Hydro Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax) (10 August 2021) (Judgment)

Hyrdo Water Well (K) Limited v Nelson Mukara Sechere & 2 others [2021] eKLR

Neutral citation: [2021] KEHC 22 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E212 OF 2019

JM MATIVO, J

AUGUST 10, 2021

BETWEEN

HYDRO WATER WELL (K) LIMITED .... PLAINTIFF

AND

GILBERT MUTHENGI WAMBUA .... 1ST DEFENDANT

HENRY NANDWA NAMAYI .... 2ND DEFENDANT

NELSON HENRY SECHERE .... 3RD DEFENDANT

SUED IN THEIR REPRESENTATIVE CAPACITY AS THE OFFICERS OF CHAE KENYA SOCIETY

Legal requirements relating to establishing a claim for lost profits as a remedy for breach of contract.

Reported by Beryl Ikamari

Law of Contract *- breach of contract - establishing a claim of breach of contract - where a plaintiff claimed that a contract had been terminated by a defendant's failure to perform certain contractual obligations - circumstances in which a litigant would be said to have established a claim for breach of contract.*

Law of Contract *- breach of contract - damages - lost profits - factors that a litigant would have to prove in establishing a claim for damages for lost profits.*

Construction Law *– contractor equipment – claim for damages for idle equipment – rule that gross idle equipment damages had to be reduced by 50% to reflect lack of wear and tear - what considerations did a court look into in measuring damages payable for idle equipment - what principles did the court take into consideration when awarding special damages*

Law of Contract *- breach of contract - damages - special damages - pleading for and proving claims for special damages - claim for a refund of premium paid for the advance payment bond - circumstances under which the court would award special damages.*

Brief facts

The parties entered into a contract for the drilling, equipping of boreholes and construction of elevated plastic tanks by the plaintiff. The contract value was Kshs. 398,237,280 and the contract was entered into after a tender process had been undertaken. According to the plaintiff, the contract was one that would be terminated by a failure to begin works within 21 days of its execution.

The plaintiff alleged that the defendants failed to perform some of their obligations under the contract. In particular, it stated that contrary to the requirements of article 4.1 of the contract the defendants failed to give the plaintiff information on the exact location, names, sites for the boreholes to be drilled, Hydrological Survey Reports for each borehole, WRMA Authorization for each borehole, EIA reports and NEMA licences for each borehole and the names of contact persons and their mobile numbers in each county. The plaintiff also stated that the defendants refused to release the original advance payment bond to enable the discharge of the security.

The plaintiff sought monetary compensation for breach of contract. The compensation sought for lost profits was Kshs. 106,985,953.33, for idle machinery and equipment they sought compensation amounting to Kshs. 28,800,000 and for the premium paid for the advance payment bond they sought compensation of Kshs. 3,200,635. They also sought costs of the suit and interest on all the sums that they claimed as compensation at court rates.

The defendants explained that it was not mandatory for the contract to be terminated if work did not begin within 21 days of the signing of the contract. The defendants added that the contract required the plaintiff to present a bank guarantee for issuance of advance payment for purposes of mobilization, but in breach of that requirement, the plaintiff supplied the defendant with an Advance Payment Bond from its insurer.

Issues

i. What elements was a litigant required to prove in a claim for breach of contract?
ii. What was the definition of loss of profit as used as a remedy for breach of contract?
iii. What requirements did a litigant have to prove to succeed in a claim for loss of profits as a remedy for breach of contract?
iv. What considerations did a court look into when measuring the monetary compensation to be awarded as loss of profit as a remedy for breach of contract?
v. What requirements did a litigant (contractor) have to prove to succeed in a claim for idle equipment?
vi. What considerations did a court look into in measuring damages payable for idle equipment?
vii. What principles did the court take into consideration when awarding special damages?

Held

1. Contract law gave effect to consensual agreements entered into by parties to the contract. Remedies granted by the court were designed to give effect to what was voluntarily undertaken by the parties. Damages in the contract were intended to place the claimant in the position he would have been in if the contract had been performed.
2. The principal remedy under common law for breach of contract was an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party.
3. A contract was the source of primary legal obligations upon each party to it to procure that whatever he had promised will be done was done. Leaving aside the comparatively rare cases in which the court was able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations gave rise to substituted or secondary obligations on the part of the party in default. Those secondary obligations of the contract breaker arose by implication of law.

4. To successfully claim damages for breach of contract, the plaintiff had to show that a contract was in existence, that the contract was breached by the defendant and that the plaintiff suffered damage (loss) as a result of the defendant's breach. The plaintiff was not required to show a causal link between the breaches of an agreement and the damages with certainty. He was only required to establish that the wrongful conduct was probably a cause of the loss. A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, would succeed unless the defendant could discharge the onus of proving that there was no such probability.
5. The test to be applied was whether there was evidence upon which a court, applying its mind reasonably to such evidence, could find for the plaintiff. That implied that the plaintiff had to make out a *prima facie* case, in the sense of showing that there was evidence relating to all the elements of the claim. The court had to consider whether there was reasonable evidence upon which a reasonable man could find for the plaintiff.
6. The existence of a contract between the parties was not disputed. Since the defendant filed a defence but failed to attend the trial, the plaintiff's evidence which showed that the defendants were in breach of contract was uncontroverted.
7. Damages for breach of contract were a substitute for performance; such damages were generally regarded as an adequate remedy. The courts would not prevent self-interested breaches of contract where the interests of the innocent party could be adequately protected by an award of damages. Nor would the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function was confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.
8. The objective of compensating the claimant for the loss sustained as a result of non-performance made it necessary to quantify the loss which he sustained as accurately as the circumstances permitted. What was crucial was to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss had been identified, the court then had to quantify it in monetary terms.
9. Where a breach of contract affected the operation of a business, the court would have to select the method of measuring the loss which was the most apt in the circumstances to secure that the claimant was compensated for the loss which it had sustained. It could estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill. The assessment of damages in such circumstances often involved the exercise of a sound imagination and the practice of the broad axe.
10. Lost profits were available where the parties' contract clearly anticipated them and the party seeking them could prove the amount with relative certainty. Lost-profit damages were available in a variety of civil contexts; tort actions (both personal and business), breach of contract actions, antitrust suits, and claims for trademark and patent infringement. Nonetheless, courts continued to face the often-difficult questions of how to assess whether the parties contemplated lost-profit damages, whether a party actually suffered them, and if so, how to measure those lost profits.
11. The most important consideration in any lost profits case was how much and what type of evidence a party needed to prove the alleged lost profits. Typically, lost profits damages referred to the loss of net profits rather than gross profits or revenue. Lost profits were damages for the loss of net income to a business and broadly speaking they reflected income from lost business activity, less expenses that would have been attributable to that activity. After calculating net profits, the plaintiff had to show:
    a. that the conduct upon which the claim was based caused the lost profit damages (proximate cause);

b. that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct (forseeability); and

c. that the lost profits were capable of proof with a reasonable degree of certainty (reasonable certainity).

12. In a claim for lost profits, the plaintiff had to show, by a preponderance of the evidence, that the plaintiff's alleged loss was the proximate result of the breach, the so-called "but-for test" (but for the breaching conduct, the plaintiff would have earned profit). A "proximate" cause was a cause that produced a result in a natural and continuous sequence and without which the result would not have occurred.

13. The second element was foreseeability, which was a determination about whether the parties contemplated that such damages would arise or should have reasonably foreseen that they would arise. The parties' relationship was typically governed by a contract, usually with a specific term. The language in the contract usually determined whether lost profits were foreseeable.

14. Determining whether contracting parties contemplated lost-profits damages typically involved answering whether the contract allowed lost profits at all. A well-drafted contract could provide for the possibility of lost profits and the period for which such profits would be recoverable. Without such a contractual provision, lost profits would be legally foreseeable if the loss was natural and inevitable upon breach or if the breach resulted in lost profits because of a special circumstance known to the defaulting party at the time of the breach. The rule required only a reasonable reason to foresee, not actual foresight. To meet that standard, courts required significant contractual evidence of the reasonable contemplation of lost profits.

15. If the plaintiff was able to demonstrate that lost profits were actually available under the contract, it would typically then have to establish the applicable duration for which lost profits were recoverable. The period for calculating lost profits was the damage period or the loss period. Calculating the loss period was fact-specific. Contract terms, statutory requirements, prior custom and practice, and industry standards could, and typically would, influence the extent of the loss period. The loss period could be relatively short and, in the past, or may be on-going into the future, particularly when a franchisee continued to operate its business while pursuing litigation.

16. The third element to be proved was that lost profit damages were reasonably certain and not speculative. Generally, the certainty of damages was sufficient if the evidence enabled the court to make a fair and reasonable approximation of damages.

17. There was no attempt to show that the contract allowed the claim at all or whether the claim was foreseeable at the time of contracting and whether the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all the circumstances to have foreseen it. There was no cogent evidence to show that the breach resulted in lost profits because of a special circumstance, a circumstance that must have been known to the defaulting party at the time of the contracting. Such a claim required a professional in the field to give expert evidence and explain how the amount claimed was explained and the rationale upon which the amounts are arrived at. There was no attempt to bring the claim within the tests laid down above. The claim for loss of profits had not been proved.

18. The plaintiff did not adduce evidence that laid a basis for the grant of damages for lost profits. The plaintiff did not show that the claim was foreseeable at the time of contract and whether the loss was natural and inevitable upon breach or that there was a special circumstance, known to the defaulting party, that resulted in the loss. There was a need for professional evidence to explain the amount claimed as lost profits. The plaintiff did not attempt to bring its claim within the framework of the existing authorities on lost profits.

19. Idle equipment (or equipment which must remain on the job site because the project was delayed) was a real and quantifiable loss to the contractor, whether rent was paid to another or charged to the contractor himself as an accounting expense, and it was recoverable. The contractor was only

entitled to compensation for the delay period attributable to the owner. The delay was attributed to the defendant. The contractor had the burden of proof to establish that the equipment was actually idle during the delay period and that the equipment was necessary to complete the work. The plaintiff had met those two tests.

20. The proper measure of damages for idle equipment was the equipment's actual rental value or the actual cost to own the equipment; absent such rate information, a rental rate book could be used as a guide. Gross idle equipment damages had to be reduced by fifty percent (50%) to reflect lack of wear and tear.
21. The plaintiff's evidence showed that their equipment had been idle for 120 days. The plaintiff stated that the rate applicable was Kshs. 10,000 per hour translating to Kshs. 28,800,000. In determining such claims the position was that gross idle equipment damages had to be reduced by 50% to reflect lack of wear and tear. Therefore, the amount payable would be Kshs. 14,400,000.
22. Typically in a construction project an advanced payment bond would be required by the client if the contractor requested advance payment to help them meet significant start up or procurement costs that may have to be incurred before construction began. For example, where the contractor has had to purchase high-value plant, equipment or materials specifically for the project. The bond would protect the client in the event that the contractor failed to fulfil its contractual obligations, for example if the contractor became insolvent. An advance payment bond would normally be an on-demand bond, meaning that the bondsman pays the amount of money set out in the bond immediately on demand, without any preconditions having to be met. That was as opposed to a conditional bond (or default bond) where the bondsman was only liable if it had been established that there has been a breach of contract.

Claim partly allowed.

Orders

i. *Judgment entered in favor of the plaintiff against the defendants jointly and severally for the total sum of Kshs. 17,600,635/= (Kshs. 14,400,000/= for idle machinery and Kshs. 3,200,635/= in respect of the claim for premium for the Advance Payment Bond).*
ii. *The said sums were to attract interests at court rates from the date of filing the suit until payment in full.*
iii. *The defendants were to pay the plaintiff the costs of the suit plus interests on the costs at court rates that was applicable from the date of taxation.*

Citations

Cases

East Africa;

1. *African Highland Produce Ltd v John Kisorio* Civil Appeal 264 of 1999; [2001] eKLR – (Mentioned)
2. *CMC Aviation Ltd v Cruisair Ltd* Civil Application NAI 12 of 1978; [1978] eKLR— (Cited)
3. *Ethics and Anti-Corruption Commission v Nderitu Wachira & 2 others* Miscellaneous Civil Application 19 of 2015; [2016] eKLR—(Cited)
4. *Nalinkumar M Shah v Mumias Sugar Company* Commercial Civil Case 40 of 2009 [2010] eKLR -(Cited)
5. *Omulo, John Didi v Small Enterprises-Finance Co Ltd & another* Civil Case 232 of 1996; [2005] eKLR — (Cited)
6. R*epublic v Rosemary Wairimu Munene; Ex-Parte Applicant v lhururu Dairy Farmers Co-operative Society Ltd* Civil Case 6 of 2004; [2004] eKLR — (Cited)
7. *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* Civil Appeal 278 of 2010; [2013] eKLR— (Cited)

8. *Shaneebal Limited v County Government of Machakos* Civil Suit 25 of 2016; [2018] eKLR — Explained
9. *Thumbi, Waweru v Samuel Njoroge Thuku* Civil Appeal No 445 of 2003; [2006] eKLR— (Explained)
10. *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* Civil Appeal 178 of 2005; [2015] eKLR— (Explained)
11. *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Civil Suit 1243 of 2001; [2009] eKLR— (Explained)

United Kingdom;

1. *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2)* [1912] UKHL J0719-2 - (Explained)
2. *Bunge SA v Nidera NV (formerly NideraHandelscompagnie BV)* [2015] UKSC 43 - (Followed)
3. *Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd)* [2010] EWCA Civ 486 (05 May 2010) - (Explained)
4. *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; [1980] UKHL 2; [1978] 1 WLR 856 - (Explained)
5. *Robinson v Harman* (1848) 1 Ex Rep 850; 154 ER 363 - (Explained)
6. *Victoria Laundry v Newman* [1949] 2 KB 528 - (Mentioned)
7. *Wertheim v Chicoutimi Pulp Co* [1911] AC 301; [1910] UKPC 1 - (Explained)

United States;

1. *Ford Contracting, Inc v Kentucky Transportation Cabinet* 449 SW 3d 397 (Ky Ct App 2014) - (Explained)
2. *Griffin v Colver* 16 NY 489 (NY 1858) - (Explained)
3. *National Controls Corp v National Semiconductor Corp* 833 F 2d 491 (3d Cir 1987) - (Explained)

Texts

Hugh, B., (Ed) (2015), *Chitty on Contracts* London: Sweet & Maxwell 32nd Edn

Statutes

1. Companies Act (cap 486) In general - (Cited)
2. Societies Act (cap 108) In general - (Cited)

Advocates

M/S Mohammed Muigai LLP Advocates for defendants

JUDGMENT

1. By a plaint dated June 27, 2019, the plaintiff, a limited liability company incorporated under the provisions of the *Companies Act*[1] brings this action against Chae Kenya Society, a society registered under the *Societies Act*,[2] (sued through its office bearers, Mr Nelson Mukara Sechere, Henry Nandwa Namayi and Gilbert Muthengi Wambua) for breach of contract. The plaintiff's claim is that following an invitation by the defendants for interested bidders to submit their bids for Tender No. CKS/01/W4A/2018-19 for drilling, equipping of boreholes and construction of elevated plastic tanks, it submitted its bid and vide a letter dated August 1, 2018, the defendants notified it that it's bid for 122 boreholes in various regions was successful at cost of Kshs 3,264,240/= per borehole translating to a contract value of Kshs 398,237,280/=.

[1] Cap 486, Laws of Kenya-Repealed by Act No 17 of 2015.

[2] Cap 108, Laws of Kenya.

2. The plaintiff states that it accepted the offer vide its letter dated August 9, 2019 and the parties entered into a contract dated September 21, 2018. Additionally, the plaintiff avers that its bid included a Bill of Quantities containing the schedule of rates that would apply once parties entered into a contract. It avers that article 1.01 (g) of the contract defined the term contract to include the Schedule of Rates and Work Plan that had been submitted by the plaintiff. Also, it avers that article 3.01 of the contract obligated the plaintiff to start drilling the boreholes within 21 days from the date of signing the contract. Further, it was a term of the contract that failure to comply with the said condition could result in cancellation of the contract. Additionally, the plaintiff avers that article 3.02 of the contract required it to mobilize drilling rigs for the contracted works and undertake not to deploy drilling rigs for any other works until completion of works under the contract.

3. The plaintiff avers that on the work plan shared with the defendants and in order to meet its obligations under the contract, it assigned and set aside three drilling rigs for purposes of performing the works under the contract as follows: -

    a. Rig 1 (KCB 489 Y) would carry out works in Nakuru, Baringo, Kerich, Uasin Gishu, Elgeyo Marakwet and Turkana where it would drill a total of 42 boreholes.

    b. Rig 2 (KBX 779 Y) would carry out works in Narok, Bomet, Nyamira, Kisii, Kitui, Machakos, Isiolo and Meru where it would drill a total of 67 boreholes.

    c. Rig 3 (KBZ 236 U) would carry out works in Garissa where it would drill a total of 13 boreholes.

4. The plaintiff states that article 3.01 of the contract obligated it to commence the works within 21 days of signing the contract, and in compliance with article 5.03 of the contract, it processed an advance payment of Kshs 159,294,912/= being 40% of the contract sum and it incurred a premium of Kshs 3,200,635/=. It states that despite fulfilling the above obligations, the defendant failed to perform its obligations under article 4.01 of the contract. Specifically, it states that the defendants failed to provide the plaintiff with the following data, documentation and information : -

    a. Exact location names/sites for the boreholes to be drilled.

    b. Hydrological Survey Reports for each borehole.

    c. WRMA Authorization for each borehole.

    d. EIA reports & NEMA licenses for each borehole.

    e. Contact persons and their mobile numbers in each county.

5. The plaintiff contends that its attempts to procure the above information from the defendant were in vain, and, also, the defendants refused to release the original advance payment bond to enable discharge of the security. It states that in order to mitigate loses, it was forced to treat the contract as terminated on February 14, 2019, and, consequent to the defendant's breach, it is entitled to damages as particularized below: -

    a. Wasted expenditure incurred to procure the Advance Payment Bond-Kshs 3,200,635/=

    b. Idle Machinery Time/Standby Time for 120 days- Kshs 28,800,000/= calculated as per the schedule of rates at 10,000 per hour.

    c. Loss of expected profits-Kshs 106,985,953.33.

6. The plaintiff avers that it has been in the business of drilling boreholes for over 18 years and it entered into the subject contract with a view of making a reasonable profit. As a consequence of the foregoing, it prays for judgment against the defendant for: -

   a. Loss of profits in the sum of Kshs 106,985,953.33.

   b. Compensation for idle machinery and equipment in the sum of Kshs 28,800,000/=.

   c. Premium paid for the advance payment bond of Kshs 3,200,635/=.

   d. Interest on (a), (b) & (c) above at court rates from the date of filing suit until payment in full.

   e. Costs of this suit together with interest thereon at such rate and for such period of time as this court may deem fit to grant.

   f. Any such other or further relief as this court may deem appropriate.

The Defendant's Defense

7. In their Statement of defence dated August 29, 2019 filed by the firm of M/S Mohammed Muigai LLP Advocates, the defendants *inter alia* denied the claim and averred that the notification of the award preceded the signing of the contract which would govern the party's relationship. They averred that article 5.03 of the contract provided that the defendant was to advance a mobilization advance of 40% upon presentation of a bank guarantee. Further, they averred that cancellation of the contract was not a mandatory consequence of failure to commence works within 21 days of signing the contract. They averred that mobilization was to be accomplished upon identifying the exact drilling site and remittance of the advance payment. The defendant averred that the contract obligated the plaintiff to present a bank guarantee for issuance of advance payment for purposes of mobilization, but in breach of the aforesaid requirement, the plaintiff alleges to have supplied the defendant with an advance payment bond from its insurer. They denied that the plaintiff suffered any loss. In its reply to defense dated September 19, 2019, the plaintiff joined issues with the defense and reiterated the contents of the plaint.

8. Vide an application dated October 2, 2020, the firm of Mohamed Muigai LLP applied to cease acting for the defendants. On February 16, 2021, the 1st defendant attended court for the hearing of the said application and asked for 2 weeks to engage another lawyer. The matter was scheduled for directions on March 8, 2021, but on the said date he did not attend court. The matter was listed before me on April 13, 2021, but despite the defendants having been served, they did not attend court. I scheduled the matter for hearing on May 19, 2021 and directed that they be served. On the said date, despite being served, there was no appearance for the defendants, hence hearing proceeded ex parte.

The Plaintiff's Evidence

9. Deepti Vara, the plaintiffs finance manager testified on behalf on the plaintiff. She adopted her witness statement dated June 27, 2019 and the plaintiffs bundle of documents which were marked as plaintiffs exhibits 1 to 13. Her testimony is essentially a replica of the averments in the plaint and the aforesaid witness statement; hence, it will add no value to rehash the same here.

The Plaintiff's Advocates Submissions

10. The plaintiffs' counsel submitted that because the defendant failed to attend hearing and adduce evidence, their defense remains unproved statements of fact, and that the plaintiffs case is

uncontroverted. To buttress his argument, he cited *CMC Aviation Ltd v Cruisair Ltd*[3] which cited *John Didi Omulo v Small Enterprises-Finance Co Ltd & another* [4]which held that unless averments the pleadings are proved by evidence, no decision can be founded upon them. He also cited *Shaneebal Limited v County Government of Machakos*[5] which adopted *Trust Bank Limited v Paramount Universal Bank Limited & 2 others*[6] for the proposition that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings and failure to adduce evidence means that the plaintiff's evidence is uncontroverted and therefore unchallenged.

11. Counsel submitted that the defendant breached article 4.01 of the contract by failing to provide the plaintiff with the exact location names/sites for the boreholes to be drilled; Hydrological Survey Reports for each borehole; WRMA Authorization for each borehole; EIA reports & NEMA licenses for each borehole; and contact persons and their mobile numbers in each county.

12. Regarding loss of profits, he submitted that profit is a remedy available to an innocent party in cases of breach of contract. He argued that the plaintiff arrived at the figure claimed for profits by calculating the costs of the works to be undertaken based on the work plan submitted. He referred to the documents at pages 34 to 38 in the plaintiff's bundle of documents which contain a calculation of the expected profits and cited *Victoria Laundry v Newman*[7] which laid down four-fold requirement for a party to succeed in a claim for loss of profits. One, the party in breach must reasonably have expected that the plaintiff would make profits had the contract been executed. Two, the claim for loss of profits would be what would be reasonably foreseeable by the parties. Three, reasonably foreseeable depends on what the parties knew during the contract making process. Four, the kind of knowledge parties have must be ordinary in any sense. He argued that the plaintiff met the above tests, that the plaintiff has been in the business of drilling boreholes for over 18 years and it entered into the contract with a view of making reasonable profits. He argued that the defendants knew that the plaintiff would make a profit if the contract was faithfully performed. He urged the court to be persuaded by *Nalinkumar M Shah v Mumias Sugar Company*.[8]

13. Additionally, counsel submitted that a plaintiff claiming damages must also show that he mitigated the loss upon breach of contract. He cited *African Highland Produce Ltd v John Kisono*[9]for the proposition that it is the duty of the plaintiff to take reasonable steps to mitigate the loss he has sustained. He argued that in order to mitigate against losses, the plaintiff was forced to treat the contract as terminated on February 14, 2019.

14. Regarding the claim for compensation for idle machinery and equipment in the sum of Kshs 28,800,000/=, counsel cited article 3.02 of the contract which provides that "the contractor shall not, upon mobilization of the assigned drilling rigs for the contracted works with the client, deploy the rigs to undertake any other works outside the scope of this contract until he has completed all the Works

[3] {2005} eKLR

[4] {2005} eKLR

[5] {2018} eKLR

[6] Nairobi (Milimani) HCCS No 1243 of 2001.

[7] {1949} 2 KB 528.

[8] {2010} eKLR.

[9] CA 264199 {2001} eKLR.

under this contract. Failure to comply with this condition may result in cancellation of the contract." He argued that in order to meet its obligations, the plaintiff assigned and set aside three drilling rigs for purposes of performing the works under the subject contract and that the plaintiff had a legitimate expectation that works would commence within 21 days and as such it had to assign drilling rigs to the 4 regions covered by the contract. He argued that the drilling rigs assigned and set aside by the plaintiff remained idle for 120 days until when the plaintiff treated the contract as terminated. As per the schedule of rates prepared by the plaintiff the rate of calculating the cost of idle machinery was Kshs 10,000 per hour totaling to Kshs 28,800,000. He submitted that the plaintiff has proved the claim for compensation for idle machinery and equipment and this court should award the same.

15. Regarding the Premium paid for the advance payment bond of Kshs 3,200,635/=, counsel submitted that as part of compliance with the contract, the plaintiff processed an advance payment bond of Kshs 159,294,912/= being the 40% of the contract sum and incurred a premium of Kshs 3,200,635/=. He submitted that this being a claim for special damages, it is trite law that it must be specifically pleaded and proved. He argued that the plaintiff produced the receipt for Kshs 3,200,635/=.

16. Lastly, counsel urged the court to award interests on the sums claimed plus costs of the case. He relied on *Ethics and Anti-Corruption Commission v Nderitu Wachira & 2 others*[10] which cited *Republic v Rosemary Wairimu Munene, ex-parte applicant v lhururu Dairy Farmers Co-operative Society Ltd* for the holding that the issue of costs is the discretion of the court.

Determination

17. The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. This position was appreciated as early as in 1848 in *Robinson v Harman*[11] in which Parke B said "the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

18. The above statement of the law has been endorsed in numerous judicial pronouncements in literally all jurisdictions of the world to the extent it can safely be said that it has acquired the singular distinction of the force of law. For instance, in 2015, it was endorsed in *Bunge SA v Nidera NV* (formerly Nidera Handelscompagnie BV)[12] where it was described as the "fundamental principle of the common law of damages." In *Wertheim v Chicoutimi Pulp Co*,[13] it was described as the "ruling principle." In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* (No 2)[14] it was described as the "fundamental basis for assessing damages."

19. The principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. This general rule, which can be traced back to *Robinson v Harman* (*supra*) is to place the claimant in the same

10 {2016} eKLR

11 {1848} 1 Exch 850.

12 {2015} UKSC 43; [2015] Bus LR 987, para 14.

13 {1911} AC 301, 307.

14 {1912} AC 673 at 689.

position as if the contract had been performed, with the guiding principle being that of restitution. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*:-[15]

> " The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..." (p 849)

20. As his Lordship stated in the above case, a contract is the source of primary legal obligations upon each party to it to procure that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to "substituted or secondary obligations" on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law.

21. To successfully claim damages, a plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the plaintiff suffered damage (loss) as a result of the defendant's breach. The plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.'[16] A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability.

22. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff. In the instant case, the existence of the contract is not disputed. The defendant filed a statement of defense, but failed to attend the trial. As a consequence, the plaintiffs evidence is uncontroverted. I have considered the evidence before me and the documents submitted. I am persuaded that the plaintiff has demonstrated that the defendants were in breach of the contract. What remains is whether the plaintiff has proved the loss suffered and whether it is entitled to various heads of damages claimed.

23. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

[15] {1980} AC 827, 848- 849.

[16] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 449.

24. The objective of compensating the claimant for the loss sustained as a result of non-performance makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.

25. The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments Ltd v Browallia Cal Ltd* (formerly Union Cal Ltd): -[17]

> " Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

26. An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill.[18]The assessment of damages in such circumstances often involves what Lord Shaw described in Watson, Laidlaw at pp 29-30 as "the exercise of a sound imagination and the practice of the broad axe."

27. The American case of *Griffin v Colver*[19] in which the New York Court of Appeals set the tone for the more modern rule of lost profits damages is apposite. It stated: -

> " It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.Griffin thus concluded that lost profits are recoverable in contract cases, but only if the aggrieved party proved them with certainty. Griffin quickly became the "leading American case on recovery of lost profits."

28. Since the above decision, (Griffin), it has been relatively clear that lost profits are available where the parties' contract clearly anticipated them and the party seeking them could prove the amount with relative certainty. Lost-profit damages are now available in a variety of civil contexts—tort actions (both personal and business), breach of contract actions, antitrust suits, and claims for trademark and patent infringement.[20] Nonetheless, courts continue to face the often-difficult questions of how to assess

[17] {2010} EWCA Civ 486; [2011] QB 477, para 22.

[18] See *Chitty on Contracts*, 32nd ed (2015), paras 26-172 - 26-174.

[19] *Griffin v Colver*, 16 NY 489, 491 (1858).

[20] *Erwin v Mendenhall*, 433 P 3d 1090, 1095 (Alaska 2018).

whether the parties contemplated lost-profit damages, whether a party actually suffered them, and if so, how to measure those lost profits.[21]

29. Perhaps the most important consideration in any lost-profits case is how much and what type of evidence a party needs to prove the alleged lost profits. To understand the necessary quantum of evidence, it is helpful first to understand the definition of lost-profits damages. Typically, lost-profits damages refer to the loss of net profits, rather than gross profits or revenue.[22] "Lost profits are damages for the loss of net income to a business and, broadly speaking, reflect income from lost business activity, less expenses that would have been attributable to that activity."[23] However, courts may award gross profits when operating expenses are fixed.[24] After calculating net lost profits, the plaintiff (typically, but not always) must show:- (a) that the conduct upon which the claim is based caused the lost profit damages; (b) that the parties contemplated the possibility of lost profit damages or that the lost profit damages were a foreseeable consequence of the conduct; and (c) that the lost profit damages are capable of proof with reasonable certainty.[25] These three elements of the claim are commonly known as proximate cause, foreseeability, and reasonable certainty.

30. Except where the defendant does not dispute liability, this first element of a claim for lost profits (proximate cause) typically requires an in-depth analysis of both the applicable law and the facts. Specifically, the plaintiff must show, by a preponderance of the evidence, that the plaintiff's alleged loss was the proximate result of the breach, the so-called "but-for test" (ie, but for the breaching conduct, the plaintiff would have earned profit). A "proximate" cause is a cause that (a) produces a result in a natural and continuous sequence and (b) without which the result would not have occurred.[26] For example, in *National Controls Corp v National Semiconductor Corp*,[27] the court considered in detail the type and quantum of evidence needed to demonstrate proximate causation for purposes of lost-profits damages. The court described the required proof as follows: -

> " The damages sought must be "a proximate consequence of the breach, not merely remote or possible . . . The element of causation defines the range of socially and economically desirable recovery and requires not only 'but-for' causation in fact but also that the conduct be a substantial factor in bringing about the harm. Where the losses cannot be allocated between those caused by the defendant's breach and those not, an entire claim may be rejected. The plaintiff thus must prove that any lost profits were proximately caused by defendant's breach, and not through some other cause. In essence, the proximate causation requirement demands that the plaintiff prove that the defendant's breach was a substantial factor in causing some harm."

21 Todd R Smyth, Recovery of Anticipated Lost Profits of New Business: Post-1965 cases, 55 ALR 4th 507 (1987).

22 Erwin v Mendenhall, 433 P 3d 1090, 1095 (Alaska 2018).

23 Ginn v Stonecreek Dental Care, 30 NE 3d 1034, 1043 (Ohio Ct App 2015).

24 22 Am Jur 2d Damages § 57 (2019).

25 Jonathan Dunitz & Nancy Fannon, *The Comprehensive Guide to Economic Damages* (5th ed, 2018); Bona Fide Conglomerate, Inc v Source America, 2017 US Dist LEXIS 116329, at *13 (SD Cal July 24, 2017).

26 *Racicky v Farmland Indus, Inc,* 328 F 3d 389, 396 (8th Cir 2003).

27 *Nat'l Controls Corp v Nat'l Semiconductor Corp*, 833 F 2d 491, 496 (3d Cir 1987).

31. The second element of a lost-profits claim is foreseeability, which is essentially a determination if the parties contemplated such damages or should have reasonably foreseen that they would arise.[28] The parties' relationship is typically governed by a contract, usually with a specific term. The language in the contract usually determines whether lost profits were foreseeable.

32. Determining whether contracting parties contemplated lost-profits damages typically involves two questions. First, does the contract allow lost profits at all? In a well-drafted contract, this first issue may be determinative, and the contract may expressly exclude any possibility of lost profits. Absent controlling contractual terms, lost profits are legally foreseeable if, at the time of contracting, (a) the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all the circumstances to have foreseen it; or (b) if the breach resulted in lost profits because of a special circumstance, a circumstance that must have been known to the defaulting party at the time of the contracting.[29] Importantly, the rule requires only a reasonable reason to foresee, not actual foresight. To meet this standard, courts require significant contractual evidence of the reasonable contemplation of lost profits.[30]

33. If the plaintiff is able to demonstrate that lost profits are actually available under the contract, it will typically then have to establish the applicable duration for which lost profits are recoverable. Parties often refer to this period for calculating lost profits as the "damage period" or the "loss period." Calculating the loss period is typically fact-specific. Contract terms, statutory requirements, prior custom and practice, and industry standards can, and typically will, influence the extent of the loss period. The loss period may be relatively short and, in the past, or may be ongoing into the future, particularly when a franchisee continues to operate its business while pursuing litigation.

34. The third element the plaintiff must prove is that lost profit damages are "reasonably certain and not speculative."[31] Generally, the certainty of damages is sufficient if the evidence enables the court to make a fair and reasonable approximation of damages.[32]

35. I have carefully examined the plaintiff's claim for lost profits. I have considered the documents relied upon by the plaintiff. The plaintiff claims Kshs 106,985,953.300/= for loss of profits. I have herein above defined lost profits which broadly reflects income from lost business activity, less expenses that would have been attributable to that activity. I have also enumerated the applicable tests in such claims.

36. First, there was no attempt to show that the contract allowed the claim at all or whether the claim was foreseeable at the time of contracting and whether the loss was natural and inevitable upon the breach so that the defaulting party may be presumed from all the circumstances to have foreseen it. Second, there is no cogent evidence to show that the breach resulted in lost profits because of a special circumstance, a circumstance that must have been known to the defaulting party at the time of the contracting. Third, such a claim requires a professional in the field to give expert evidence and explain how the amount claimed is explained and the rationale upon which the amounts are arrived at. Fourth, there was no attempt to bring the claim within the tests laid down in the authorities discussed above. Guided by the tests discussed earlier, I find and hold that it is correct to state that there is no basis at

[28] *HSS Enters, LLC v Amco Ins Co*, 2008 WL 1787127, at *13 (WD Wash Apr 16, 2008).

[29] *Precision Pine & Timber, Inc v United States*, 63 Fed Cl 122, 130 (2004); Restatement (Second) of Contracts § 351(2)

[30] *Ashland Mgmt Inc v Janien*, 82 NY 2d 395, 405 (1993).

[31] Rubin Res, *Inc v Morris*, 237 W Va 370, 379 (2016); *Stern Oil Co v Brown*, 908 NW 2d 144, 151 (SD 2018).

[32] *Precision Pine & Timber, Inc v United States*, 63 Fed Cl 122, 131 (2004).

all upon which a court properly directing itself to the law and the material before me can entertain the claim for profits in this case. It follows that the claim for loss of profits has not been proved. The same is declined.

37. I no turn to the claim for idle machinery for 120 days. In addressing this issue, I may profitably borrow from the Kentucky Court of Appeals' decision in *Ford Contracting, Inc v Kentucky Transportation Cabinet*[33] which held that idle equipment costs are compensable. It stated: -

> " Idle equipment (or equipment which must remain on the job site because the project is delayed) is a real and quantifiable loss to the contractor, whether rent is paid to another or charged to the contractor himself as an accounting expense, and it is recoverable."

38. The contractor is only entitled to compensation for the delay period attributable to the owner. There is no doubt that the delay in this case is attributed to the defendant. The contractor has the burden of proof to establish (a) that the equipment was actually idle during the delay period and (b) that the equipment was necessary to complete the work. I have no doubt that the plaintiff has met these two tests.

39. The other hurdle the plaintiff must surmount is persuading the court on the damages for idle machinery in the particular case. The proper measure of damages is the equipment's actual rental value or the actual cost to own the equipment; absent such rate information, a rental rate book may be used as a guide. Lastly, Gross idle equipment damages must be reduced by 50% to reflect lack of wear and tear.

40. The plaintiff's witness testified that they incurred stand by time and that they could have engaged their equipment elsewhere. He testified that the defendant did not allow them to commence the work for 120 days. As for the rate, he stated that they applied the rate in their offer which had been accepted which was Kshs 10,000/= per hour translating to Kshs 28,800,000/. Whereas I have no reason to doubt the plaintiffs tabulation on the above sum, decided cases are in agreement that in such claims, the gross idle equipment damages must be reduced by 50% to reflect lack of wear and tear. Accordingly, I will subject the above sum to 50% reduction which will translate to Kshs 14,400,000/=.

41. Regarding the claim for premium for the advance payment bond for the sum of Kshs 3,200,635/=, perhaps, it is useful to mention that typically in a construction project an advanced payment bond will be required by the client if the contractor requests advance payment to help them meet significant start up or procurement costs that may have to be incurred before construction begins. For example, where the contractor has had to purchase high-value plant, equipment or materials specifically for the project. The bond will protect the client in the event that the contractor fails to fulfil its contractual obligations, for example if the contractor becomes insolvent. An advance payment bond will normally be an on-demand bond, meaning that the bondsman pays the amount of money set out in the bond immediately on demand, without any preconditions having to be met. This is as opposed to a conditional bond (or default bond) where the bondsman is only liable if it has been established that there has been a breach of contract.

[33] 449 SW 3d 397 (Ky Ct App 2014).

42. It is trite law that special damages must not only be specifically pleaded, but must also be strictly proved with as much particularity as circumstances permit. The court of Appeal in *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [34] observed: -

> " ...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of..."

43. Our decisional law is quite clear that one consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt meets the test. (See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited*;[35] *Zacharia Waweru Thumbi v Samuel Njoroge Thuku*[36]). Consequently, our case is clear that a party must produce actual receipts in order to meet the test of specifically proving special damages. On record is a receipt dated May 27, 2019 for the sum of Kshs 3,200,635/= in support of the plaintiffs claim for the said sum. It is my finding that the plaintiff has proved on a balance of probabilities that it incurred the said expense.

Conclusion

44. I find and hold that the plaintiff has proved its case to the extent herein above stated. Accordingly, I enter judgment in favour of the plaintiff against the defendants jointly and severally for the total sum of Kshs 17,600,635/=. (Being Kshs 14,400,000/= for idle machinery and Kshs 3,200,635/= in respect of the claim for premium for the Advance Payment Bond.

45. The said sum shall attract interests at court rates from the date of filing the suit until payment in full. The defendants will also pay the plaintiff the costs of this suit plus interests on the costs at court rates to apply from the date of taxation.

Orders accordingly

SIGNED, DATED AND DELIVERED VIA E-MAIL AT NAIROBI THIS 10TH DAY OF AUGUST 2021

JOHN M. MATIVO

JUDGE

34 {2013} eKLR.

35 {2015} eKLR

36 {2006} eKLR