



IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL SUIT NO E006 OF 2020

MOSES NJANE NGENDO..... PLAINTIFF

VERSUS

JOSIAH ANYANGU OMUTOKO..... 1ST DEFENDANT

CLEOPAS MALALA.....2ND DEFENDANT

JUDGMENT

1. **MOSES NJANE NGENDO** sued the two defendants and seeks judgment for:-

- a) Declaration that the defendants be held personally liable for breach of contract, fraud/illegal conduct and loss.***
- b) Specific performance of the contract by paying the contractual sum.***
- c) An order compelling the defendants to release and return the aforesaid Stage Equipment (Dias) to the plaintiff the same condition as they hired.***
- d) Special damages and general damages.***
- e) Interest until payment in full.***
- f) Costs and interests of the suit.***

2. The plaintiff's claim is that on 22nd December, 2019 he entered into an oral contract with the 1st defendant who contracted on behalf of the 2nd defendant for the hire of the plaintiff's stage equipment (Dias) for an event known as Malala Cup Football Tournament. The hire period was 8 days. The price of the hire was agreed at Kshs.300,000. The defendants paid the plaintiff Kshs.85,000. The plaintiff's claim is that to date, he has not been paid the balance of the agreed hire charge.

3. The defendants were served with the summons and plaint and on failing to file an appearance within the requisite period, interlocutory judgment was entered against them.

4. The plaintiff formally proved his case. He stated in evidence that he operates his business in Kiamumbi, Kiambu County. His business is the hiring out of equipment for events such as campaigns, corporate functions, tournament and birthday parties amongst others.

5. The plaintiff further stated that in 2019 the 1st defendant requested to hire for the 2nd defendant's event

stage equipment (Dias). The agreed price was Kshs. 300,000. The equipment was taken to the 2nd defendant's event and was accompanied by plaintiff's employee. That equipment was not returned as agreed and the plaintiff hired a lorry, at the cost of Kshs.60,000/- to go and collect his equipment but he was informed that 2nd defendant ordered the equipment should not be released. Plaintiff case is that todate, the equipment has not been returned to him and the defendant's failed to pay him the balance the hire charge, being Kshs.215,000/-.

ANALYSIS

6. There is uncontroverted evidence that the two defendants agreed to hire the plaintiff stage equipment, took possession the same but failed to pay the total hire price and failed to return the equipment to the plaintiff to date. Verbal/oral contracts are valid just like written contracts. This is as long as such contracts are for a lawful purpose, there is mutual agreement, consideration and genuine assent for the contract to be enforceable.

7. The plaintiff proved on a balance of probability that he is owed by the defendants the balance of the hire price, of Kshs.215,000/=.

8. The plaintiff pleaded in his plaint setting out the itemized stage equipment hired and not returned by defendants but in his evidence before court and by written statement the plaintiff failed to testify on those itemized stage equipment. That claim for return of those specific items of stage equipment for that reason therefore remains unproved.

9. The plaintiff further pleaded particulars of loss he incurred which included accommodation for crew from 21st December, 2019 to 4th January, 2020 at Kshs.4000 per day; for additional crew from 29th December, 2019 to 4th January, 2020 at Kshs.4,000 per day; for truck hire Kshs.60,000; truck charges for 30th December, 2019 to 28th January, 2020 at Kshs.7000 per day; and for stage hire charges at Kshs.100,000 per day from 30th December, 2019 todate. None of those claims were proved by the plaintiff in evidence. The plaintiff was obligated to prove those claims which are claim in special damages, as was stated in the Court of Appeal decision **CAPITAL FISH KENYA LIMITED VS KENYA POWER & LIGHTING COMPANY LIMITED (2016) eKLR** as follows:-

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES VS. SIFA INTERNATIONAL LIMITED (2016) eKLR, MACHARIA & WAIGURU VS MURANGA MUNICIPAL COUNCIL & ANOTHER (2014) eKLR and PROVINCIAL INSURANCE CO. EA LTD VS MORDEKAI MWANGA NANDWA, KSM CACA 179 OF 1995 (UR). In the latter case this Court was emphatic that “... 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. It is equally clear that no general damages may be awarded for breach of contract ...”

10. The plaintiff's claim for general damages suffered is not available in a claim for breach of contract; see the case **KENYA TOURIST DEVELOPMENT CORPORATION VS. SUNDOWNER LODGE LIMITED (2018) eKLR** thus:-

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: 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.”

11. The plaintiff perhaps should be reminded that although he was formally proving his case, he had an obligation to prove his case on required standard of proof, on a balance of probability. The plaintiff claim which was by and large a claim in damages remained unproved. A case in point which shows the plaintiff’s duty is **BID INSURANCE BROKERS LIMITED VS. BRITISH UNITED PROVIDENT FUND (2016) eKLR** thus:-

*“In the case of **KENYA BREWERIES LIMITED KIAMBU vs. GENERAL TRANSPORT AGENCY LIMITED [2000] eKLR**, the court said –*

*“It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in **BONHAM CARTERS HYDE PARK HOTEL LIMITED [1948] 64TR 177** –*

The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down 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.”

DISPOSITION

12. For the reasons set out above, the following is the judgment of this Court:-

(a) Judgment is entered for the plaintiff against the defendants for Kshs.215,000 with interest at court rate from 22nd December, 2019 until payment in full.

(b) The plaintiff is awarded costs of the suit to be paid by the defendants.

13. **JUDGMENT DATED and DELIVERED at KIAMBU this 24th day of MARCH, 2022.**

MARY KASANGO

JUDGE

Coram:

Court Assistant : Maurice

For Plaintiff : -Mr. Kabuthu

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE

