



Progressive Credit Limited v Seedtran Transporters Limited & another (Civil Appeal 99 of 2021) [2023] KEHC 27572 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEHC 27572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 99 OF 2021
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

PROGRESSIVE CREDIT LIMITED APPELLANT

AND

SEEDTRAN TRANSPORTERS LIMITED 1ST RESPONDENT

SWABRA MOHAMMED ABDULHAMIN 2ND RESPONDENT

*(Being an Appeal from the Judgement and Decree of Honourable
S. Muchoki, Resident Magistrate delivered in Mombasa CMCC
No. 1344 of 2019 dated and delivered on 10th June 2021))*

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 10th June 2021 in Mombasa CMCC No. 1344 of 2019. The Trial Court entered Judgement for the Respondents for Kshs. 3,414,000/- plus costs and interest.
2. The Appellant being aggrieved by the Award filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
 - a. The Trial Court erred in law and fact in finding that the Appellant was in breach of contract.
 - b. The Trial Court erred in law and fact in awarding the Respondent General Damages for breach of contract of Kshs. 2,000,000/=
 - c. The Trial Court erred in law and fact in awarding the Respondent exemplary damages of Kshs. 1,000,000/= for breach of contract.
 - d. The Trial Court erred in law and fact in awarding the Respondent Kshs. 414,000/= in Special Damages.



- e. The Trial Court erred in law and fact in failing to appreciate the evidence tendered by the parties in court.
- f. The Trial Court erred in law and fact in failing to consider the submission and authorities of the Appellant

The Appellant's Submissions

3. The Appellant filed submissions dated 20th January 2023 in support of the Appeal. It was the submission of the Appellant that the Trial Court erred in finding breach of contract against the Appellant. Further, it was submitted that the Respondent failed to satisfy the conditions set by the Appellant for the advancement of Kshs. 3,500,000/= within 24 hours and so was in breach of contract and not the Appellant.
4. Counsel also submitted that damages are as a general rule not recoverable in breach of contract and relied on the case of Kenya Tourism Development Authority vs Sundowner Lodge Ltd (2018) eKLR. It was further submission of the Appellant that the Respondent was not entitled to special damages because he failed to prove them as required under the law. Reliance was placed inter alia on the Court of Appeal cases of Capital Fish Limited vs Kenya Power & Lighting Co. Ltd. (2016) eKLR and David Bagite vs Martin Bundi (1997) eKLR.
5. The Appellant submitted further that the Respondent was not entitled to exemplary damages and urged the Court to find that such damages, like general damages were not applicable to this case as they only applied to oppressive and arbitrary conduct and where the profit calculated by the Defendant exceeds the compensation payable to the Claimant. Counsel relied on the case of Kinakie Co-operative Society vs green Hotel (1988) ECLR.

Respondent's Submissions

6. The Respondent's submissions on the main Appeal are dated 3rd March 2023 and filed on 6th March 2023. It was the submission by counsel that the Respondent and the Appellant entered into a loan agreement for Kshs. 2,312,852. The Respondent stated that it proved breach of the loan agreement on a balance of probabilities since the Appellant failed to rebut the evidence by the Respondent.
7. The Respondent relied on the case of Timsales Limited vs Haron Thuo Ndungu (2010) eKLR to submit that the Appellant failed to call Daniel Okoth and Caroline as witnesses whose evidence would be prejudicial to the Respondent and as such the information as concealed should be used against the Appellant.
8. On this submission, I note that the Appellant called one witness who testified on its behalf and closed its case. With due respect to counsel, I do not agree with the argument that the Appellant was bound to call witnesses whom the Respondent thought were crucial. It was upon the Appellant to choose whichever witness they liked to advance their case.
9. The Respondent would only raise issue if the witnesses who were otherwise compellable were not called but this was a pretrial issue that was being raised late in the day through submissions. The Respondent cannot turn out to dictate the kind of witness the Appellant ought or ought not to have called.
10. The Respondent further submitted that the Appellant failed to discharge its burden under Section 107 and 108 of the [Evidence Act](#) hence the Appeal was merited. Counsel further submitted that the



special damages were well proved as found by the Trial Court. Reliance was placed on the case of C Metah & Co. Ltd vs. Barclays Bank Limited (2019) eKLR.

11. In conclusion, it was submitted that the Judgment of the Honourable Magistrate was well based and there was not need to disturb it.

Analysis

12. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issues for determination are;
 - a. Whether the Trial Court erred in the award of damages for breach of contract
 - b. Whether the trial court erred in the award of exemplary damages
 - c. Whether the trial court erred in the award of special damages
13. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
14. In the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Award of damages for breach of contract

15. Whereas the Appellant stated that General Damages are as a general rule not available in breach of contract claims, the Respondents argued that as correctly awarded by the Trial Court, General damages and exemplary damages were applicable to this case.
16. The trial court considered whether or not the Appellant was in breach of contract, and if so, whether the Respondent was entitled to general damages for breach of contract, punitive damages, exemplary damages and special damages. On this point, the trial court held that:

.it is not in dispute that all motor vehicles including motor vehicle registration number KBG 263 M and KAR 551 D were handed to the Defendant and registered both in the names of the Defendant and the Plaintiff

it is this court's finding that once the security had been registered, the Plaintiff was already assured that a sum of Kshs. 2,312,852 would be deposited in the Plaintiff's account....

the Plaintiff borrowed a loan and working capital from the Defendant. The Plaintiff did not get the loan despite being assured that she would get the loan. The Plaintiff is thus entitled to General Damages in which case should not be treated as nominal damages...



17. It follows that indeed general damages are as a general rule not awarded in breach of contract claims. However, this does not mean that general damages are not awarded at all as submitted by the Appellant. Each case falls on its own set of facts and is unique. The Court found that the Plaintiff suffered consequential loss and underwent mental loss and anxiety when the Defendant failed to disburse the loan.
18. The Appellant's case was that it is the Respondent who was in breach of contract for failure to meet all the conditions including the existence the fact that the Motor Vehicles were in South Sudan fitted with tracking system and so were unavailable and the Respondent was guilty of nondisclosure.
19. I note however that though the Appellant alleged nondisclosure, it ought to have been demonstrated that the Respondent had the knowledge of such information prior to the contract and concealed it, and if the Appellant had known of such information, it would not have entered into the contract. Nondisclosure amounts to false misrepresentation and the law frowns upon it.
20. In *Sachin Shaha v Jagat Mahendra Kumar Shah & another* [2020] eKLR, the Court stated as follows;

As pointed out by Counsel for Sachin, Black's Law Dictionary (Eighth edition) defines fraudulent misrepresentation as:-

"A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and is intended to induce a party to detrimentally rely on it".

There is no departure between the parties that fraud is proven when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false (*Derry -vs- Peek* (1889) 14 App Cas 337). Further elements were pointed out by Counsel for the Defendants to be that the representation was made with the intention of influencing the claimant. And that the claimant relied on the information and as a consequence suffered material loss.

As to the relationship between non-disclosure and misrepresentation. Chitty on Contracts, General Principles, 31st Edition states:

"Non-disclosure. The general rule is that mere non-disclosure does not constitute misrepresentation, for there is, in general, no duty on the parties to contract to disclose material facts to each other, however dishonest such non-disclosure may be in particular circumstances.

But there are exceptions to the general rule that there is no duty to disclose. First, there are many statutory exceptions. Second, there are exceptions at common law where the contract is within the class of contracts *uberrimae fidei*, where there is a fiduciary relationship between the parties, and where failure to disclose some facts distorts a positive representation. It is also possible for a person to be guilty of misrepresentation by conduct".

21. In the circumstances of this case, I do not agree that the threshold for nondisclosure was met as to hold the Respondent liable.
22. On award of general damages, in the case of *Gideon Mutiso Mutua V Mega Wealth International Limited* [2012] eKLR Odunga J (as he then was) opined thus;

"The principle guiding the award of general damages for breach of contract was restated in *Provincial Insurance Company of East Africa Ltd. vs. Mordekai Mwangi Nandwa* Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289 in which the Court of appeal citing



Dharamshi vs. Karsan [1974] EA 41, held that it is quite clear that no general damages may be granted for breach of contract (emphasis mine). In my view the Court of Appeal did not hold that general damages are not awardable 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. It may however exceptionally include compensation for physical discomfort or inconvenience or loss of time. Otherwise the damages which are recoverable in an action for breach of contract are either nominal damages, that is to say, where a party has proved breach of contract but not proved that he sustained any actual loss consequent to the breach; or substantial damages, that is to say, where a party has not only proved a breach of contract but has also proved that he sustained some actual loss as a result of the breach. See *Hadley vs. Baxendale* 156 ER 145; *Addis vs. Gramophone Company* (1990) AC 488; *Bailey vs. Bullock* (1950) 2 All ER 1167; *Sutton and Shammon on Contracts*, 7th Ed Page 399.” Emphasis mine

23. Further, in the case of *Capital Fish Limited v Kenya Power and Lighting Company Limited* (2016) eKLR, the Court of Appeal gave exceptions where general damages are awardable for breach of contract and stated as follows;

“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.”

24. Based on the conduct of the Appellant, I find that the award of Kshs. 2,000,000 was reasonable compensation in damages for breach of contract bearing in my all factors in this dispute and commensurate with the principles of award of damages in contract law.

Award of Exemplary Damages

25. It was the Respondent’s case in the trial Court that the Plaintiff lost the contract sum of USD 18,000 from a company known as China First Halfway Engineering where it would have made a profit of Kshs. 1,000,000.
26. The Trial Court awarded the Respondent Kshs. 1,000,000 as consequential lost profit.
27. In the case of *Godfrey Julius Ndumba Mbogori & another V. Nairobi City County* [2018] eKLR, it was states as follows;

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where



Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

28. The conduct on the part of the Appellant to even go ahead and have the vehicles registered in its name, yet the loan money had not been released, and thereafter, the delay in discharging the said logbooks, to the effect that the Respondent cannot access another loan facility, that qualifies the threshold that would entitle the Respondent to exemplary damages.
29. However, I am also alive to the fact that there are factors that may affect the expected profits. I therefore set aside the award under this head from Ksh. 1,000,000 to Ksh. 500,000.

Award of special damages

30. On the issue for special damages, courts have stated times without number that special damages must not only be pleaded but also strictly proved. In *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR it was stated as follows;

“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.”

31. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177), it was stated as follows;

“[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A.* delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.”

32. It is settled law that special damages must be pleaded and strictly proved. The Respondent pleaded Valuation Cost of Kshs. 40,000, NTSA costs of Kshs. 14,000, track costs of Kshs. 40,000, Insurance cost of Kshs. 265,261 and monies paid to the Defendant of Kshs. 55,000 giving a total sum of Kshs. 414,000. The amount is however ought to be Kshs. 414,261. The cost for insurance ought not to have been awarded. It is a statutory requirement that vehicles must be insured. I will set aside this award.

Determination

33. In the upshot, the Appeal partly succeeds in the following terms.
 - a. The Award of Kshs. 2,000,000 in damages for breach of contract is confirmed.
 - b. The Award in damages of Kshs. 1,000,000 in exemplary damages is reduced to Ksh. 500,000



- c. The Award of Kshs. 414,261 in special damages is set aside, reduce Ksh. 265,261 as insurance costs, leaving Ksh. 149,000 which is awarded as special damages.
- d. The Award in (a) above shall attract interest at court rates from the date of judgement and (b) from date filing suit, until payment in full.
- e. Respondent is awarded costs.

It is so ordered.

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

.....

F. WANGARI

JUDGE

In the presence of;

N/A by the Appellant

Murage Advocate for the Respondent

Barile, Court Assistant

