



REPUBLIC OF KENYA



**Prasun Construction Company Ltd v Sunshine Villas Limited & another  
(Civil Suit 5 of 2020) [2023] KEHC 2856 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2856 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL SUIT 5 OF 2020  
JN KAMAU, J  
MARCH 30, 2023**

**BETWEEN**

**PRASUN CONSTRUCTION COMPANY LTD ..... PLAINTIFF**

**AND**

**SUNSHINE VILLAS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF KISUMU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In its Plaint dated 8<sup>th</sup> June 2020, the Plaintiff sought for Judgment against the Defendants jointly and severally for:-
  - a. Kenya Shillings 246,698,498/= being the value of goods, items, machinery and equipment stolen/damaged and/or destroyed during the demolitions of the structure building on /in LR Kisumu Municipality/Block 13/302 (hereinafter referred to as “the subject property”).
  - b. Costs of the suit.
  - c. Interests on both (a) and (b) above at 14% with effect from the date hereof until payment in full.
2. On 19<sup>th</sup> July 2021, the 1<sup>st</sup> Defendant filed its Statement of Defence dated 16<sup>th</sup> July 2021. It pleaded that it was the 2<sup>nd</sup> Defendant that demolished the development on the subject property and that the demolition was unjustified. It was its case that it was the 2<sup>nd</sup> Defendant who should be held liable to the Plaintiff.
3. On 4<sup>th</sup> August 2021, the 2<sup>nd</sup> Defendant filed his Statement of Defence dated 12<sup>th</sup> July 2021. It pleaded that in the letter of approval granted to the 1<sup>st</sup> Defendant dated 13<sup>th</sup> January 2017 by the City of Kisumu it was clear on conditions number V and VI and that by a letter dated 23<sup>rd</sup> April 2018, the 1<sup>st</sup> Defendant



was again informed that the development on the subject property was in breach and violation of the conditions of approval and hence the notice for stoppage of construction.

4. The case proceeded to hearing and parties were directed to file their Written Submissions.
5. The Plaintiff's Written Submissions were dated 8<sup>th</sup> August 2022 and filed on 10<sup>th</sup> August 2022. The 1<sup>st</sup> Defendant's Written Submissions were dated and filed on 17<sup>th</sup> October 2022 while those of the 2<sup>nd</sup> Defendant were dated 3<sup>rd</sup> October 2022 and filed on 7<sup>th</sup> October 2022. This Judgment is based on evidence tendered by parties during trial and the aforesaid Written Submissions which parties relied upon in their entirety.

### **Legal Analysis**

6. The applicable law as to the burden of proof is found in Section 107 (1) of the [Evidence Act](#) which states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

7. Section 108 further provides that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

8. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. In the case of [Karugi & Another vs Kabiya & 3 Others](#) [1987] KLR 347 the Court of Appeal stated that:-

“The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

9. Having looked at the Pleadings herein, the evidence tendered during trial and the respective parties' Written Submissions, it appeared to this court that the only issue placed before it for determination was whether or not the Plaintiff proved its case on a balance of probabilities as required by law.
10. This court therefore dealt with the said issue under the following distinct and separate heads.

### **I. Liability**

11. Notably, Malik Parsun Patel (hereinafter referred to as “PW 1”) testified that the 2<sup>nd</sup> Defendant demolished the 1<sup>st</sup> Defendant's development on the subject property on 30<sup>th</sup> April 2018 to 1<sup>st</sup> May 2018. He stated that he had a site office where all copies of approved structural and architectural drawings were kept. He informed the court that the said site office was also destroyed with the relevant documents therein. He further stated that he took a video of the demolition and played the same during trial. He showed a clip of what was previously on the site. There were several machinery on the site. He testified that the demolition was done by an excavator and that it began at 10.00p.m and ended at 1.00p.m. He added that there was also a caterpillar with a big arm doing the demolition. He stated that there were several vehicles at the site and people who were masked were barricading the road.
12. On cross-examination by the 1<sup>st</sup> Defendant, he testified that he had a contract with the 1<sup>st</sup> Defendant to construct the property and that he had not sued it for breach of contract. He further stated that the demolition was carried out by the 2<sup>nd</sup> Defendant and that he had not adduced anything to show that



- the 1<sup>st</sup> Defendant participated in the demolition. He added that he was aware of the court proceedings between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in Kisumu ELC No 23 of 2018 and that he was aware that in the case the 1<sup>st</sup> Defendant was allowed to continue with the construction at the site. He pointed out that the 1<sup>st</sup> Defendant was only but a victim of circumstances in his contract with it.
13. Suresh Patel (hereinafter referred to as “DW 1”) testified that he was on the site on 29<sup>th</sup> April 2018 when the demolition occurred and that he saw people with bulldozers breaking the perimeter wall. He stated that it was the 2<sup>nd</sup> Defendant who demolished the building because he saw on Orimba at the site. He added that the 2<sup>nd</sup> Defendant said that there were no approval plans yet he stated that he had approved plans. He further testified that he sued the 2<sup>nd</sup> Defendant in Kisumu ELC No 23 of 2018 and was given orders to continue with the construction. He corroborated PW 1’s evidence that there were equipment and machines on the ground which were brand new and that it was a big construction. He informed the court that he went to the site after the demolition and the Plaintiff’s equipment and machinery were stolen, some were damaged and the site office was destroyed and documents taken.
  14. Moses Orege Onyango (hereinafter referred to as “DW 2”), the incharge, Lands and Physical Planning of the 2<sup>nd</sup> Defendant testified that he was not aware of any demolitions by the 2<sup>nd</sup> Defendant on 28<sup>th</sup> April 2018. He stated that he joined the County Government in August 2020 and did not know the events that took place in prior offices. He further testified that he knew Mr Orimba and Dorris Ombara but he could not tell whether or not they were at the scene of the demolition.
  15. On submissions, it was the Plaintiff’s case that it was a Contractor, the 1<sup>st</sup> Defendant was a Developer and the current registered owner of the subject property and the 2<sup>nd</sup> Defendant was the constitutional devolved unit whose mandate was to govern the Kisumu County. It pointed out that the 1<sup>st</sup> Defendant sought to develop its said subject property and entered into a contract with it to carry out the construction and completion of apartments on the subject property.
  16. It contended that it mobilized its equipment, machinery, plant, apparatus and tools to the site and embarked on the construction. It pointed out that by a letter dated 23<sup>rd</sup> April 2018, the 2<sup>nd</sup> Defendant informed the 1<sup>st</sup> Defendant that it had revoked the approval plan for the wall and the building for reason that the development was being undertaken on road reserve which was a parcel in dispute and the same was to be pulled down within 48 hours failure to which it would demolish the same on its own at the 1<sup>st</sup> Defendant’s as to costs and penalties incidental thereto.
  17. It asserted that true to its word, the 2<sup>nd</sup> Defendant carried out the demolition during which its machinery, equipment, appliances/apparatus and tools were either damaged, destroyed or stolen by the persons who carried out the said demolition and as a result it suffered loss and damage.
  18. It contended that it shouldered both the legal and evidential burden of proof of its case in line with Sections 107 through to 110 of the *Evidence Act* (Cap 80) and that once it has discharged its burden of proof a Defendant who wishes to rebut its case takes the burden to do so pursuant to Section 112 of the said *Act*. It pointed out that the said Section 112 buttresses the doctrine of evidence that ‘he who alleges must prove’. It added that it therefore followed that when the 2<sup>nd</sup> Defendant alleged that it did not demolish the development of the subject property and yet it had issued a letter intimating that it would do so, the burden of proving otherwise lay with it. In this regard, it placed reliance on the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015]eKLR where it was held that Section 108 of the *Evidence Act* provides that the burden lies in that person who would fail if no evidence at all were given at either side.
  19. It asserted that the standard of proof is on a balance of probabilities, or the preponderance of probabilities. In this respect, it relied on the cases of *William Kabogo Gitau vs George Thuo & 2 Others*



[2010] 1KLR 526 and *Palace Investment Ltd vs Geoffrey Kariuki Mwenda & Another*[2015]eKLR where the common thread was that the burden on a balance of preponderance of probabilities means a win, however narrow.

20. It further submitted that the letter dated 23<sup>rd</sup> April 2018 was clear on its instructions on demolishing of the development on the subject property and that the 2<sup>nd</sup> Defendant could not turn around and deny the contents and substance of its own letter, as the letter spoke for itself. It added that the 2<sup>nd</sup> Defendant could not seek to introduce oral evidence to either challenge the contents of the said letter. It argued that based on the standard of proof as set out in *Palace Investment's* case (Supra), it had established its case.
21. On its part, the 1<sup>st</sup> Defendant submitted that as a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. It invoked Section 107(1), Sections 109 and 112 of the *Evidence Act* Cap 80 Laws of Kenya and contended that it was not in dispute that it was the owner of the subject property and that at all material times it was in the process of developing an apartment block on the said subject property after the necessary approvals by the 2<sup>nd</sup> Defendant.
22. It asserted that it was the Plaintiff's contention that while undertaking building operations on the subject property the 2<sup>nd</sup> Defendant caused it the loss of Kshs 246,698,498/= being the value of goods, items, machinery and equipment stolen/damaged and/or destroyed during the demolition of the structure/building on the subject property. It contended that DW 2 testified that there was no evidence to prove that the 2<sup>nd</sup> Defendant was involved in the demolition and argued that in the suit Kisumu ELC No 23 of 2018 where it sued the 2<sup>nd</sup> Defendant on the question of ownership of the land wherein it sought an injunction to stop the demolition of the development, the 2<sup>nd</sup> Defendant acknowledged that it had ordered the stoppage of construction and further directed the partial demolition of the development on the said subject property in the guise that it had encroached a road reserve.
23. It asserted that pursuant to demolition, the court ordered survey exercise in the subject property and found that it had in fact not encroached onto the alleged road reserve and ordered it to resume construction. It was its case that the PW 1 testified that it was the 2<sup>nd</sup> Defendant who demolished the development of the subject property as its employees were seen on the site including security offered by the Kenya Police. It added that the Plaintiff tendered photographic and video evidence to show the structure allegedly demolished by the 2<sup>nd</sup> Defendant and that its evidence was not rebutted by the 2<sup>nd</sup> Defendant who acknowledged having sent an enforcement notice to the 1<sup>st</sup> Defendant to cease construction and threatening demolition.
24. It argued that the DW 2's assertion that the subject property was a public land was completely unsupported by evidence and indeed the 2<sup>nd</sup> Defendant did not plead that in its Statement of Defence nor tabled any evidence including an alleged County Taskforce report that the land in question was a public utility. It added that the development received approval and the 2<sup>nd</sup> Defendant trying to stop its construction coupled with the evidence of PW 1 and DW 2 who testified that the 2<sup>nd</sup> Defendant participated in the demolition put the issue of liability beyond challenge.
25. In that respect, it relied on the case of *County Government of Meru vs Isaiah Mugambi M'muketha* [2017]eKLR where it was held that the fact that the Municipal Council of Meru tried to stop the construction of the buildings on the suit premises coupled with the rest of the evidence that the appellant participated in the destruction of the respondent's property put the issue of liability beyond challenge.



26. It was its contention that no evidence whatsoever was led by the Plaintiff or the 2<sup>nd</sup> Defendant that it participated in the demolition and destruction of its own building and added that it was only a victim of circumstances that occasioned loss and damage upon the Plaintiff's machinery and equipment. It urged the court to find the 2<sup>nd</sup> Defendant solely liable for the demolition of the development on the subject property. It was categorical that the particulars of negligence, carelessness and recklessness attributed on its part on the Plaintiff had been rebutted.
27. It was categorical that there had been an express approval of the project and that the construction was ongoing even at the time of the demolition and that there had been intermitted stoppages that resulted in the institution of Kisumu ELC No 23 of 2018 between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant wherein the court delivered its Ruling on 26<sup>th</sup> July 2019 and held that it was highly probable that the demolition was being conducted and or directed by the Defendants. It argued that the said Ruling and orders emanating therefrom were never appealed against and hence the finding of the court was still valid. It added that the said order demonstrated that the 2<sup>nd</sup> Defendant's allegations that the 1<sup>st</sup> Defendant had breached the terms/conditions set out in the letter of approval dated 13<sup>th</sup> January 2017 was unfounded and which also showed that the demolition was not justified.
28. It further submitted that Dorcas Ombara and Mr Orimba were 2<sup>nd</sup> Defendant's employees that were at the scene of the demolition yet the 2<sup>nd</sup> Defendant could not account for their whereabouts and could neither confirm and or deny that they were at the scene of the demolition during the demolition
29. On its part, the 2<sup>nd</sup> Defendant submitted that the Plaintiff had failed to prove privity of contract between it and the 2<sup>nd</sup> Defendant. It pointed out that the videos shown by the Plaintiff showed that there was an image of either Mr Orimba or Mrs Doris Ombara who were alleged to be at the scene. It argued that it was in evidence that when it has to carry out a demolition the same is done after notice of the affected person or entity and occurs during the day and not at night. It added that it did not owe the Plaintiff any duty of care to its property when it is not the one carrying out the demolition.
30. Notably, it was not in dispute that the 2<sup>nd</sup> Defendant duly approved the development at the subject property vide its letter dated 13<sup>th</sup> January 2017. A fact that was admitted by DW 2. Further, the letter dated 23<sup>rd</sup> April 2018 by the 2<sup>nd</sup> Defendant was authored and signed by Dorcas Ombara, the City Manager of the 2<sup>nd</sup> Defendant. DW 2 confirmed knowing Dorcas Ombara as an employee of the 2<sup>nd</sup> Defendant and that the said letter was indeed written by her. The said letter directed the 1<sup>st</sup> Defendant to pull down the development so far executed and revert the land to its initial state. That was to be done within forty eight (48) hours failure to which the 2<sup>nd</sup> Defendant would on its own demolish the same.
31. Having said so, this court noted that DW 2 in his defence, did not deny the fact that the demolition took place and the allegation that it was done by the 2<sup>nd</sup> Defendant, however, he was not aware whether or not the 2<sup>nd</sup> Defendant carried out such a demolition in the year 2018. It was this court's considered view that it was possible that it was true he was not aware of the same since he testified that he began working with the 2<sup>nd</sup> Defendant in the year 2020 while the demolition took place in 2018.
32. Though DW 2 testified that in case of breach of any condition in the approval letter, the 2<sup>nd</sup> Defendant was entitled to demolish a building, he had produced no documentary evidence to prove that the 1<sup>st</sup> Defendant was in breach of any condition of the approval letter.
33. Going further, this court was also guided by the decision in Kisumu ELC No 23 of 2018 as submitted by the Plaintiff and the 1<sup>st</sup> Defendant. Being a special court tasked with the mandate of hearing and determining disputes on environment and land, its holding that the 1<sup>st</sup> Defendant had not encroached on a road reserve was therefore binding to this court and must inform its decision unless the same was



to be overturned by a higher court. Notably, the 2<sup>nd</sup> Defendant had not appealed against the said court's orders as there was nothing in evidence to prove otherwise.

34. On the other hand, a reading of the trial proceedings showed that there was no evidence adduced to show that the demolition was carried out by the 1<sup>st</sup> Defendant. All the evidence on liability pointed at the 2<sup>nd</sup> Defendant and it was vicariously liable for the action of its Enforcement officers more so because a decision was arrived at by a court of competent jurisdiction that the Plaintiff had not encroached on the road reserve.

## II. Loss And Damages

35. Notably, the Plaintiff set out the particulars of loss and damage in its Plaintiff.
36. PW 1 in his testimony, he produced two(2) bundles of documents and made reference to several documents in his bundle of documents to show that the machinery had been acquired and were on site at the time of demolition, he further referred to several invoices, statements, bank accounts statements, copies of cheques to confirm payments, several Electronic Register Receipts (ETR) as samples, financial statements in answer to the profits made in 2018, agreements for residential premises, evidence of payment of rent, the occurrence book number given at Kisumu Central Police Station of the loss. He testified that what was reported at the police was only an estimate of the loss.
37. On submissions, the Plaintiff contended that its claim was in the nature of special damages and that it had explained each of the tables, the particulars of losses and damage in witness statement and further witness statement by PW 1 and argued that it had not only specifically pleaded the special damages but had also strictly proved the same as was held in the case of *Mwai vs Kenya Tourist Development Corporation* [1983]KLR 358. It added that it had set out the particulars of negligence, carelessness and recklessness against both the Defendants but the they both shifted liability/blame against each other in that, whereas the 1<sup>st</sup> Defendant blamed the 2<sup>nd</sup> Defendant for carrying out the demolition of the development of the subject property the 2<sup>nd</sup> Defendant pleaded that if there was any loss by the Plaintiff the same was due to the breaches by the 1<sup>st</sup> Defendant on the terms of the approval granted by the City of Kisumu.
38. It added that the 2<sup>nd</sup> Defendant admitted that the 1<sup>st</sup> Defendant's initial project was for the construction of thirty (32) residential units and two (2) penthouses on the subject property and that after the demolition on 29<sup>th</sup> April 2018 and on 30<sup>th</sup> and 1<sup>st</sup> of May 2018 the project was downscaled to eight (8) residential units. It was its contention that the value of the project and the returns of profits were reduced.
39. It was emphatic that it had proven its case to the required standard and neither of the Defendants had challenged its evidence and that its factual evidence stood unscathed. It added that the 2<sup>nd</sup> Defendant only attacked its testimony because of the fact that only a few of the receipts for purchase of the equipment/machinery and apparatus or tools had corresponding copies of the Electronic Tax Register (ETR) receipts. It pointed that it however explained that third parties, the suppliers, issued the invoices and receipts that it had lost his equipment at the hands of the Defendants and it had suffered special damages by virtue of loss. In this regard, it placed reliance on the case of *Nkuene Dairy Farmers Co-op Society Ltd & Another vs Ngacha Ndeiya* [2010]eKLR where it was held that special damages in a material damage claim need not be shown to have actually been incurred, the claimant is only required to show the extent of the damage and what it would cost to restore the damage item to as near as possible the condition it was in before the damages complained of.



40. It was its case that the documents it produced to show that it had the machinery/equipment, apparatus and or tools that were stolen/damaged were sufficient to proof of his case. In this respect, it relied on the case of *Samuel Kariuki Nyangiti vs Jobaan Distelberger* [2017]eKLR where the court held that the fact that damages are difficult to estimate and cannot be ascertained with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages.
41. It further cited a passage at page 328 paragraph 863 of *Halsbury's Laws of England-Fourth Edition* where the author wrote on loss of use of profit-earning chattel as follows:-
- “The measure is the value of the Chattel to the owner as going concern at the time and place of the loss so that he might be in a position to purchase a replacement.”
42. It was emphatic that it had discharged the burden of proof to the required standards on a balance of probabilities and urged the court to allow its claim and enter judgement against the Defendants jointly and severally for Kshs 246,698,498/=, costs and interest as prayed.
43. On its part, the 1<sup>st</sup> Defendant submitted that from the pleadings it was evident that the development on the subject property was damaged due to the actions of the 2<sup>nd</sup> Defendant which undertook the demolition using an excavator which at the material time was under the command and control of the 2<sup>nd</sup> Defendant through its officers accompanied by the Kenya Police. It added that both PW 1 and DW 1 testified that there was looting and/or loss due to theft and damage of machinery and equipment as direct consequence of the 2<sup>nd</sup> Defendant's aforesaid actions and that the looters took advantage of the stripped partially demolished building to take away machinery, equipment and documents.
44. It submitted that the Plaintiff's evidence as to the extent of damage in respect of damaged and/or stolen machinery and equipment and the qualified damages was not challenged at all by the 2<sup>nd</sup> Defendant. It asserted that the law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved as was held in the case of *Capital Fish Kenya Limited vs Kenya Power & Lighting Limited* [2016]eKLR. It was emphatic that the Plaintiff tendered sufficient proof of loss required in relation to special damages as a reasonable man would have contemplated and that that sufficed in place of physical and/or documentary evidence.
45. It invoked Section 27 of the *Civil Procedure Act* and contended that costs follow the event and that a successful party should not be deprived of costs save for good reasons. In this respect, it relied on the case of *Morgan Air Cargo Limited vs Everest Enterprises Limited* [2014]eKLR where the court held that the exercise of the discretion to award costs depends on the circumstances of each case and that the factors to consider in determining the issue of costs include; the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant t Article 159(2)(c) of the *Constitution*.
46. It was its contention that in the circumstances of this case, the 2<sup>nd</sup> Defendant contributed to the filing of the suit hence should bear the costs arising from the suit. It urged the court to hold the 2<sup>nd</sup> Defendant solely liable for the loss and damage claimed by the Plaintiff and dismiss the suit against it,
47. On its part, the 2<sup>nd</sup> Defendant submitted that the Plaintiff had claimed liquidated claim of Kshs 246,689,498/= and which it was required to specifically plead and prove each and every claim as pleaded. In this regard, it placed reliance on the case of *Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya Ltd* [2015]eKLR where it was held that a liquidated claim is laid by specifically pleading



it with particular then specifically proving it and the case of Nicholas Angwenyi Siro T/A Riverside Continental Resort vs Finlay Kirui & Another [2019]eKLR where it was held that special damages must be pleaded and proved.

48. It contended that the Plaintiff produced various invoices in its list of exhibits invoices or proforma and statements from third parties that it claimed did not meet the threshold for proof of special damage claim. It invoked Section 37 of the Evidence Act and cited the cases of Jamal Mohamed Bandira vs Owners of Motor Vessel Naisibu [2020]eKLR and Great Lakes Transport Co Ltd (U) Ltd vs KRA [2019]eKLR where the common thread was that an invoice or a proforma invoice was not evidence of payment of the quoted sum. It contended that a claim based on such invoices must fail for failure of proof.
49. It was categorical that the receipts or evidence of the ownership of the goods, items, machinery and equipment clearly did not support the amount pleaded of Kshs 246,698,498/=. It added that the Plaintiff in his cross-examination confirmed that when he made the report at the police station, he had stated that lost items were worth Kshs 10,028,900/= as evidenced by the Police Abstract. It argued therefore that no explanation was given as to how the figure shot to Kshs 200,000/=. It further asserted that the Tenancy Agreement produced as exhibit showed that it commenced and end long before the alleged contract for works between the Plaintiff and the 1<sup>st</sup> Defendant was executed and argued that therefore it did not have any relevance with the suit herein.
50. It further submitted that though the Plaintiff had claimed for specific liquidated claim in its pleadings, PW 1 in his testimony indicated that the claim was for the entire construction. He stated that the construction was scaled down by the 1<sup>st</sup> Defendant from the initial Kshs 261,750,000/=. It argued that however, there was no evidence of any addendum to the contract that was signed by the Plaintiff and the 1<sup>st</sup> Defendant nor existence of another contract showing the change in the contract sum.
51. It was emphatic that the court could not grant prayers for what was neither pleaded nor prayed for and that a clear reading of the prayers on the pleadings did not include loss of business or any other loss other than for items, machinery and equipment. It added that the financial statements produced by the Plaintiff that showed how much profit the Plaintiff made years before the cause of action herein was therefore not relevant.
52. It was categorical that the Plaintiff had failed to prove its case to the required standard. It added that the items, tools, machinery and equipment ought to have been listed, the value shown against each, proof of ownership or value exhibited would have gone a long way to assist the court in solving this dispute. It contended that the claim must fail for lack of failure to meet the standard of proof in liquidated claim as provided for in law.
53. The Plaintiff had pleaded Kshs 246,698,498/= as special damages. In the Paragraph 9 of the Plaintiff, the same was tabulated as follows:-
  - a. Cost of idle machinery Kshs 104,175,500.00
  - b. Payments to site staff & incidental/ travel Kshs 13,815,024.00 costs
  - c. Credit and financial costs and charges Kshs 8,497,864.00
  - d. Lost/damaged/stolen and or destroyed Kshs 6,044,500.00 items
  - e. Loss of profit due to demolition Kshs 114,165,608.00



Kshs 246,698,495.17

54. The Plaintiff did not call any expert witnesses to support its claim and but produced various documents to support the same. It did not also take the court through the daily rate hire under the head of costs of idle machinery and equipment. It produced several invoices, cash sales and statements but it was not clear if the same related to the idle equipment. If they did, then the daily rate hire would not have been applicable because the machinery was not on hire.
55. If the said invoices and cash sales related to purchase of the equipment, the question that arose in the mind of this court was whether the machinery and equipment were covered by the insurance that was issued by Occidental Insurance Co Limited for Kshs 272,750,000/=. This had been taken out for the period 29<sup>th</sup> March 2017 and 28<sup>th</sup> September 2018 as per the letter dated 30<sup>th</sup> June 2017 to the Plaintiff's bankers, Bank of Baraka. Notably, the demolition occurred on the night of 30<sup>th</sup> April 2018 and 1<sup>st</sup> May 2018 when the cover was in force.
56. Going further, according to the Contractor's All Risks Policy No OLG/CAR/02/72038/09, the General exclusions provided that the insurer would not indemnify the Plaintiff in respect of loss, damage or liability directly or indirectly caused by or arising an act activated by "war invasion, act of foreign enemy, hostilities of war (whether war be declared or not), civil war, rebellion, revolution, insurrection, mutiny, riot, strike, lock-out, civil commotion, military or usurped power, a group of malicious persons or persons acting out on behalf or in connection with any political organisation, conspiracy, confiscation, commandeering, requisition or destruction or damage by an order of government de jure or de facto or by any public authority, nuclear reaction, nuclear rations or radioactive contamination, wilful act or wilful negligence of the insured or of his representatives...the burden of proving that such loss, destruction , damage .. is covered shall be upon the insured."
57. The Plaintiff did not lead any evidence to show that the loss, destruction and damage was not covered under the aforesaid Policy or if it lodged a claim with its insurer and the same was declined. Indeed, this court had to be cautious not to be caught up in aiding unjust enrichment on the part of the Plaintiff herein to the detriment of the 2<sup>nd</sup> Defendant.
58. This court noted from the Plaintiff's letter dated 12<sup>th</sup> January 2017 that the total built up for the building was 102,500 sq ft and the price per sq ft was Kshs 2,500/= giving a total cost of Kshs 256,250,000/=. The total price of the contract was Kshs 261,750,000/= which was inclusive of sixteen (16%) per cent Value Added Tax (VAT).
59. The Interim Certificates No (1) and (2) dated 21<sup>st</sup> June 2017 and 22<sup>nd</sup> September 2019 for Kshs 14,383,764.39 and Kshs 10,831,356/= respectively were paid to the Contractor. These were not anywhere the Plaintiff's claim of Kshs 246,698.498/=.
60. A perusal of the photos that the Plaintiff adduced in evidence showed that the part of the building was still standing and not all units had been constructed. This court was not persuaded that the destruction of the construction could have amounted to almost a similar amount for the entire contract. If it amounted to the said figure, the Plaintiff did not demonstrate the same.
61. This court agreed with the 2<sup>nd</sup> Defendant that the invoices and pro forma invoices did not reach the threshold of proof of proof of a claim for special damages. The Plaintiff did not adduce any evidence to assist the court to conclusively determine what the daily rates were and the exact damage that was occasioned more so as PW 1 averred that the report the Plaintiff made to the Police Station was that it lost items worth Kshs 10,0298,900/=.



62. In addition, it was not clear to this court if Site staff, incidental and travelling expenses related to the night of demolition only. The period of when this claim related to was not well set out and differentiated. It was also not sufficient for the Plaintiff to have adduced credit and finance charges. It ought to have demonstrated how the same was connected to the demolition on that material night.
63. This court also noted that the Plaintiff did not lead evidence to prove its claim for loss of profits. Its claim as drafted was for special damages that had to be specifically pleaded and proven. A claim for loss of profits also had to be specifically pleaded in the Plaint so as not amount to an ambush to the 2<sup>nd</sup> Defendant.
64. Notably, in Paragraph 46 of his Witness Statement, PW 1 stated that after consultations with the Client, it was agreed that the Plaintiff undertakes repair works in the sum of Kshs 7,000,000/= as per the Structural Engineer's Report. Indeed, in its letter dated 4<sup>th</sup> March 2020 to the 1<sup>st</sup> Defendant, the Plaintiff had evaluated the damage that was caused by the illegal demolition and agreed on the payment of Kshs 7,000,000/= inclusive of VAT.
65. It asserted that before it could pay the said sum of Kshs 7,000,000/=, its Bank refused to avail it more funds due to uncertainty of the feasibility of the project whereupon it reduced the original ten (10) floors to two (2) floors.
66. Refusal by the Plaintiff's bank to advance it monies was not a foreseeable consequence of the demolition of its property by the 2<sup>nd</sup> Defendant. However, damages could have been an adequate remedy. Unfortunately, the Plaintiff did not claim for the same. The 2<sup>nd</sup> Defendant could not therefore be penalised for the downscaling of the project. Indeed, the Plaintiff did not demonstrate the mitigation it undertook so as to re-commence the construction once it was got the go ahead to proceed with the construction.
67. This court looked at the photographs that the Plaintiff adduced in evidence and noted that that the structures supporting the building while it was under construction were destroyed. The photos of the Scaffoldings, Steel Shuttering Plates, Steel Column Shuttering, Gum Poles, 3T Double Drum Roller, JS500 Batching Plant, SP 1200 Concrete Pump, Block Making Machine, Mixer Machine Plants and Tools, Plate Compactor, Italy Hoist, Vibrator, Welding Generator and Water Pump referred to as idle equipment appeared intact and not damaged at all.
68. In the absence of any proof to the contrary, this court came to the firm conclusion that Plaintiff had proved its claim against the 2<sup>nd</sup> Defendant to the required standard, which in civil cases is proof on a balance of probability and that the only claim it found to have been proven was the one for the sum Kshs 7,000,000/= being the repair charges that had been agreed upon between the Plaintiff and the 1<sup>st</sup> Defendant herein. On the other hand, this court found and held that the Plaintiff did not prove its case against the 1<sup>st</sup> Defendant herein on a balance of probability.
69. While arriving at the aforesaid figure, it is important to point out that the Plaintiff's case was not set out clearly causing this court to go through its voluminous documents to ascertain the amount it should award the Plaintiff having found that the 2<sup>nd</sup> Defendant was liable for the losses that it incurred. It was a straight forward case but at the same time very tedious because the Plaintiff left the court to comb through the voluminous documents to ascertain which documents proved which claim.
70. Turning to the issue of costs, it is provided in Section 27 of the *Civil Procedure Act* that unless there are exceptional circumstances, costs follow the event. Nothing was presented to this court to persuade it to deviate from that general principal that the 2<sup>nd</sup> Defendant ought to compensate the Plaintiff herein



as the latter was the successful litigant. However, it deviated from the said general principle in respect of costs to the 1<sup>st</sup> Defendant for the reason as the 1<sup>st</sup> Defendant was supporting the Plaintiff's case.

### **Disposition**

71. For the foregoing reason, the upshot of this court's decision was the Plaintiff's suit that was lodged on 15<sup>th</sup> February 2021 was merited and consequently, judgment be and is hereby entered in favour of the Plaintiff herein against the 2<sup>nd</sup> Defendant for:-
  - a. Kshs 7,000,000/= being the value of items that were damaged and/or destroyed during the demolitions of the structure building on /in LR Kisumu Municipality/Block 13/302.
  - b. The said sum of Kshs 7,000,000/= will accrue interest at court's rates from the date of filing suit until payment in full.
  - c. The 2<sup>nd</sup> Defendant will bear the Plaintiff's costs of the suit.
72. On the other hand, the Plaintiff's suit as against the 1<sup>st</sup> Defendant be and is hereby dismissed with no orders as to costs.
73. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF MARCH 2023**

**J. KAMAU**

**JUDGE**

