



**Mbatia v Mburu Joseph Braimoh Ndungu t/a Riggha & Mburu Advocates (Civil Case E048 of 2022) [2023] KEHC 3530 (KLR) (Civ) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3530 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE E048 OF 2022**

**AA VISRAM, J**

**APRIL 28, 2023**

**BETWEEN**

**SERAH NJERI MBATIA ..... PLAINTIFF**

**AND**

**MBURU JOSEPH BRAIMOH NDUNGU T/A RIGGHA & MBURU  
ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The present matter arises out of a claim by the Plaintiff for breach of contract and professional negligence on the part of his former advocate in relation to a sale and purchase of a property.
2. The Plaintiff claimed that her advocate acted in a careless and negligent manner which resulted in a botched sale of her husband's property, causing her loss to the tune of Kshs.27, 902,814/=. She claimed the said sum as special damages, and further claimed general damages; punitive damages; and interest on the above.
3. Interlocutory judgment was entered against the Defendant on 8<sup>th</sup> July, 2022 pursuant to Order 10, Rule 6 of the Civil Procedure Rules. The matter now comes before the court for assessment of damages.
4. At the hearing of the formal proof, the Plaintiff prayed that this court adopt her witness statement as her evidence in chief; and further allow her list and bundle of documents and further list of documents be deemed as duly produced and marked as Exhibits 1-12 and Exhibits 13-15 respectively. The Plaintiff stated that the same had been duly filed.
5. The Plaintiff filed written submission dated 28<sup>th</sup> February, 2023 in support of her claims to be assessed by the court.



Claim for Special Damages in the sum of Kshs. 27,902,814/= and Claim for General Damages in the sum of Kshs. 30,000,000/=

6. The Plaintiff submitted that her claim for special damages had been arrived at on the following basis: “The plaintiff donor of power of attorney Mr. John Kagochi lost rental income of Kshs.480,000/= per month from the date when renovation works were to take place totalling to Kshs.23,500,000/=.
  - a. The donor equally paid a sum of Kshs.291,800/= to the County Government of Nairobi for approval of renovation works.
  - b. For travel to Kenya to attend hearings from the United States of America to Nairobi both the plaintiff and the donor spent a sum of Kshs.212,448/= for the plaintiff and Kshs.461,048/= for the donor and owner of property respectively. Total travel expenses =Kshs. 673,496/=.
  - c. Cost of ELC case No. 222 of 2018 amounting to Kshs.1,719,606/=”
7. The Plaintiff claimed the sum of Kshs.30,000,000/= as general damages for suffering, mental anguish, anxiety and emotional distress, endured by her and her family during the court process. She stated that she had also endured inconvenience occasioned during travel from her place of work in the United States of America, to Kenya to participate in the present court proceedings. Further, she submitted that she was at risk of losing her marriage as a consequence of the present case, and she ought to be compensated for her pain and suffering generally.
8. I have considered the evidence tendered by Plaintiff together with the submission of counsel.
9. Looking at the pleadings, I see that the cause of action against the Defendant arose in both tort and contract. The Plaintiff appears to have drafted her pleadings alleging both breach of contract and negligence on the part of the Defendant.
10. I do not think the Plaintiff can have it both ways, she ought to have elected how to pursue her cause of action against the Defendant from the outset. Reading the Plaintiff, I see the cause of action arose on or around May 2018. By my calculation, this means that as at March 2022 when the suit was filed, the Plaintiff was already time barred from pursuing her claim in tort because the three-year statutory period of limitation had expired pursuant to Section 4(2) of the *Limitation of Actions Act* CAP 22.
11. Accordingly, I will determine the Plaintiff’s cause of action as one founded on Breach of Contract and apply the applicable law relating to contract and not tort.
12. The principles relating to damages for breach of contract were well explained in the decision of the High Court in *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* (2015)eKLR, where the court stated as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR*). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* [1854] 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising



naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”. (emphasis mine)

13. Based on the principles set out above, I will proceed to assess costs of the Plaintiff’s claims and determine the same.
14. As regards the claim for loss of rental income, applying the test in *Hadley Baxendale* (supra), I find that on balance of probability, the evidence is not sufficient to show that the said damages arose either naturally or directly from the breach, or that the same were within the reasonable contemplation of the parties at the time the advocate and the Plaintiff entered into a contract for provision of legal services.
15. I hold the above view because, in the absence of specific evidence to the contrary, which has not been shown, Advocates do not generally know, and nor are they expected to know, the precise; general; or future plans; financial, or otherwise, of their clients intended use of income derived from a transaction after the completion of that transaction. I am not persuaded that loss of expectation based on income derived from future plans which had not yet materialized ought to be awarded.
16. Based on the reasons above, I am of the view that this head of damage is speculative and accordingly fails.
17. The reasoning above also applies to the head of damage relating to sums paid to the County Government for approval works. The same is accordingly dismissed.
18. As regards the head of damage in relation to cost of travel; I do not think that costs of foreign travel may be properly categorized as damages in the legal sense. I am of the view that the Plaintiff chose to file suit against the Defendant whom she knew to be based in Kenya, while she resided abroad. Such costs may be more appropriately categorized as costs arising during the course of litigation rather than damages, and which are ordinarily determined through a separate process by a Taxing Master.
19. Nevertheless, if I am wrong, applying my mind to the test in *Hadley Baxendale*, I find the said ‘damage’ to be too remote. I would think that an individual sued in Kenya, based on a cause of action that arose in Kenya, has a reasonable expectation to believe that any costs of travel costs incurred during litigation, for which either party may be ultimately liable, ought to be limited to costs of travel within the jurisdiction that the cause of action arose.
20. As regards the head of damage relating to the judgment in ELC case No. 222 of 2018, entered against the Plaintiff in the sum of Kshs.1,719,606/=; the Plaintiff has not produced a certified copy of a decree arising out of the said judgment nor has the plaintiff provided any evidence to show that she actually paid this amount pursuant to the terms of the said judgment. Finally, the said judgment (although listed as item No. 10 in the Plaintiff’s list of Documents) was not physically present in the bundle, either in hard copy, or in digital format in the Case Tracking System (CTS). The court was therefore unable to verify, either the amount awarded against the Plaintiff, or if the same was ever paid, and is recoverable by the Plaintiff.



- 21. As regards the claim for general damages; the Plaintiff claimed the sum of Kshs.30,000,000/= as general damages for professional negligence. The Plaintiff did not however provide a single legal authority to justify this figure.
- 22. In any event, the law is that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages.
- 23. In Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR the Court of Appeal had this to say regarding general damages for breach of contract:

“...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 J.A 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.”

- 24. The above principle was affirmed by the decision of the Court of Appeal in Securicor Courier (K) Ltd v Benson David Onyango & another [2008] eKLR. (See also Provincial Insurance Co. EA Ltd v Mordechai Mwangi Nandwa, (KSM Civil Appeal No 179 of 1995.)
- 25. Based on the law as stated above, and because the cause of action in the present matter is based on breach of contract and not tort (for the reasons stated above), the Plaintiff is not entitled to general damages.
- 26. Accordingly, based on the reasons stated above, the upshot is that the plaintiff claims fail in entirety and are dismissed. However, because the defendant did not take part in the suit, I make no award as to costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

..... **for the Plaintiff**  
 ..... **for the Defendant**