



Jemmina Holdings Limited v County Government of Kitui; County Assembly of Kitui (Interested Party) (Civil Suit E004 of 2022) [2023] KEHC 22201 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 22201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL SUIT E004 OF 2022
F WANGARI, J
APRIL 27, 2023**

BETWEEN

JEMMINA HOLDINGS LIMITED PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KITUI DEFENDANT

AND

THE COUNTY ASSEMBLY OF KITUI INTERESTED PARTY

JUDGMENT

1. Through a plaint dated June 14, 2022 and filed in court on even date, the plaintiff for judgement against the defendant for: -
 - a. An order of Specific Performance of the said contract of supply dated June 30, 2020 compelling the defendant to comply with the terms of the agreement and pay the plaintiff for the goods delivered on May 31, 2021.
 - b. Special damages in the sum of Kshs. 23,148,750/= plus 14% interest on the default payment at Kshs. 3,240,825/=;
 - c. General damages for breach of contract;
 - d. Costs of the suit;
 - e. Interests on (a), (b), (c) and (d) above from the date of filing this suit until payment in full;
 - f. Any other remedy this Honourable Court may deem fit to grant in the circumstances.
2. Contemporaneously with the suit was an application of even date which sought for among other orders, a mandatory injunction compelling the defendant to settle the contractual amount of Kshs.



23,148,750/= being the consideration for the goods delivered on 31st May, 2021. An order of specific performance was equally sought. I note that the said application was struck off on July 21, 2022 for being improper and irregular. A request for interlocutory judgement was then filed on July 28, 2022 and the same was endorsed on even date. On August 30, 2022, Counsel for the Plaintiff informed the court that they had not followed the requisite procedure in requesting judgement against the County Government and thus sought for time to regularize the position. On September 19, 2022, an application dated September 15, 2022 was filed. The application primarily sought for leave to file request for interlocutory judgement against the Defendant/Respondent (County Government of Kitui) and the same was allowed on September 20, 2022.

3. The matter proceeded by way of formal proof on January 23, 2023 as the court was satisfied on service of the Defendant. PW1, John Kyalo Muniyithya testified on behalf of the Plaintiff. He adopted his witness statement dated June 14, 2022 as his evidence in chief. He equally produced the documents contained in his list dated June 14, 2022 and filed on even date. The plaintiff's and the defence case was closed and the plaintiff opted to file written submissions.
4. The plaintiff complied by filing detailed submissions together with various authorities in support of its position and prayed that judgement be entered in its favour as prayed.

Analysis and Determination

5. I have considered the pleadings, submissions together with the authorities relied upon by the plaintiff as well as the law and in my respectful view, the following are the issues for determination: -
 - a. Whether the plaintiff made out a case for grant of orders of specific performance;
 - b. Whether the plaintiff specifically pleaded and strictly proved special damages in the sum of Kshs. 23,148,750/=;
 - c. Whether the plaintiff is entitled to general damages for breach of contract;
 - d. What is the order as to costs and interests?
6. On the first issue, the plaintiff's claim is hinged on an offer letter dated June 15, 2020 wherein it was offer a tender by the Defendant for supply, installation and commissioning of equipment for mango juice and tomato paste production both with input capacity of 500kg per batch under Covid – 19 interventions. The quoted amount was Kshs. 23,148,750/=. The offer was accepted vide a letter dated June 19, 2020. Once accepted, a contract for the said works was entered into on June 30, 2020 and subsequently, a purchase order number 464 was issued to the plaintiff. On May 31, 2021, the plaintiff delivered the ordered equipment and a delivery note confirming that the goods received were in good order and condition. An invoice was raised on the same date and a demand for payment issued. To date, the same has never been paid.
7. As earlier observed, though the defendant was properly served, it neither bothered to file a statement of defence nor challenge the evidence put forward by the plaintiff. As such, the plaintiff's evidence remained uncontroverted but even so, it was still under an obligation to prove its case to the required standard. In *Karugi & another v Kabiya & 3 others* [1987] KLR 347, the Court of Appeal held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.
8. On the prayer for specific performance, the plaintiff submitted that it had a valid and enforceable contract with the defendant and that it had fulfilled its obligations under the said contract. In *Gharib*



Suleman Gharib v Abdulrahman Mohamed Agil LLR No 750 (CAK) Civil Appeal No 112 of 1998 the Court held that: - "... The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages..."

9. In *Gurder Singh Birdi & Marinder Singh Gbatora v Abubakar Madhubuti*, Civil Appeal No 165 of 1996, it was held that the underlying principle in granting the equitable relief of specific performance is that, "the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."
10. An order for specific performance is an equitable remedy which, like all equitable remedies, is available at the court's discretion. It is an order that is however rarely granted unless the Plaintiff is able to show that damages would not be an adequate remedy. In the present case, the Plaintiff established through evidence that it performed his part of the bargain by supplying, installing and commissioning equipment for tomato paste production and mango juice production totaling to Kshs. 23,148,750/= and which amount has never been paid to date. The work has already been done and all that remains is payment for the goods and services. The plaintiff seeks orders for specific performance to compel the defendant to comply with the terms of the agreement and pay the plaintiff for the goods delivered on May 31, 2021. My finding is that this court has the power to compel the Defendant to honour its part of the bargain by paying for what it contracted for and received. It is thus my finding that the Plaintiff is entitled to an order of specific performance.
11. On the second issue, the plaintiff has pleaded a sum of Kshs. 23,148,750/= being the contract sum. It is on authorities basic that special damages must not only be specifically pleaded but also strictly proved. In *Provincial Insurance Co. EA Ltd v Mordechai Mwangi Nandwa*, (KSM Civil Appeal No 179 of 1995, it was held thus; "...It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead." A claim for special damages is in the nature of restitution and where proved, it is meant to restore the claimant to the position he would have been save for the action complained of. Having found that the Plaintiff is entitled to an order of specific performance, I have no doubts that the plaintiff pleaded the special damages and proved the same to the required standard. The contract sum was Kshs. 23,148,750/=. The plaintiff delivered the goods it was contracted and installed the same. There is no contrary evidence to suggest otherwise and I thus hold that the Plaintiff proved its claim for special damages to the tune of Kshs. 23,148,750/=.
12. On the third issue, whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. As was held in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company* [2016] eKLR, a party seeking general damages for breach of contract has the cardinal duty to lead evidence to bring the defendant's conduct within the exceptions. In urging this position, the plaintiff asserted that it procured the goods using United States of America Dollars (USD) and because of the delay in payment, the Kenyan Shilling has deteriorated against the USD thus subjecting it to further losses. The plaintiff equally submits that when it was awarded the tender, he obtained a loan from Stanbic Bank for a sum of Kshs. 20,706,605/= and which money was used to procure the equipment. As a result of the delay, it lost an opportunity to purchase a house situated in Karen and the interest rate continues to grow.



13. I note that the plaintiff produced an offer letter from Stanbic Bank dated September 9, 2019 and a sale agreement dated July 13, 2021. The contract between the plaintiff and the defendant was signed on June 30, 2020. It thus follows that the offer letter dated September 9, 2019 has no correlation with the contract between the plaintiff and the defendant. In fact, the title of the said offer letter reads “Home Loan Facility.” I thus do not see how the failure to pay by the defendant affected re-payment of that facility if it was ever extended. Indeed, it cannot be said that monies from the said facility were utilized to purchase the equipment as submitted by the plaintiff. I am not convinced that the loan from Stanbic Bank was taken for the purposes of performing the contract and this cannot be a basis to award general damages for breach of contract. At the time the plaintiff received the offer from the bank, there was no valid contract between the plaintiff and the defendant.
14. However, the sale agreement dated July 13, 2021 falls squarely within the period the payment ought to have been made and I have no hesitation in holding on a balance of probability that the delay in making the payments for the equipment supplied led to the plaintiff’s director losing out on the house. The defendant’s conduct in not making payments immediately as agreed is deemed to be insolent and I so hold. In *Jamuto Enterprises Ltd v County Government of Meru* [2021] eKLR, the court while considering an almost similar situation as obtains herein held as follows: - “...Having found the delay to have been unconscionable, oppressive and injurious, it becomes axiomatic that the defendant breached the contract with the plaintiff as far as payment was concerned...I take the reality that there is always cost of money and that when one keeps away another’s money unfairly, the innocent party suffers. That is when the remedy for damages for breach of contract sets in to reconstitute the offended to the position he would have been in if not for the breach...” Considering the facts of the case, an award of that general damages for breach of contract has been made out. I do assess damages at a sum of Kshs. 2,000,000/=. In arriving at that sum, I have given regard to the fact that had the money been available to the plaintiff, he would have used it to better his business and was otherwise unfairly kept from it.
15. On interest, it is trite that special damages attract interest from the date of filing suit while general damages attract interest from the date of judgement. I see no reason to depart from what the law has settled and I so hold that special damages shall attract interest at court rates from the date of filing suit while general damages shall attract interest from the date of judgement.
16. Finally, on costs, the same follows the event and the plaintiff being the successful party is entitled to its costs.
17. Following the foregoing discourse, the upshot is that the following orders do hereby issue: -
 - a. Judgement is hereby entered in favour of the plaintiff against the defendant as follows; -
 - i. An order of Specific Performance of the contract of supply dated June 30, 2020 compelling the defendant to comply with the terms of the agreement and pay the plaintiff for the goods delivered on May 31, 2021;
 - ii. Special damages in the sum of Kshs. 23,148,750/= plus interests at court rates from the date of filing suit till payment in full;
 - iii. General damages for breach of contract assessed at Kshs. 2,000,000/= and the same shall attract interest from the date of this judgement until payment in full;
 - iv. Costs of the suit to the plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF APRIL, 2023.



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F. WANGARI

JUDGE

In the presence of;

Ms. Mango Advocate h/b for Mr. Katisya Advocate for the Plaintiff

N/A for the Respondent

N/A for the Interested Party

Guyo, Court Assistant

