



REPUBLIC OF KENYA



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**AHA African Safaris Limited v Panal Pina Airflo Limited (Civil Suit E065 of 2018)  
[2022] KEHC 15746 (KLR) (Commercial and Tax) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15746 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E065 OF 2018  
EC MWITA, J  
NOVEMBER 25, 2022**

**BETWEEN**

**AHA AFRICAN SAFARIS LIMITED ..... PLAINTIFF**

**AND**

**PANAL PINA AIRFLO LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff and the defendant entered into a transport contract dated 1<sup>st</sup> September 2017. By that agreement, the plaintiff was to provide transport services to the defendant's employees/staff to various destinations in terms of that agreement. The plaintiff was to provide 7 buses of 28 seater capacity each and one 14 seater minibus daily in the morning and evening for week days except on Sunday and public holidays. The defendant would to pay Kshs 11000 daily for each bus and Kshs 7, 900 for the minibus respectively. A party could terminate the contract by giving a three months written notice.
2. The defendant served a three months' notice dated 28<sup>th</sup> June 2018 terminating the contract. The plaintiff filed this suit through a plaint dated 13<sup>th</sup> September 2018 and amended on 12<sup>th</sup> October 2018, seeking a declaration that the contract was unlawfully terminated, Kshs 72,817,134, as well as general and aggravated damages for the unlawful termination of the contract.
3. The defendant filed a defence dated 5<sup>th</sup> November 2018 denying the plaintiff's claim. The defendant averred that the contract was properly terminated due to breach of the terms of that contract such as overcharging for the services after the requisite notice was served. The defendant denied that the termination caused the plaintiff any financial difficulty or that the plaintiff was underpaid as rates had been mutually agreed.



## Evidence

4. During the hearing of the suit, the plaintiff called Kamau Ndumba, the plaintiff's director as PW1. The witness adopted his witness statement dated 13<sup>th</sup> September 2018 as evidence before the court. Ndumba reiterated that according to the transport agreement the plaintiff was to provide transport for the defendant's staff from Jomo Kenyatta International Airport (JKIA) to various places within Nairobi for six days a week, except Sundays and public holidays. The plaintiff was to provide seven 28 seater buses and one 14 seater mini bus for three years. The defendant was to pay Kshs 11,000 per day for each 28 seater bus and 7,900 per day for the mini bus. The contract could be terminated by either party upon giving a three months written notice.
5. On 28<sup>th</sup> June 2018, the defendant terminated the contract by serving the three months' notice but without reasons. This act greatly prejudiced the plaintiff financially and affected its arrangements and engagements with third parties, including financiers and those the plaintiff had engaged to provide vehicles on agreed terms to enable it perform its obligations under the contract. It is the plaintiff's case that termination of the contract had occasioned it loss of income and damage.
6. The defendant on its part called Kini Pandurang, its head of finance, as DW1. Pandurana testified, also adopting his witness statement dated 6<sup>th</sup> March 2020. He admitted that the defendant contracted the plaintiff to provide transport services to its staff in an agreement entered into on 1<sup>st</sup> September for 3 years at Kshs 11000 per day for each of the 7 28 seater buses and Kshs 7,900 for the 14 seater minibus. The contract could be terminated by serving a three months' written notice. The defendant terminated the contract by serving a written notice dated 29<sup>th</sup> June 2018, due to the plaintiff's breach of the terms of the contract. Pandurana asserted that the plaintiff was overcharging the defendant in that although the plaintiff provided four (4) buses and one (1) minibus, the invoices issued were for seven (7) buses and one (1) minibus.
7. Pandurama maintained that parties discussed the issue and agreed on charges payable on the basis of actual services rendered. Following this discussion, the plaintiff went ahead and gave a credit note to the defendant for the month of April 2018 and billed for services at the negotiated rate. Shortly after, the plaintiff reneged on the agreed terms and reverted to the old rates for May and June 2018. The plaintiff even continued billing the vehicles at full capacity even after some members of staff stopped using the service, leading to termination of the contract.
8. According to Pandurana, as at October 2018, there was no outstanding amount due to the plaintiff on account of the services rendered and there had been no underpayment of any invoice since payment was based on the plaintiff's own invoices.

## Plaintiff's submissions

9. Parties agreed to file written submissions. The plaintiff's submissions dated 23<sup>rd</sup> May 2022. It was submitted that the plaintiff had proved its case on a balanced of probability that the contract was unlawfully terminated. The plaintiff argued that the notice terminating the contract did not comply with the terms of the contract as no reasons were given, and the letter dated 18<sup>th</sup> August 2018 purporting to give reasons, was an afterthought and only came in response to the demand letter from the plaintiff to the defendant.
10. Regarding the amount payable, the plaintiff argued that it used to earn Kshs, 84, 900 per day, including weekends and holidays and for the remaining two years, the amount added up to Kshs 61, 977,000 and not Kshs 72,817,134 claimed in the amended plaint. The plaintiff submitted that it had committed



it resources to the contract and the arbitrary and abrupt termination of the contract caused loss of anticipated income for the unexpired two years.

11. On the claim for underpayment, the plaintiff asserted that invoices were submitted based on the services rendered and the number of vehicles hired per month. However, the defendant was not fully paying the invoices and did not offer any explanation for not paying the full amount. The total amount underpaid was Kshs 1,514,292.
12. Regarding the defendant's claim that there was overcharging, the plaintiff argued that invoices were issued according to the number of buses and the one minibus used. The plaintiff asserted that indeed parties had tentatively agreed that the number of vehicles be reduced but this was subject to a proper contract that was to be executed by the parties which was however not done.
13. The plaintiff relied on *Eldo City Ltd v Corn Products Kenya Ltd & another* [2013] eKLR and *Smith v Cook* (1891) AC 297 for the proposition that the duty of the court is to give effect to the intention of the parties.
14. On damages, the plaintiff argued that it was entitled to special damages of Kshs 61, 997,000 for unexpired term; Kshs 1,514,292 for underpaid invoices, general and aggravated damages.

#### **Defendant's submissions**

15. The defendant submitted through written submissions dated 25<sup>th</sup> July 2022, that the plaintiff had not proved its case on a balance of probabilities. On the termination of the contract, the defendant argued that the contract was lawfully terminated by serving a three month notice. The termination notice did not have to give reasons because parties had in a meeting held on 24<sup>th</sup> April 2018 engaged on the issues affecting performance of the contract prior to termination and, therefore, the plaintiff was well aware of the reasons by the time the notice for termination was served.
16. The defendant relied on *Albert Cheboi & another v Insurance Regulatory Authority* [2020] eKLR, for the proposition that the notice of termination was in tandem with the contract notwithstanding that the notice did not contain reasons.
17. Regarding the claim for Kshs 72,817,134 for the unexpired term and Kshs 1,5514,292 for underpayment, the defendant asserted that the claims were fabricated, a fact that was demonstrated in the plaintiff's own submissions where it was admitted that the claim was Kshs 61,977,000, which, in any case, had no basis. The defendant maintained that the plaintiff had not discharged the burden of proof and relied on *Patrick Lumumba Kimuyu v Prime Fuels Limited* [2013] eKLR, that the burden of proof is always on the plaintiff.
18. On special damages, the defendant argued that the plaintiff is not entitled to damages and maintained that damages suffered, if any, was self-inflicted. The defendant further argued that the plaintiff had not proved the damage suffered as no evidence was adduced to support this claim. The defendant also asserted that the plaintiff did not particularize the special damages suffered and relied on *Ouma v Nairobi City Council* 1976-80) KLR 375, that special damages must be pleaded with particularity and proved by evidence.
19. The defendant also relied on *African Line Transport Company & another v Sylvester Keitany* [2017] eKLR and *Kenya Tourist Development Corporation v Sundown Lodge Limited* [2018] eKLR, that special damages must be pleaded and specifically proved through evidence.
20. The defendant further relied on *Daniel Otieno Migore v South Nyanza Sugar Company Limited* [2018] eKLR to argue that parties are bound by their pleadings and evidence that is at variance



with pleadings is for rejection. The defendant maintained that the plaintiff's evidence contradicted the pleadings regarding the claim for 72, 817,134 million in the amended plaint and Kshs 61,977,000 in the submissions. The defendant also argued that submissions cannot take the place of evidence and cited *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR.

21. On general damages the defendant took the view, that damages are not awarded for breach of contract and relied on *Consolata Anyango Ouma v South Nyanza Sugar Company Limited* [2015] eKLR. The defendant further argued that aggravated damages are not awarded in cases of breach of contract.
22. The defendant similarly maintained that underpayment was not proved and that although the plaintiff pleaded Kshs 825,33 in the amended plaint the amount urged in the submissions urged was Kshs 1,514,392, thus the claim was not proved.
23. With regard to loss of income, the defendant argued that this was neither pleaded nor proved and relied on the decision in *Hydro Water Well (K) Limited & 3 others v AS the Officers of Chae Kenya Society & 3 others* (HCC No. E212 of 2019) [2021] KHC 22 (KLR).

### **Determination**

24. This suit arose from termination of a transport contract between the parties. The plaintiff argued that although the contract was to run for three continuous years it was unlawfully terminated and, therefore, it is entitled to both special damages for the unexpired period, underpaid amount; general damages and aggravated damages.
25. Having perused the pleadings, considered the evidence and submissions by parties, the issues that arise for determination are; whether the contract was unlawfully terminated; whether the plaintiff is entitled to special damages for the unexpired period of the contract and whether the plaintiff is entitled to general and aggravated damages.

### **Termination of contract**

26. The plaintiff's case is that the contract was unlawfully terminated because the defendant did not give reasons for the termination. The plaintiff relied on a portion of the contract that required reasons to be given in certain circumstances. The defendant on its part maintained that notice for termination was served as required and it did not have to state the reasons because parties had earlier met and engaged on issues affecting performance of the contract and the plaintiff was aware of the reasons for termination.
27. Parties were in agreement that the contract could be terminated by either party on giving a three months notice. Parties were also in agreement that the defendant served the required notice, but the plaintiff's take was that the termination notice did not contain reasons rendering the termination unlawful.
28. I have read the contract and, in particular, clause 4.14 of the Service Contract agreement signed on 1<sup>st</sup> September 2017. The clause under subhead "Termination Notice Period", states that "Under normal circumstances, the company will inform the transporter in writing of any failures to perform the specifications of the contract. Either party shall issue a written termination notice to each other of not less than three (3) months."
29. The plaintiff relied on the part of the clause that stated that under normal circumstances, the defendant was to inform the plaintiff of any failures to perform the contract in writing, to argue that the notice served did not contain reasons. This clause cannot be read in isolation. One must read the entire of clause 4 to make sense out of clause 4. 14.



30. Clause 4.0 is generally on termination while clause 4.1 is on termination notice. Clause 4.1 states that where either party is desirous of terminating the contract, a written notice is to be served under the circumstances listed under clauses 4.1 1, 4.12 and 4.13. The circumstances include; misconduct on the part of the plaintiff (transporter), insolvency of the plaintiff(transporter), or ceasing operations by the plaintiff (transporter)for whatever reasons.
31. Clause 4.4 then states that under normal circumstances, the company is to inform the transporter in writing about the failures, before stating that the termination period should not be less than three months.
32. A holistic reading of clause 4 shows that it gives the circumstances under which the contract may be terminated by the company(defendant). Clause 4.1 4 merely states that under normal circumstanced, the company (defendant) should inform the transporter (plaintiff) of the failures in performing the obligations under the contract. That clause, in my view, does not make giving reasons mandatory before termination. If that was the intention, nothing would have been easier than stating that the defendant must give written reasons before terminating the contract. In any case, the part that talks about giving reasons comes way before the period of the notice. I do not think that portion of the clause should be read as imposing a mandatory obligation on either party to give reasons for terminating the contract. Demanding reasons would make the contract not subject to termination, rendering the termination clause superfluous.
33. The view I take is that a reading of clause 4 did not make it mandatory for the defendant to give reasons for terminating the transport contract between the parties. In any event, the defendant stated that parties had met in April 2018 and discussed the issues regarding the contract, a fact the plaintiff did not dispute. For that reason, the inescapable conclusion I come to, is that there was no violation of the contract entered into on 1<sup>st</sup> September 2017 between the plaintiff and defendant.

### **Special damages**

34. The next issue is whether the plaintiff is entitled to special damages for the unexpired contract period. Having determined that there was no breach of contract, the issue of payment of special damages for the unexpired period would not arise. However, for completeness of the matter, I will consider this issue.
35. The plaintiff's case is that since the contract was for three years but was prematurely terminated with two years remaining, the defendant should pay for unexpired period. The plaintiff made the case that since the defendant was paying Kshs 11,000 for each of the seven buses per day, and Kshs 7, 900 per day for the minibus, the amount due for the unexpired period was, according to the amended plaint, Kshs 72,817,134. In the witness statement adopted as evidence before court, the plaintiff maintained this as the amount that was due. However, in the submissions, the plaintiff argued that there was an error in calculating the amount due. The plaintiff now urged that the amount due was Kshs 61,977,000.
36. The defendant maintained that there being no breach of contract, the amount claimed for the unexpired period is not payable. It is the defendant's further case that the plaintiff did not specifically prove the claim and, in any case, submissions do not constitute evidence and the amount claimed remained unproved. The defendant took the view, that whereas the amount in the amended plaint is Kshs 72,817,134, the submissions urged for Kshs 61,977,000, a contradiction that left the claim not proved.
37. There is no denial that the amount pleaded for the unexpired period was in the form of special damages. In this regard, the law is settled that a claim for special damages must not only be specifically pleaded, it



must be strictly proved with as much particularity as circumstances permit. (See *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR).

38. In *Provincial Insurance Co. EA Ltd v Mordekai Mwangi Nandwa*, (KSM Civil Appeal No 179 of 1995,) the court stated that it is now well settled that special damages need to be specifically pleaded before they can be awarded. None can be awarded if not pleaded.

39. 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, where he stated:

[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 damage: They have to prove it.

40. Similarly, in *Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell)*, SCCA 109/2002 (December 20, 2004), Cooke, J. A, delivering the judgment of the court, stated that special damages must be strictly proved and 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 that the court may consider the concept of reasonableness.

41. And in *Union Bank of Nigeria PLC v Albaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering the judgment of the Supreme Court of Nigeria, stated:

I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

42. Flowing from the long line of decisions cited above, it is plain that a plaintiff must plead special damages with particularity and strictly prove those damages. It is not for the court to arbitrarily award damages simply because a plaintiff has merely pleaded the damages without strictly proving them.

43. It is clear in this case, that the plaintiff did not strictly prove the claim for special damages. Whereas the amount pleaded in amended plaint was Kshs 72,817,134, the plaintiff urged for Kshs 61,977,000 in the submissions without formally amending the plaint, thus rendering the claims contradictory and unproved. In the circumstance, I find and hold that the claim for special damages was not proved and is not allowable.

### **General and aggravated damages**

44. The plaintiff again sought both general and aggravated damages for loss of business suffered due to breach of contract. The defendant took the view that general damages or even aggravated damages are not awardable for breach of contract.

45. The law, as I understand it, is that general damages are not awardable in cases of breach of contract. In such cases, parties seek quantified damages (special damages) for the loss suffered, whose essence is intended to put the plaintiff to the position he would have been had the defendant performed his



obligations under the contract. For that reason, an award of general damages would be a duplication and an unjust enrichment.

46. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* (*supra*), the appellant had agreed to give a loan of Kshs 15,000,000 to the respondent for construction of a hotel but the appellant unilaterally withdrew that offer. The respondent filed a suit claiming general damages of Kshs 421,760,000 in the form of opportunity costs and loss of business following breach of that contract. The High Court awarded general damages of Kshs 30,000,000 for breach of contract. On appeal, the Court of Appeal held that as a general rule, general damages are not recoverable in cases of alleged breach of contract. Damages for breach of contract are compensation to the aggrieved party and a restitution of what he had lost due to the breach.
47. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication. And *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract.
48. The above decisions affirm the position that the damage suffered or is believed to have been suffered, and is to be compensated as damages, can only be known by the party and it is claimed in specific terms which has to be proved by evidence.
49. It follows from the above principle of law, that the plaintiff is not entitled to damages for breach of contractual obligations, having raised a specific claim for special damages otherwise this would amount to a duplication of claims.

### **Underpayment**

50. The plaintiff again claimed Kshs 825,330 for underpaid invoices in the amended pleadings. According to the plaintiff, invoices were sent to the defendant for the months of April, May and June but they were underpaid without explanation. The defendant on its part argued that invoices were fully paid for services rendered and there was no underpayment. The defendant maintained that the plaintiff had overstated the invoices given that parties had met in April 2018 and resolved the issue and the plaintiff even gave a credit note for those months. For that reason, there was no underpayment.
51. The plaintiff pleaded for underpayment of Kshs 825,330 in the amended pleadings. However, in the submissions, the plaintiff once again urged for Kshs 1,514,392. It is worth noting that the plaintiff did not formally amend the pleadings to plead for Kshs 1,514,392. This figure was only urged in the submissions. Submissions is not evidence and cannot prove a party's claim. Submissions cannot also be the fulcrum of a claim in the manner the plaintiff purported in this case. It is clear that the plaintiff shifted its claim in the amended pleadings from Kshs 825,330 to Kshs 1,514,392 through submissions. That shift brought not only confusion but also contradiction on what the plaintiff's true claim for underpayment was, leaving the claim unproven. This claim must also fail.

### **Conclusion**

52. Having considered the pleadings, evidence and submissions by parties as well as decisions relied on by parties and those cited by the court, the conclusion I come to is that there was no breach of the contract. The defendant served the requisite notice and, therefore, the contract was properly terminated. I also find that the plaintiff was not entitled to special damages for breach of contract given that the contract was lawfully terminated. I further find that the general damages are not awardable in case of alleged breach of contract as this would be a duplication given that any loss suffered due to breach is known and is claimed as special damages.



53. Finally, I further find that the claim for underpayment was not proved. Whereas the plaintiff claimed Kshs 825, 330 in the amended plaint, the plaintiff urged for Kshs 1,514,392 in the submissions, thus shifting from the claim pleaded and therefore leaving this claim not proved.
54. In the end, I find that the plaintiff did not prove its case on a balance of probabilities. Consequently, the suit is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**E C MWITA**

**JUDGE**

