



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

SUIT NUMBER 216 OF 2019

PERI FORMWORK SCAFFOLDING.....PLAINTIFF

-VERSUS-

WHITE LOTUS PROJECTS LIMITED.....DEFENDANT

J U D G M E N T

1. By a plaint dated 29/08/2019, the plaintiff claimed from the defendant a sum of US \$ 1,705,158/22, being the balance for materials supplied for the defendant's construction projects known as "the Pinnacle Project". The parties had entered into an Agreement for the supply of Formwork dated 30/3/2017. The plaintiff also prayed for general and exemplary damages for breach of contract.

2. The Defendant entered appearance on 18/9/2019 but failed to file any defence to the claim. The plaintiff requested for judgment on 14/11/2019 which was entered on 10/01/2020 and the matter was fixed for formal proof.

3. On 16/11/2020, the formal proof took place virtually. **Mr. Christopher Ralph Heesen**, the plaintiff's Head of Strategic Projects, testified on behalf of the plaintiff. He adopted his witness statement and testified that the defendant and the plaintiff entered into an agreement for supply of goods to the defendant. That while the plaintiff performed its part of the agreement, the defendant failed to perform its part by failing to pay for the delivered goods. This was despite having acknowledged the debt and undertaking to pay the same. He stated that this was in breach of the agreement between the parties.

4. The Plaintiff filed submissions which the Court has considered. It was submitted that the plaintiff entered into an agreement with the defendant on 30/03/2017 for the supply of formwork to various elements of the Pinnacle Project. Despite the plaintiff performing its part by supplying the initial formwork which was acknowledged by the defendant totaling US \$ 2,405,158.22, the defendant had failed to perform its part.

5. That the defendant expressed difficulty in meeting the payments and only paid US \$ 700,000 leaving an outstanding sum of US \$ 1,705,158.22. This failure amounted to a breach contract.

6. In **Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR**, Emukule J observed: -

"..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

7. In **Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR**, the Court held: -

"In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."

8. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth.

9. The suit before Court is based on an alleged breach of an agreement between the plaintiff and defendant. The Plaintiff adduced evidence of the existence of the agreement by producing a copy of the same.

10. As regards its breach, PW1 testified that the plaintiff supplied the initial formwork to the defendant, and thereby satisfied its part of the agreement. That it thereafter raised invoices totaling the sum of US \$ 2,405,158.22. Out of this amount, the defendant only paid US\$ 700,000 leaving a balance of US \$ 1,705,158.22. In the letters dated 24/4/2018 and 1/8/2018, the defendant acknowledged the supply of the formwork by the plaintiff. In the premises, the plaintiff's claim was due and payable.

11. In **Mukuru Munge v Florence Shingi Mwawana & 2 others [2016] eKLR**, the Court of Appeal held: -

“It is axiomatic that a cause of action founded on contract accrues when breach takes place and not when damage is suffered...And a breach of contract occurs when one or both parties fail to fulfill their obligations under the terms of the contract.”

12. In **Mwangi v Kiiru [1987] eKLR**, Lord Diplock's sentiments in **Photo Production v Securicor Ltd (1980) AC 827**, were approved. In that case Lord Diplock observed: -

“Characteristically, commercial contracts are a source of primary legal obligation upon each party to it to procure that whatever has been promised will be done...Every failure to perform a primary obligation is a breach of contract.”

13. Since the plaintiff's evidence was unchallenged, I hold that the plaintiff was able to prove, on a balance of probability the existence of the said contract; its performance and the breach thereof.

14. On mitigation of costs, the plaintiff gave evidence of the effort it undertook including: obtaining interim preservative orders whereby the court directed the defendant to deliver all the supplied materials to a storage facility designated by the plaintiff for the purpose of preservation. During that period, the plaintiff incurred additional expenses amounting to US \$ 121,291.75; the Plaintiff marketed and sold the supplied material to third parties so as to mitigate its losses and was able to recover a sum of US\$ 317,465.81.

15. In **African Highland Produce Limited v John Kisorio [2001] eKLR**, the Court of Appeal stated: -

“The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimize the damages or embark on dubious litigation. The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant.”

16. In view of the foregoing, the Court is satisfied that; the defendant was in breach of its contract with the plaintiff; the plaintiff properly mitigated its damages and that consequently, the plaintiff has proved its claim against the defendant to the required standard. Having proved its case, I now consider the prayers sought.

17. In the first prayer, the plaintiff sought that the contractual outstanding amount of US \$ 1,705,158.22, which was proven through the various commercial invoices that were produced in evidence, be allowed. This is hereby allowed.

18. The injunction and other prayers of preservation were overtaken by events or have already been granted in the interim.

19. The plaintiff also sought general and exemplary damages. In **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR**, the Court of Appeal held: -

“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 case 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. Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour.”

20. It was submitted for the plaintiff that the defendant's actions were aimed at making a profit from the supply of the goods from the plaintiff. That it failed to compensate the plaintiff and that therefore, exemplary damages should be awarded.

21. It is not in dispute that the defendant used the plaintiff's material for a project but did pay for the same. However, there was no evidence to show that the profit was not in excess of what was contemplated in the contract between the parties. In this regard, the rule in **Rookes V Barnard** was not achieved. The claim for general and exemplary damages is therefore declined.

22. On general damages, in **Anson's Law of Contract, 28th Edition at page 589 and 590**, it is stated: -

“Every breach of a 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 that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

23. In this regard, an award of general damages is a remedy for the loss incurred by the injured party due to the breach of contract. The plaintiff demonstrated that it suffered losses due to the depreciation, tampering with, removal and dealing with the supplied material as they lay in waste in the defendant's possession. Further the breach of contract brought great inconvenience to the plaintiff particularly in the efforts to mitigate the losses caused by the breach of contract. The plaintiff is entitled to general damages which I assess at Kshs. 10,000,000/=.

24. Accordingly, the Court finds that the plaintiff has proved its case. The plaintiff is awarded the sum of US \$ 1,705,158.22 claimed and Kshs. 10,000,000/= general damages. The claim for exemplary damages is declined. Interest on the special damages of US\$ 1,705,158.22 is awarded at court rate from the date of filing suit. Interest on general damages shall apply from the date of Judgment.

It is so decreed.

DATED and DELIVERED at Nairobi this 27th day of January, 2021.

A. MABEYA, FCIArb

JUDGE