Peterson Mitau t/a Mombasa Fresh Water Supply Company v Kenya Ports Authority (Civil Case 75 of 2018) [2023] KEHC 18189 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18189 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 75 OF 2018

OA SEWE, J

MAY 30, 2023

BETWEEN

PETERSON MITAU T/A MOMBASA FRESH WATER SUPPLY COMPANY .... PLAINTIFF

AND

KENYA PORTS AUTHORITY .... DEFENDANT

JUDGMENT

1. The plaintiff, Peterson Mitau, is a businessman engaged in the supply of fresh water to his customers within Mombasa County. He trades as Mombasa Fresh Water Supply Company. In that capacity he was engaged by the defendant, Kenya Ports Authority, to supply fresh water vide a contract dated 27th September 2016. It was the plaintiff's contention that between the years 2017 and 2018, he supplied the defendant with fresh water at its request to the tune of Kshs. 37,504,830; and that the defendant only paid him Kshs. 2,300,000/=, leaving a balance of Kshs. 35,178,030/=.

2. Accordingly, the plaintiff filed this suit vide his Plaint dated 14th September 2018, seeking the following reliefs:

   (a) Special damages of Kshs. 35,178,030/= being the outstanding debt plus interest at prevailing commercial rates;

   (b) Damages for breach of contract;

   (c) Interest on [a] and [b] above at court rates (12%) per annum or such other rate as the Court shall determine from the date of filing the suit to the date of payment in full of the sum claimed;

   (d) Costs of the suit;

   (e) Any other relief that the Court may deem fit to grant.

3. The Plaint was amended on 17th September 2018 to indicate, at paragraph 7 of the Amended Plaint, that interest be paid at the commercial rate of 18% on a reducing balance. The prayer for special damages was similarly amended to read "The liquidated sum of Kshs. 35,178,030/=."

PARA 4.

In response to the Plaint, the defendant filed its Defence and Counterclaim on 17th October 2018 contending that the alleged outstanding invoices resulted upon discovery that the plaintiff alongside other water suppliers perpetrated fraudulent activities, the particulars whereof were supplied at paragraph 7 of the Defence and Counterclaim to be:

SUBPARA (a)

Fictitious and fraudulent delivery notes including alterations;

SUBPARA (b)

Deliveries of water in excess of available capacity;

SUBPARA (c)

Inflated bowser capacities;

SUBPARA (e)

Fictitious truck trips.

5. Accordingly, the defendant put in a Counterclaim averring that the plaintiff is indebted to it in the total sum of Kshs. 8,164,800/= made up as follows:

   (a) A sum of Kshs. 7,322,000/= paid for a total of 10,460MT of water delivered using duplicate and/or triplicate delivery notes;

   (b) A sum of Kshs. 151,200/= for payment made in respect of 216MT excess tonnage of water where the plaintiff claimed delivery of 20MT water which is in excess of the normal water bowser capacity of 14MT;

   (c) A sum of Kshs. 28,000/= for water allegedly delivered without indicating the quantity of water delivered in the delivery note as per procedure;

   (d) A sum of Kshs. 126,000/= paid for delivery of water without indicating the truck numbers and amount of water being delivered in the delivery notes;

   (e) A sum of Kshs. 537,600/= lost in respect of fictitious truck trips allegedly done by truck number KCK 068 at Kshs. 182,000/=, EX35 KA04 at Kshs. 327,600 and KBA 660B at Kshs. 28,000/=.

6. On account of the foregoing, the defendant's prayers were that:

   (a) The plaintiff's suit be dismissed with costs and judgment be entered on the Counterclaim as prayed;

   (b) That judgment be entered for it for the said sum of Kshs. 8,164,800/= as pleaded in the Counterclaim;

   (c) Interest on [b] at court rates from the date of filing of the Defence and Counterclaim until payment in full;

   (d) Costs of the Counterclaim;

(e) Any other relief the Court deems fit to grant.

7. The record of the court shows that, because of the sheer number of documents involved, an order was made by Hon. Lady Justice Dorah Chepkwony on the 26th November 2019 that a joint audit exercise be undertaken by the parties; and because the parties were thereafter unable to agree on the appointment of an auditor, the Court further issued an order directing the Institute of Certified Public Accountants of Kenya (ICPAK) to appoint an auditor for the exercise. ICPAK then appointed the firm of M/s Ambale Ogotand Company, Certified Public Accountants and Auditors, to conduct the joint audit. The record further shows that the audit exercise was indeed carried out by the firm of M/s Ambale Ogot and Company and a report filed; which report shows that the Auditors relied on documents supplied by the parties as shown hereunder:

    (a) The plaintiff supplied the documents produced herein and marked Volumes A and B, filed on 8th October 2021;

    (b) The defendant supplied the documents marked as Volumes 1 to 8 filed on 4th March 2019, 21st June 2021, 29th June 2021, 8th November 2021 and 16th June 2022.

8. At the hearing, the plaintiff testified as PW1 and adopted his witness statement dated 14th September 2018 in which he stated that, vide a contract letter dated 27th September 2016, the defendant contracted him to supply fresh water. He therefore testified that, pursuant to that contract, he supplied the defendant with fresh water between the years 2017 and 2018 to the tune of Kshs. 37,504,830/=; and that only Kshs. 2,300,000/= was paid by the defendant, leaving an outstanding sum of Kshs. 35,178,030/=; which the defendant has neglected or refused to pay. He made reference to the joint audit report and the List and Bundle of Documents filed by him on 8th October 2021, comprising of delivery notes, invoices and dispatch notes. They were accordingly produced and marked the Plaintiff's Exhibit A and B. The plaintiff also produced the letter of contract as the Plaintiff's Exhibit C in this matter.

9. The plaintiff further testified that, in the course of time, they would be called by the responsible officers of the defendant and instructed to supply water without Local Purchase Orders (LPOs) on the understanding that the same would be issued afterwards. His evidence was that where that was the case, they would not be paid until the LPOs were issued, thereby delaying their payment needlessly. He therefore told the Court that, as water suppliers, they wrote a joint letter of complaint dated 28th August 2018 to the Managing Director of the defendant. He produced a copy of the letter herein and it was marked the Plaintiff's Exhibit D. He also produced supplementary documents, all marked the Plaintiff's Exhibit E, to demonstrate that he supplied water for which he was not fully paid by the defendant.

10. The plaintiff denied any fraudulent conduct as alleged by the defendant or at all. He explained that, if there was any duplication of delivery note numbers then it was due to an error in printing; as there was no single delivery that was claimed for twice by him. He also testified that no single motor vehicle delivered less tonnage because the engineers of the defendant ensured that the suppliers' motor vehicles would be weighed prior to and after delivery. He concluded his evidence by asserting that he has never been charged with fraud in connection with his transactions with the defendant.

11. The plaintiff also called CPA Fredrick Ambale Mugwanga of Ambale Ogot and Company. He testified as PW2 and confirmed that, at the order of the Court, he conducted an audit in connection with this dispute. He accordingly prepared his report dated 24th March 2021, which was produced the Plaintiff's Exhibit 5. In his own analysis, the sum due to the plaintiff for water delivered is Kshs. 28,833,230/= only.

12. On behalf of the defendant, evidence was called from Fredrick Otieno Oyugi (DW1), the General Manager, Internal Audit & Risk Management. He conceded that the plaintiff was one of the defendant's service providers in that he was contracted to supply the defendant with fresh water along with other suppliers. DW1 testified that, sometime in 2018, the management of the defendant noted that the budget for water had been overspent by over twice the budgeted amount, from Kshs. 60,000,000/= to Kshs. 120,000,000/=, and yet there was still an outstanding claim for Kshs. 60,000,000/=. He was instructed to conduct an audit and prepare a report; which he did. In connection with the plaintiff, he noted that he had already been paid for water that was delivered; and that the outstanding invoices were flagged in connection with fictitious deliveries, as some of the delivery notes relied on were altered without any counter-signature.

13. DW1 further stated that the audit also revealed that some of the deliveries claimed for by the plaintiff were in excess of the capacity of either the storage tank or the truck in question; such that in total the defendant lost Kshs. 35,000,000/= out of which an amount of Kshs. 7,053,200/= was attributable to the plaintiff. He added that, as at June 2018, the plaintiff had been paid Kshs. 23,000,000/=. He therefore informed the Court that he prepared three audit reports in respect of the allegations of fraud; and that the matter was ultimately referred to the Ethics and Anti-Corruption Commission (EACC) for investigations. He produced his report pertaining to the plaintiff's firm as Defence Exhibit 1.DW1 likewise produced the defendant's Bundle of Documents as the Defendants Exhibit 2, 3 and 4 herein. He prayed for the dismissal of the plaintiff's suit with costs, and for the defendant's Counterclaim to be allowed with costs.

14. In his written submissions filed on 4th August 2022, Mr. Mutugi for the plaintiff proposed the following issues for determination:

    (a) Whether there was a contractual relationship between the parties;

    (b) Whether the plaintiff has proved his claim against the defendant on a balance of probabilities and thus entitled to the prayers sought;

    (c) Whether the defendant has proved the Counterclaim.

15. On whether the plaintiff had a contractual relationship with the defendant, counsel made reference to the letter of contract for the supply of fresh water, dated 27th September 2016, as extended by the Notice of Extension dated 1st April 2019 and the numerous delivery notes exhibited by both sides. He cited **Latimer Ruguaru Gacanja (Trading as Zoea Transporter Limited) v Trustees of the Lutheran World Federation** [2021] eKLR for the proposition that delivery notes are, in themselves, sufficient proof of delivery of goods.

16. On whether the plaintiff has proved his claim against the defendant, Mr. Mutugi placed reliance on the outcome of the joint audit prepared by M/s Ambale Ogot and Company; by which it was ascertained that the defendant is indebted to the plaintiff in the sum of Kshs. 28,833,230/= for water supplied. He relied on Surya Holdings Limited & 2 Others v CFC Stanbic Bank Limited [2018] eKLR in urging the Court to find in favour of the plaintiff in connection with the Kshs. 35,175,030/= prayed for by the plaintiff.

17. On damages, Mr. Mutugi relied on the Latimer Case (supra) to support his submission that the plaintiff is entitled to damages for breach of contract. He also asked for interest at prevailing commercial rates in line with Section 26(1) of the *Civil Procedure Act* as well as costs of the suit.

18. In respect of the defendant's Counterclaim, Mr. Mutugi took the view that the defendant utterly failed to prove its allegations as required by Section 107 of the *Evidence Act*, Chapter 80 of the Laws of

Kenya; granted explanation offered by the plaintiff for the apparent duplication of certain numbers on the delivery notes. He also relied on the evidence of PW2 to the effect that the contents of the allegedly duplicated delivery notes were different, indicating that they were used on different occasions for entirely different transactions. He also discounted the other allegations by the defendant as to the capacity of the vehicles and the distance covered by the trucks and urged the Court to find that no concrete evidence was adduced by the defendant to support their surmises of fraud.

19. On his part, learned counsel for the defendant, Mr. Wafula, proposed the following issues for determination, in his written submissions dated 23rd August 2022:

    (a) Whether the plaintiff's claim for special damages amounting to Kshs. 35,178,030/= was properly pleaded, and if not, what are the consequences of failing to properly plead the same?

    (b) Whether the claim for Kshs. 35,178,030/= was proved to the standard required in law;

    (c) Whether the defendant established fraud on the part of the plaintiff in respect of the contents of the delivery notes and what is the effect of established fraud on the plaintiff's claim?

    (d) What is the effect of the Gazette Notice No. 13100 dated 3rd December 2021 recommending the prosecution of the plaintiff in relation to the transaction the subject of these proceedings?

    (e) Whether the defendant is entitled to the sum of Kshs. 8,164,800/= as pleaded in the Counterclaim.

20 On whether the plaintiff's claim for Kshs. 35,178,030/= was properly pleaded, Mr. Wafula made reference to paragraphs 5 and 6 of the plaintiff's Amended Plaint in which he claimed a compounded sum, yet in Siree Limited v Lake Turkana El Molo Lodges [2002] 2 EA 521, the Court of Appeal held that where damages can be calculated to a cent, they cease to be general damages and must be claimed as special damages. In his submission, the plaintiff ought to have specifically pleaded each item forming that total sum of Kshs. 35,178,030/= so as to afford the defendant an opportunity to properly defend itself in the exercise of its rights under Article 50 of *the Constitution*. Mr. Wafula made reference to a good number of precedents to support his point of view, including the decision of the Court of Appeal in Daniel Kosgei Ngelechei v Catholic Diocese Registered Trustees of Eldoret & Another [2016] eKLR.

21. On the authority of Independent Electoral & Boundaries Commission & Another v Steven Mutinda Mule & 3 Others [2014] eKLR, and Raila Amolo Odinga & Another v Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR, among other authorities, Mr. Wafula adverted to the principle that parties are bound by their pleadings; and that at the hearing of the case, the parties are only allowed to deal with issues raised in their pleadings. He therefore submitted that, since the plaintiff did not furnish particulars of special damages, the Court ought not to award any.

22. In the same vein, Mr. Wafula pointed out that, even assuming that the plaintiff's prayer for special damages was properly pleaded, he was expected to specifically prove the same, which in his view was not done. Counsel relied on Kampala City v Nakaye [1972] EA 446, Hahn v Singh [1985] eKLR, Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR and Stephen Wasike Wakhu & Another v Security Express Limited [2006] eKLR, to support his submission that the delivery notes relied on by the plaintiff fell short of proving that he delivered fresh water to the defendant as alleged, but rather were simply "...a pile of unreliable pieces of paper that do not amount to evidence to prove delivery of water to the Defendant..."

23 Mr. Wafula made specific reference to certain delivery notes at paragraph 40 to 44 of his written submissions and urged the Court to find that they were not only defective in form, but that it was also

inconceivable that delivery could be made within the timelines indicated in the invoices. He therefore urged the Court to find that the delivery notes are all forgeries and therefore unreliable. Accordingly, counsel relied on Standard Chartered Bank Ltd v Intercom Services Ltd & 4 Others and Scolt v Brown Doering Menab & Co. (3) (892) 2 QB 724 for the principle that no court will lend its aid to a man who founds his cause of action on an immoral or illegal act.

24. Counsel postulated that, although the plaintiff acknowledged payment in the sum of Kshs. 2,300,000/= only, the amount could be higher, given that the claim is not specific as to whether the amount was for the calendar years 2017 and 2018 or the financial year, which is reckoned from July to June of the following year. He therefore postulated that it is likely that the defendant paid not just Kshs. 2,300,000/= but Kshs. 23, 632,000/= as shown in the Remittance Advices exhibited before the Court. He consequently faulted the conclusion reached by the auditor that the plaintiff is owed Kshs. 28,833,230/= by the defendant.

25. With regard to the defendant's Counterclaim, Mr. Wafula submitted that credible evidence was presented by the defendant, including the Remittance Advices exhibited as Defence Exhibit 8 and Gazette Notice No. 13100 dated 3rd December 2021 to confirm that the plaintiff received payment for goods not supplied; and therefore that the sums set out in the Counterclaim ought to be refunded. He accordingly urged that the plaintiff's suit be dismissed with costs, and that the defendant's Counterclaim be allowed with costs.

26. I have carefully considered the pleadings filed by the parties, the evidence adduced in support thereof as well as the written submissions filed by learned counsel. There appears to be no dispute that the plaintiff was one of the defendant's service providers in that he was duly contracted to supply the defendant with fresh water, along with other suppliers. Although the plaintiff was not specific as to when his services were procured, he relied on a letter dated 27th September 2016 addressed to **M/s Mombasa Fresh Water Supplies Co. Ltd**. The letter was written with reference to the initial contract and states as follows in part:

...

"Re: Contract for Supply of Fresh Water To Kenya Ports Authority

= =

This is in reference to the above captioned contract between yourselves and the Authority.

This is to notify you that the contract has been extended for a period of six (6) months from 1st October, 2016 at the same contract prices and terms and conditions.

Please acknowledge receipt of this letter of notification signifying your acceptance within (7) days from the date of this letter.

You may contact the officer whose particulars appear below on the subject matter of this letter of notification of award..."

27. The defendant was in a position to avail the primary documents, including extensions if any, from March 2017 after the lapse of the 6 months' period mentioned in the above letter. There being no evidence to the contrary, I am satisfied that the contract was valid as of 18th August 2018 when the plaintiff, along with other fresh water suppliers wrote the letter of complaint to the defendant's Managing Director in connection with their pending bills.

28. In addition the plaintiff relied on other documents sent to the defendant in the form of delivery notes, invoices and remittance advice issued to the defendant and which bear the names of the defendant as well as stamp impressions of the defendant indicating that the documents were received by the

defendant. A good number of the delivery notes and invoices form part of the defendant's own Bundle of Documents filed on 4th March 2019, and Volume 6. In the Plaintiff's Bundle of Documents dated and filed on 4th March 2019, there is an Audit Report prepared by DW1 in which the plaintiff is acknowledged as one of the defendant's contracted water vendors. At page 18 of the Plaintiff's Exhibit dated 4th March 2019 is an Appendix prepared by DW1 showing various payments totaling Kshs. 23,632,000/= made to the plaintiff between 30th January 2017 and 7th March 2018.

29. It is therefore not in dispute that the plaintiff was one of the defendant's contracted water vendors; and that he had indeed supplied fresh water to the defendant during the period in question, namely the years 2017 and 2018. While the plaintiff contends that the defendant paid only Kshs. 2,300,000/= leaving a balance of Kshs. 35,178,030/=, the defendant was of the contention that the plaintiff had been overpaid or wrongly paid by some Kshs. 8,164,800/=, which includes fictitious/fraudulent payments made at the instance of the plaintiff. In the premises, the issues for determination are:

(a) Whether the plaintiff's claim for Kshs. 35,178,030/= has been proved to the standard required in law;

(b) Whether the defendant is entitled to the refund of a sum of Kshs. 8,164,800/= as pleaded in the Counterclaim.

SUBDIVISION - a On whether the plaintiff's claim for Kshs. 35,178,030/= has been proved to the requisite standard:

30. First and foremost, a technical point was raised by Mr. Wafula to the effect that this aspect to the plaintiff's claim, being a claim for special damages, was not properly pleaded in so far as it was not particularized. Mr. Wafula referred to several authorities to underscore the principle that special damages must not only be specifically pleaded but also proved. For instance, counsel relied on Siree Limited v Lake Turkana El Molo Lodges (supra) in which it was held that:

> " Where damages can be calculated to a cent, they cease to be damages and must be claimed as special damages"

31. The objection appears to have been premised on the claim as pleaded in the initial plaint dated 14th September 2018, in which the plaintiff prayed for "Special Damages of Kshs. 35,178,030/= being the outstanding debt as claimed hereinabove plus interest at prevailing commercial rates. The fact of the matter, however, is that the Plaint was thereafter amended to read "The liquidated amount of Kshs. 35,178,030/=. Granted the nature of the plaintiff's claim, which is hinged on a contractual relationship, I find nothing wrong with the claim as amended.

32. As to whether the plaintiff has proved his claim for the aforesaid sum of Kshs. 35,178,030/= on a balance of probabilities, Section 107 of the *Evidence Act* is explicit that:

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

33. Likewise, Section 108 of the *Evidence Act* provides that:

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

34. As has been pointed out herein above, the plaintiff relied on two big Bundles of Documents filed on 8th October 2021, initially marked as the **VolumeA and Volume B**. The documents comprise of delivery notes and invoices to back up the plaintiff's claim. PW1 explained that they used to invoice the defendant after every two weeks by means of dispatch notes to which they would attach the delivery notes as well as the invoices. He added that the invoices would be verified by the same officer who used to give them the LPOs. On the basis of those documents, as well as the Bundles of Documents marked Volume C, D and E, the plaintiff urged the Court to find in his favour.

35. The plaintiff's evidence was however challenged in material respects by the defendant. The pertinent points raised by counsel for the defendant in connection with the invoices, with a view of demonstrating that the plaintiff's claim is fraudulent, are as hereunder:

(a) In respect of Motor Vehicle Registration Nos. KAK 531P, the invoices reveal that deliveries were made at particular times of the day as follows:

Date	Delivery Note No.	Page	1st Trip	2nd Trip
1.9.2017	1458/1460	7 and 9	8.00 a.m.	11.40 a.m.
4.9.2017	1180/1482	11 and 13	8.00 a.m.	11.40 a.m.
5.9.2017	1490/1492	15 and 17	8.00 a.m.	11.40 a.m.
6.9.2017	1501/1503	19 and 21	8.00 a.m.	11.40 a.m.
7.9,2017	1522/1524	23 and 25	8.00 a.m.	11.40
8.9.2017	1526/1528	27 and 29	8.00 a.m.	11.40

(b) For Motor Vehicle Registration No. KBN 472C, the relevant invoices show that deliveries were made as follows:

Date	Delivery Note No.	Page	1st Trip	2nd Trip
1.9.2017	1459/1461	8 and 10	8.10 a.m.	11.00 a.m.
4.9.2017	1481/1483	12 and 14	8.10 a.m.	11.00 a.m.
5.9.2017	1491/1493	16 and 18	8.10 a.m.	11.00 a.m.
6.9.2017	1502/1504	20 and 22	8.10 a.m.	11.00 a.m.
7.9.2017	1523/1525	24 and 26	8.10 a.m.	11.00 a.m.
8.9.2017	1527/1529	28 and 30	8.10 a.m.	11.00 a.m.

(c) In addition to the foregoing, it is notable that Motor Vehicle Registration No. KAC is purported to have delivered water at KPA New Terminal on 2nd October 2017 via delivery notes numbers 2490 and 2251 both dated 2nd October 2017, yet the delivery time was only 10 minutes apart, at10 a.m. and 10.10 a.m. between the first and second trips.

(d) In the case of delivery notes numbers 11624 and 11631, motor vehicle Registration No. KBR 128A was alleged to have delivered fresh water to the defendant on 14th July 2017 at 12.30 p.m. The same motor vehicle was also claimed to have made a second delivery on the same date at 12.35 p.m., a difference of only 5 minutes. Similarly, Track No. EX35 KA 04 is said to have delivered 18 tons of water vide delivery notes numbers 2932 and 2933 at 12.55 p.m. and 13.00 p.m. respectively on 16th January 2018; indicating a time difference of 5 minutes.

36 There is therefore considerable merit in the submission by Mr. Wafula that the foregoing instances are indeed impracticable and lend credence to the defendant's allegations of fraudulent conduct on the part of the plaintiff. This is particularly so in the light of the evidence that some of the delivery notes bore same serial number; while others, though blank, bore the "received" stamp of the defendant (see page 504 of Volume 4 of the Defendant's Bundle). Moreover, the defendant drew the attention of the Court to a report by the Ethics and Anti-Corruption Commission published in the Kenya Gazette as Notice No. 13100 dated 3rd December 2021 to confirm that investigations were carried out into the allegations of fraud surrounding the water supply contracts. The report, filed on 4th January 2022 as Volume 7 of the defendant's Further List and Bundle of Documents, reads as follows in its pertinent part:

> " Further investigations established that some suppliers were paid for goods not delivered...a report was compiled and forwarded to the DPP with recommendation to charge officials of KPA, Mombasa Fresh Water Supply Company... and all their directors..."

37. The Court takes judicial notice of and accepts as credible evidence the contents of the EACC report by dint of Section 85 of the *Evidence Act*, which provides that:

The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.

38. In the light of the discrepancies noted above, it is plain therefore that, notwithstanding that the plaintiff was not charged with a criminal offence pursuant to the recommendation of the Ethics and Anti-Corruption Commission, there is credible proof that not all the delivery notes he submitted to the defendant were genuine. That being the case, and having alleged fraud, the onus was on the defendant to satisfactorily demonstrate to the court why the sum claimed by the plaintiff is not due. I say so because it contracted the services of the plaintiff and was expected, by dint of Section 68(1) of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015 to keep a record of each procurement for at least 6 years. Thus, the evidential burden, for purposes of Section 112 of the *Evidence Act*, was on the defendant to demonstrate what part of the plaintiff's claim is warranted and what portion is fraudulent.

39. I note that defendant conducted an audit of the pending water bills; and that three reports dated 28th June 2018 and 23rd July 2018 were produced as part of the defendant's initial Bundle of Documents filed on 4th March 2019, at pages 1 to 16. In respect of the plaintiff, the report shows, at page 8 of the Bundle, that 61 invoices had been submitted totaling Kshs. 36,959,376 out of which only 38 together with their supporting delivery notes were available for verification; and that 8 of the invoices,

amounting to Kshs. 3,760,000/= had been paid already. The invoices were set out in Appendix IVA and IVB. However, a look at Appendix IVB reveals that not all of the invoices listed in the "Paid" column were in fact paid. The majority of them are reflected as "Not Paid" under that column.

40. Accordingly, although DW1 testified to the effect that the plaintiff had already been paid Kshs. 23,632,000/= as at June 2018 and that there were remittance advices to confirm payment, no such evidence was presented by the defendant. Accordingly, the Court granted time, at the instance of Mr. Wafula, for the defendant to avail proof of payment to narrow down the gap between the genuine invoices and the questioned ones. In the end, DW1 was unable to avail any such proof but opted to rely on the remittance advices filed earlier by the defendant. When counsel for the plaintiff took DW1 through all the remittance advices, it emerged that they were for invoices that do not form part of the plaintiff's claim as currently computed; and therefore that there is no duplication of the plaintiff's claim as alleged by the defendant.

41. What emerges from the foregoing is that, whereas the defendant contends that it fully paid the plaintiff for all the deliveries made during the financial year 2017/2018, the plaintiff's stance is that only Kshs. 2,300,000/= was paid; and that the defendant still owes him Kshs. 35,178,030/= for fresh water delivered. To ascertain the truth of the matter, the Court made an order on 5th October 2020 for a joint audit exercise to be undertaken by an independent auditor. The exercise was done by M/s Ambale Ogot and Company, Certified Public Accountants, and a report presented herein by Mr. Ambale (PW2). The report was marked as the Plaintiff's Exhibit No. 5. At page 7 of the report, PW2 came to the conclusion that only 47 invoices were ascertained to be for water delivered in respect of which payment was yet to be done; and therefore that the total amount due on those invoices is Kshs. 28,833,230/= for the period 1st April 2017 to 14th September 2018.

42. No doubt, the order was made with Section 48 (1) and (2) of the *Evidence Act* in mind. The provision states: -

> " (1) when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible, if made by persons specially skilled in such foreign law, science or art on questions as to identify the genuineness of the handwriting or finger or other impressions.
>
> (2) such persons are called experts."

43. In Mutonyi v Republic (Criminal Appeal No. 92 of 1981) expert evidence was defined as follows: -

> " Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurement and the like."

44. The Court of Appeal further laid down the following guidelines in the Mutonyi Case with regard to expert evidence:

> " An expert witness who hopes to carry weight in a court of law must before giving his expert opinion:-
>
> (i) Establish by evidence that he is specifically skilled in his science or art.

(ii) Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.

(iii) Give evidence of the facts which may be ascertained by him or facts reported to him by another witness."

45. The question to pose then is what probative value should the Court place on the independent auditor's report? In this regard, I have reminded myself that the Court is not bound to accept such evidence at face value, but must weigh it in the context of the entirety of the evidence adduced by the parties. Thus, in Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR it was held:

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess...."

46. Similarly, in Shah and Another v Shah and Others [2003] 1 EA 290 the Court (Hon. Ombija, J.) took the following view, which I find persuasive:

> " ...one of the special circumstances when witnesses may be called upon to give evidence of opinion is where the situation involves evidence of expert witnesses. This is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion. Handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence. This is done by asking questions to determine:
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> 1. the witness' educational background, and where the qualification is on the grounds of practical experience, on background in this regard.
> 2. areas in his field where he took extra courses or degrees to qualify himself further.
> 3. work experience including places, times, length of experience conditions under which he worked et cetera.
>
> Failure to properly qualify an expert may result in exclusion of his testimony... Moreover the opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case. The court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded, expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion..."

47. Accordingly, PW2 started off by stating his academic qualifications, namely that he is a qualified auditor duly certified by ICPAK. He also mentioned his experience and pointed out in his report that the audit was conducted in accordance with International Standards of Auditing (ISA). He underscored the fact that, as a firm of auditors, they are independent of this case as required by the ICPAK Code of Ethics. He added that he looked at the various documents given to him in addition to holding meetings with the parties where clarification was necessary. He also explained the variance of Kshs. 6,344,800/= between the sum of Kshs. 35,178,030/= claimed by the plaintiff and their finding of Kshs. 28,833,230/=; making it clear that it was attributed to payments already made as well as the unverified transactions. In cross-examination, PW2 conceded that there were discrepancies noted in some of the delivery notes, such as where 2 deliveries were allegedly made within a span of 5 minutes. He made it clear that the time factor was a concern to them and that they brought it to the attention of the defendant's management.

48. In the premises, I am convinced that the report of the independent auditor is indeed objective and therefore reliable; and that it represents the true position of the defendant's indebtedness to the plaintiff. Although DW1 expressed his reservations about PW2's report, no other report by another independent auditor was presented for the Court's consideration. It is now settled that an expert's opinion can only be challenged by another expert opinion. Accordingly, in Miscellaneous Application No. 427 of 2010 Ali Mohammed Sunkar v Diamond Trust Bank (K) Limited, it was held: -

> "The Defendant's attempts to resist the Plaintiff's Application by challenging the handwriting experts report. The report can only be challenged by counter expert report, Elizabeth Hinga who is the head of Debt Recovery Unit cannot simply discredit the handwriting experts report without tabling another handwriting report. The Plaintiff has proved that he did not author the bank transfers by his own personal averment and also supported by expert evidence which the Defendant has failed to rebut. There is no issue to go for trial."

49. Consequently, there being no counter report, I accept the evidence of PW1 and find that the amount owing from the defendant to the plaintiff is Kshs. 28,833,230/=. It is significant that the amount represented by the variance is almost similar to the sum claimed by the defendant in its Counterclaim.

50. As to whether the plaintiff is entitled to damages for breach of contract, needless to say that damages are available as a remedy for breach contract. In Anson's Law of Contract 28th Edition the opinion is given that:

> "Every breach of contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of the breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal..."

51. Thus, in Gedion Mutiso Mutua v Mega Wealth International Limited [2012] eKLR, it was held thus:

> "The principle guiding the award of general damages for breach of contract was restated in Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa [1995-1988] 2 EA 289 ...that it is quite clear that no general damages may be granted for breach of contract...That notwithstanding, the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and

reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. the plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property, or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract..."

52. The same thought was expressed by the Court of Appeal in Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR, thus:

> "...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 vs. 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. And so it would be. See also SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008] eKLR. 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. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages..."

53. In this instance, the contract was performed, save for the aspect of payment. In the circumstances, I take the view that having found for the plaintiff in the aforesaid sum of Kshs. 28,833,230/=, there is no justification for a separate award of damages; taking into consideration that due to the discrepancies noted in connection with a considerable number of the plaintiff's delivery notes, the matter had to be subjected to investigations before the defendant could make any payment.

54. The plaintiff also claimed interest on the principal sum at commercial rates. Needless to mention that the rationale for an award of interest on the principal sum is to compensate a plaintiff for the deprivation of any money that is rightfully due to it through the wrong act of a defendant. Thus, in Lata v Mbiyu [1965] EA 392 it was held that:

> "The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the *Civil Procedure Act* but such discretion must, of course, be judicially exercised... It is clearly right that in cases where the successful party was deprived of the use of goods or money by reason of a wrongful act on the part of the defendant, the party who has been

deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

55. It is equally trite that a debt does not attract interest in the absence of an express provision in that regard. Hence, in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another, the Court of Appeal quoted with approval the following passage from Chitty on Contract, 27th Edition Volume 2 paragraph 36-224:

> At common Law the general rule is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect."

56. Not a single LPO was exhibited by the plaintiff in proof of the terms of their contract with the defendant. I therefore find no basis for awarding interest at commercial rates, though prayed for in the Amended Plaint. Besides, as pointed out herein above, the plaintiff was not entirely absolved from blame in connection with the procurement irregularities surrounding the water vendors' pending bills. The plaintiff consequently had a part to play in the delay in payment; and until the exact amount due was ascertained, the defendant was not obliged to pay. For those reasons, it is my view that interest on the principal sum is only payable at court rates from the date of this judgment.

57. On the question of costs, the proviso to Section 27(1) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya is explicit that costs follow the event. The event herein is that the plaintiff is the successful litigant herein. Ordinarily therefore, the plaintiff would be entitled to costs of his suit. However, Section 27 also recognizes that, ultimately, it is within the discretion of the Court to award costs. It states:

> " Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid…"

58. As noted herein above, this is a matter that entailed procurement irregularities, some of which have been attributed to the plaintiff. There would therefore be no justification in burdening the defendant with an award in costs in the circumstances.

b Whether the defendant is entitled to the refund of a sum of Kshs. 8,164,800/= as pleaded in the Counterclaim:

59. The defendant's Counterclaim was premised on allegations of fraud whose particulars were supplied at paragraph 7 of the Defence and paragraph 14 of the Counterclaim. The plaintiff denied the allegations and pointed out that he has never been charged with any fraud-related offence as a result of the subject delivery notes; and as pointed out herein above, the defendant was as much to blame for its loss by way of poor record keeping and failure to comply with the law relating to procurement. In particular, it emerged that the defendant habitually issued LPOs after delivery; and therefore was unable to track the supplies made by the plaintiff. Thus, at pages 10 to 18 of the audit report exhibited by PW2, the firm of **Ambale Ogot and Company** pointed out several systemic weaknesses to the defendant with proposals for appropriate action. They included the following:

    (a) The defendant did not have reorder level of water for their water stations where the plaintiff was supplying water. It was proposed by the auditors that a specified reorder level for any

commodity including water be set to help the defendant in determining when to make an order and in what particular quantity so as to effectively control the purchases.

(b) All the copies of invoices given to the auditors from both the plaintiff and defendant were signed by authorized employees of the defendant; and that this was confirmed at the KPA meeting of 15th December 2020. The recommendation was that all accounting documents be made readily available for verification whenever audit or any need arises.

(c) Purchase orders were made by the defendant after the delivery of goods; a practice that exposed the defendant to errors and fraudulent changes. The auditors recommended that purchase orders be prepared by the defendant before delivery of goods and services as a way of effectively controlling and managing purchases.

(d) There was no water stock movement schedule at KPA to monitor the purchase and usage of water at the Authority. The auditors recommended that a stock movement schedule be put in place to monitor usage of all goods purchased by the defendant, including water.

(e) The plaintiff had their contract to supply water to the defendant extended for a further 12 months from 1st April 2017 yet some of the invoices, duly signed and approved by authorized employees of the defendant, were for dates beyond the extended period. The auditor's recommendation was that signed supply contracts be made readily available when required.

60. As was pointed out in Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR:

Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in this sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

61. In the circumstances, granted the role played by the employees of the defendant in the implementation of the subject contract, the defendant's Counterclaim is unfounded and is hereby dismissed.

62. In the result, it is hereby ordered that:

(a) Judgment be and is hereby entered for the plaintiff in the sum of Kshs. 28,833,230/= together with interest thereon at court rates from the date hereof until the date of full payment.

(b) The defendant's Counterclaim be and is hereby dismissed.

(c) Each party to bear own costs of the suit;

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF MAY 2023

OLGA SEWE

JUDGE