



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 568 OF 2015

BETWEEN

GEORGE MAINA KINGORI T/A

WANGA INVESTMENTSPLAINTIFF

AND

BAMBURI SPECIAL PRODUCTS LIMITEDDEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff's case is set out in the Complaint dated 12th May 2015. He alleges that the Defendant breached the contract for the supply of ready mix concrete of *class 20* for the construction of his commercial and residential development on Plot No. Umoja Block 83/1224. He seeks a declaration that the Defendant is in breach of the contract, general damages for breach of contract and loss of income and payment of KES. 8,346,258.00.
2. In its Statement of Defence dated 23rd December 2015, the Defendant admits that it supplied ready mix concrete of 'class 20' as agreed but denies that it breached the contract as alleged by the Plaintiff.
3. The matter was set down for hearing on various dates. The Plaintiff (PW 1) testified on his own behalf while the Defendant called two witnesses: Annette Ounga (DW 1), its Quality Controller-Ready-Mix Concrete and its Logistics Manager, Moses Maina (DW 2). The advocates also filed written submissions in support of their respective positions which I shall consider in reaching this judgment.

The Plaintiff's Case

4. The Plaintiff testified that the parties entered into a contract for the supply and delivery of *ready to mix concrete class 20 pump as per KS 02-594 and BS EN 206: Part 1* by the quotation offer dated 9th May 2013 and for the price of KES. 723,840.00 ("the Quotation"). He accepted the offer by paying the purchase price. He further testified that he orally informed the Defendant that the 'class 20' concrete was to be a composition of 1 part of Cement, 2 parts of Sand and 4 parts of Ballast. He alleged that the quality that he had ordered was not what was being delivered as he noticed that the said mix concrete was "lighter" as the deliveries progressed and was not compatible with his form of work.
5. The Plaintiff recalled that this change of quality affected the building as the beams developed cracks but these were arrested. On 26th November 2014, he addressed his concerns with the Defendant by an email stating that from the last supply of 16th November 2014, he had observed that the concrete supplied was too light and of a more liquid form than the standard *class 20*. Further that there was no portion of ballast and if it was there at all, it was in very small quantities. The Plaintiff further recalled that the Defendant, in its email to him on the same day, confirmed that it had changed the mix design because it had changed its supply of aggregates. The Plaintiff thus contends that the Defendant, by its own admission, supplied a product that did not correspond with what was initially ordered by the Plaintiff.
6. The Plaintiff informed the court that he did not order any more cement and his building, which was designed to have seven floors, stalled at the fourth floor. The Plaintiff added that between 23rd May 2013 and 16th November 2014 he made purchases worth KES. 8,346,258.00 and despite several demands, the Defendant ignored and or refused to address his concerns. The Plaintiff seeks relief on the basis that the

Defendant refused to supply the required quality of concrete indicated and changed the mixture content in breach of the contract.

7. Counsel for the Plaintiff relies on **section 15** of the *Sale of Goods Act (Chapter 31 of the Laws of Kenya)* (“the *SGA*”) which provides that where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description. Counsel submits that the Plaintiff gave a description of the kind of ready to mix cement he wanted to purchase which was *class 20*, comprising of 1 part Cement, 2 parts Sand and 4 parts Ballast. Counsel submits that the Defendant owed the Plaintiff the obligation to deliver ready-to-mix concrete which conformed to the description issued to the Plaintiff.

8. The Plaintiff further submits that **section 16** of the *SGA* provides for exceptions to an implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale where; (a) the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required (b) goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality. The Plaintiff states that he had disclosed to the Defendant the purpose for which he needed the ready-to-mix concrete which was delivered directly to the construction site without any opportunity for the Plaintiff to interfere with the quality thereof. He adds that as the Defendant is in the business of dealing with ready-to-mix concrete, it owed him an obligation to ensure that the concrete delivered was fit for purposes and of merchantable quality.

9. The Plaintiff further submits that while **Paragraph 6** of the Conditions of Sale of ready-to-mix concrete attached to the Quotation provides for situations under which the Defendant is unable to accept responsibility in respect of strength or defect which may develop in any concrete supplied, the Defendant did not provide proof that the Plaintiff dealt with the concrete in any manner that would exclude liability in respect to weakness and defects of the concrete supplied. The Plaintiff relies on the case of *Showcase Properties Limited v Bamburi Special Products Limited ML HC COMM No. 577 of 2011 [2020] eKLR* to support of this submission. The Plaintiff submits the Defendant breached the contract of sale and is liable for the weakness of the building resulting from the concrete supplied. His Counsel invites the court to find that the concrete mix supplied was not fit for purpose, did not fit the description and was not of merchantable quality.

10. As regards the relief sought, the Plaintiff argues that the court should award him general damages for breach of the contract and loss of income as a result of the unfinished building for which he had provided proof of income generated from the ground and 1st floors and that general damages are meant to put him in a position he would have been had the breach not occurred. He further submits that he has provided a breakdown of the KES. 8,346,258.00 paid to the Defendant for the ready mix concrete supplied and the Defendant, having breached the contract of sale, should refund the amount he incurred in purchasing the concrete. He asserts that he had proved his case on the balance of probabilities.

The Defendant’s Case

11. The Defendant does not dispute that it entered into a contract with the Plaintiff for the supply of concrete mix *class 20 pump as per KS 02-594 and BS EN 206: Part 1* originating from the Quotation dated 9th May 2013 and that the Plaintiff paid KES. 723,840.00 signaling acceptance of the offer. The Defendant denies that the contract was valued at KES 8,346,258.00 or that it received any such sum from the Plaintiff in regard to a single contract but contends that it entered into various contracts with the Plaintiff for the supply and delivery of the said concrete mix on diverse dates between 16th May 2013 and 25th August 2014. It asserts that it delivered the concrete as agreed without any complaint by the Plaintiff.

12. The Defendant contends that by a contract dated 12th November 2014, it agreed to supply to the Plaintiff concrete as specified in the Quotation and at the terms of sale set out on the back, and the Plaintiff accepted the same by signing the quotation on 13th November 2014. The Defendant states that the class of concrete is not determined by the mix and denies that it breached the contract as alleged by the Plaintiff. The Defendant further states that the only requirement given by the Plaintiff was that the strength of the concrete should be minimum *20MPa* and that for each supply made, the Plaintiff signed delivery notes at the site as proof of acceptance of each truckload for every individual supply and there was no incidence of rejection of any truckload due to quality-related complaints.

13. The Defendant does not dispute that the Plaintiff wrote to it on 26th November 2014 asking why the concrete supplied on 16th November 2014 seemed “too light” and different from what he had observed in previous pours. In response to this observation, the Defendant explained that the source of raw material had changed hence the mix had to be changed accordingly. In response to the Plaintiff’s contention that it failed to provide *class 20* concrete which was constituted by part cement, sand and ballast in the ratio of 1:2:4, the Defendant responded that:

- a) There was no agreement on the mix design with the Plaintiff prior to the supply and in particular there was no agreement on constituent materials i.e., type, quality and quantity of sand, ballast cement or admixtures. The only requirement was for a C20 strength concrete.
- b) The Defendant’s batching system is done by weight and not by volume as implied by the Plaintiff.
- c) Such a mix by volume is never a guarantee that the required strength will be achieved as it depends on the properties of all the raw materials. That the ratio of 1:2:4 alluded to by the Plaintiff results in harsh unworkable concrete that will not meet the required strengths

14. The witnesses testified that the Defendant uses different ratios of the same mixture depending on the distance to the site, traffic conditions, weather, nature of raw materials and customer specifications and that the Defendant was not obliged to disclose concrete mix designs and any changes thereto to customers. That as per *BS EN 206-1 Standard Specification, performance, production and Conformity of Concrete* and *KS-02-594* quoted to the customer, conformance criteria of the concrete is dependent on the 28-day strength of concrete. The Defendant adds that in this case, the strength achieved was more than the minimum characteristic strength required i.e., achieved *22MPa* versus a minimum of *20MPa*.

15. The Defendant further avers that the Plaintiff did not disclose to the Defendant the nature and type of formwork used at his site or any special circumstances as to the workability /fluidity of the concrete. It further submits that from the Report of the concrete strength analysis conducted by the Defendant's experts, it is evident that the ready mix supplied was of *class 20* as per the Plaintiff's order. For the above reasons, the Defendant urged the court not to grant the reliefs sought by the Plaintiff.

Analysis and determination

16. The fact that the Plaintiff engaged the Defendant to supply ready mix concrete and the Defendant did supply concrete is not disputed. This is evidenced by the various contracts for the supply and delivery of ready-to-mix concrete *class 20 pump as per KS 02-594 and BS EN 206: Part 1*. The main issues for determination are whether the Plaintiff has made out a case against the Defendant for breach of contract and whether he is entitled to the reliefs sought in the Plaintiff.

Breach of Contract

17. The Plaintiff's case is that the Defendant supplied the wrong concrete mix which he had described to the Defendant as *class 20* comprising of Cement, Sand and Ballast in the ratio 1:2:4. The Defendant, on the other hand, contends that the Plaintiff only described that he wanted to buy the *Class 20* concrete, which is what it delivered.

18. In this case, the offer was constituted by the Quotation dated 9th May 2013 setting out the terms of the supply. The description of the ready mix cement indicated "*Supply of concrete class20 pump as per KS 02-594 and BS EN 206: Part 1*". The reverse side of the quotation contains "*General Conditions*" which I consider germane provided as follows:

5. All concrete supplied conforms to is offered for supply under KS 02-594 and BS EN 206: part 1, unless otherwise stated.

6. The concrete supplied is as detailed on the delivery docket, the Company is unable to accept responsibility in respect of strength or any defect which may develop in any concrete supplied if:

a) Water is added to concrete either before or after discharge from the delivery unit.

b) Concrete is manufactured from customer's specified mixed design ratios.

c) Such non conformity or defect is due to faulty handling, placing or curing by the Customer or agent.

d) Such non conformity of defect is due to faulty or defective job practice by the Customer or agent.

7. The class of concrete ordered will be detailed on the face of the delivery note and must be checked by the Customer at the time of delivery for compliance with the job specification . The Company is unable to accept responsibility if this check is not made before discharge is commenced.

8. The Company will not recognize test results from concrete supplied by it unless such concrete is sampled at the point of delivery and tested in accordance with KS 02-595 Part 1-5 as applicable. External testing will not automatically be carried out, however if so requested the Company will institute a test program at the Customer's expense. Charges for this service will be in accordance with the Company's ruling rates at the time of delivery.

19. Since the Quotation and delivery notes on record constitute the contract between the parties, I am unable to find where the Plaintiff had given a description of the ready concrete mix was to be in the ratio 1:2:4. In the circumstances, the provisions of **section 15** and **16** of the **SGA** relied on by the Plaintiff are inapplicable to this case. The Quotation duly accepted by the Plaintiff points to the concrete mix being *Class20*. In order to succeed the Plaintiff had to demonstrate that the concrete *Class-20* was indeed in the ratio 1:2:4 or that it did not meet the relevant standard *KS 02-294 and BN EN 206; Part 1*. The Defendant's case was that the class of the concrete required by the Plaintiff was in respect of its strength which did not change as indicated in the *Comprehensive Strength of Concrete Test* reports.

20. Under **Condition 7** of the Conditions of Sale, the Plaintiff was required to check the concrete at the time of delivery for compliance with the job specification. There is no evidence that the Plaintiff conducted such a check before delivery, faulted the quality and rejected a delivery for non-conformity. The fact that the Plaintiff noticed that the concrete was "too light" does not automatically mean that the same is of poor or undesired quality without technical or expert evidence confirming the quality of the concrete was contrary the specifications agreed upon as stated in the Quotation. Although the Plaintiff was afforded the opportunity to bring expert testimony on this aspect of the case, he failed to do so.

21. As a result of the foregoing, I find that the Plaintiff has failed to prove that the Defendant breached the contract as he did not demonstrate that the Defendant supplied concrete mix supplied was different from the desired class stated in the Quotation.

22. The Plaintiff bears the burden of proving causation. In other words, he had to establish that the inferior concrete supplied to him led to or was the cause of the loss and damage he now claims. Even if I was to find that the concrete supplied was not the one desired by the Plaintiff, I am unable to find that it was responsible for the cracks in his building or that it was the reason why his building stalled at the fourth floor. He confirmed that the Defendant was not involved in building the columns or foundation of the building and that at the time when there were cracks on the building's beams on the roof of the ground floor, the Defendant was not involved in the supply of concrete. The Plaintiff also admitted that in 2012 he already had tenants in the building and that the beams that supported the ground floor were already cracking. The Plaintiff conceded that the reason he did not go higher than the 4th floor was because the beams of the 1st floor were compromised and that his engineer advised him not to build further. On the basis of the evidence, I find that the Plaintiff has not proved the concrete supplied by the

Defendant was the cause of the weak beams and columns of his Building and his failure to build higher floors.

Reliefs sought by the Plaintiff

23. Having reached the conclusion that the Plaintiff has failed to establish breach of contract, it follows that I cannot grant any of the relief. Had the Plaintiff succeeded, it would not have recovered general damages for breach of contract and loss of income as it is firmly established in our law that damages at large are not available for breach of contract (see *Kenya Tourist Development Corporation v Sundowner Lodge Limited NRB Civil Appeal No. 120 of 2017 [2018] eKLR*). The claim for loss of income is in the nature of special damages which must be pleaded with particularity and proved (see *Banque Indosuez v DJ Lowe and Company Ltd [2006] 2KLR 208*). Since the Plaintiff did not plead such a claim, I would not have awarded it.

Disposition

24. The Plaintiff has failed to prove his case on the balance of probabilities. As a result, I now dismiss the suit. The Plaintiff shall pay costs of the suit to the Defendant.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 21ST day of APRIL 2021.

JOHN M. MATIVO

JUDGE

Ms Wambui instructed by Njenga, Mbugua and Nyanjua Advocates for the Plaintiff.

Mr Wambugu instructed by Wambugu Gitonga and Company Advocates for the Defendant.