damage, loss or injury he has suffered through that breach. He is, as far as money can do it, to be placed in the same position as if the contract had been performed. This implies a ‘net loss’ approach ...

If the plaintiff cannot establish an actual loss, he is entitled only to nominal damages. Even where the plaintiff can prove his loss, damages are hardly ever a full recompense, since ‘it must be remembered the rules as to damages can in the nature of things only be approximately just’. ...

In principle, he should be entitled to recover his expected net profit plus any of his incidental expenditure of a type reasonably contemplated by the parties at the time the contract was made but not his gross profit (eg. the full contract price) plus his disbursements which would have been incurred in earning that gross profit”.
15. In the present case, the plaintiff has prayed for a total of Kshs 26,600,000/- which the amount it would have earned until the end of the contract. I doubt whether that would be the proper estimation of the loss or damages the plaintiff suffered. The contract between the parties had a termination clause. Either party would have terminated the same by giving a three month’s notice. The defendant failed to give such notice.
16. In this regard, the only breach by the defendant was the failure to issue the notice. My view therefore is that, compensation should be with respect to the three months the defendant failed to give notice. In this case the monthly payment was Kshs 1,400,000/- therefore in three months the plaintiff is entitled to Kshs 4,200,000/-.
17. The plaintiff further claimed damages for breach of contract in the sum of Kshs 4,200,000/=. This payer is in the nature of general damages. In [Kenya Tourist Development Corporation v Sundowner Lodge Limited](#) [2018] eKLR, the Court held that :-

“ ... as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi v Karsan [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa JA expressing the view that such an award would amount to duplication ...



The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs 30 million merely because he believed that the respondent “had suffered serious damages” (sic).

What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove.”

18. From the foregoing, the amount claimed as damages for breach of contract in the sum of Kshs 4,200,000/- is a duplication. Accordingly, the claim for Kshs 26,600,000/- is declined. However, damages of Kshs 4,200,000/- is awarded to the plaintiff. In the upshot, the plaintiff has proved part of its claim to the required standard.
19. Accordingly judgment is entered in favour of the plaintiffs against the defendant for Kshs 4,200,000/- together with interest thereon at court rate from the date of the suit until payment in full. The plaintiff will also have the costs of the suit.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

