



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 2 OF 2019

JAMUTO ENTERPRISES LIMITED (Suing through

JOHN MUTUA M'RUGURU).....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF MERU.....DEFENDANT

JUDGMENT

1. In this suit, the plaintiff claims from the defendant specific performance, general damages for breaches of contract and interest thereon, Mesne profits of Kshs 24,000 per day standing at Kshs11,856,000, Kshs 2,500,000 interest resulting from the loan from Dhabiti Sacco and costs of the suit.

2. The plaintiff pleaded that he successfully applied for a construction tender following an advertisement by the defendant, for construction of proposed boundary walls at Maili Tatu Stadium, proposed Ngutu Bridge in Thangata Ward and proposed workshop block at Athwana Youth Polytechnic at Mikinduri Ward totaling to Kshs 21,841,321.80. After the plaintiff was issued with notification of tender, he commenced the construction works and was subsequently issued with certificates of practical completion. In a bid to finance the construction works, the plaintiff pleads that he obtained loan facilities from Cooperative Bank of Kenya and Dhabiti Sacco. It is then pleaded that the works were duly performed and confirmed by the defendant's inspection team but the defendant's blatantly refused to pay the agreed consideration of Kshs 21,841,321.80, the plaintiff was forced to sell two of his lorries to regularize his loans. The unpaid loan facility of Kshs 5,500,000 with Dhabiti Sacco has since escalated to Kshs 8,000,000. The plaintiff pleaded that the refusal to pay on due dates or within a reasonable time amounts to breaches of contract, for which he has suffered damage and lost Kshs 24,000 earned daily from use of his two lorries. He thus claims both general and special damages. With the plaint, the plaintiff filed witness statements and list of document

3. The claim was resisted by the defendant who filed a statement of defense and witness statement. In those documents the contract between the parties was acknowledged as well as delay in payment it being asserted that the plaintiff was made aware of the financial challenges upon the defendant occasioned by factors beyond its control

4. At the trial, the plaintiff called 3 witnesses with the defendant calling just one. John Mutua M'Ruguru **PW1**, the plaintiff's director and a contractor, testified that the plaintiff was awarded a tender for varied construction works for the defendant. In a bid to finance the works, the plaintiff obtained loan facilities from Cooperative Bank and Dhabiti Sacco. The works were immediately commenced, duly completed and certificate of practical completion issued. The defendant however failed to honour the requests for payment, which prompted the plaintiff to sell two of his lorries, to regularize his loan with Cooperative Bank. He was fearful that his home would likely be sold to recover the debt owed to Dhabiti Sacco. He confirmed that the contractual sum had since been paid and thus the plaintiff's claim was for general damages for breach of contract, loss of business, contractual interest of 14% for 3 years amounting to Kshs 6,067,640.24, accrued interest of Kshs 4,893,669.35.

4. During cross examination, he stated that he neither had documents to show the earnings from the lorry nor a professional opinion on how the loss was calculated. He further did not exhibit any document to show rather the delay would attract interest at the rate of 14%.

5. During re-examination, he confirmed that he had exhibited two sale agreements proving that the lorries belonged to him, and the purchase price was to paid to an identified Cooperative Bank account. He further affirmed that from the documents he had produced, he had arrears of Kshs 8,000,000 as at 9/7/2019.

6. Gichuru Igweta (**PW2**) supervised the three construction works at the request of the plaintiff. He stated that they had never been paid by the defendant, despite having completed the works. He stated that as a result of the delayed payment, the plaintiff incurred losses and lost assets.

7. During cross examination, he confirmed that the company had lost two lorries. He stated that he was present when PW1 applied for the loan with Dhabiti Sacco in 2017. In re- examination, he stated that the agreement between him and the plaintiff was verbal.

8. Paskwale Mwititi Kigea (**PW3**) supplied the building and construction materials at the behest of the plaintiff, but has never been paid. During cross examination, he stated that after the suit was filed, he was subsequently paid by the plaintiff. At re-examination, he stated that the agreement with the plaintiff was verbal and that he was only paid in 2020.

9. For the defence, Charles Mwenda Kaibiria (**DW1**), the Director of Budget of the defendant, acknowledged receiving invoices from the plaintiff after the contract between the parties herein had been duly executed. He attributed the delay in honouring the payments to the delayed release of funds by the National Treasury. He however denied being privy to the agreement between the plaintiff and his financiers. He further denied that the two lorries were owned by the plaintiff. He confirmed that for the first contract, the plaintiff had invoiced the defendant on 6/4/2017 and after inspection was done on 8/5/2019, payment was made on 11/7/2019. The second contract was invoiced on 15/6/2017, inspected on 3/4/2019 and payment made on 16/6/2020. The third contract was invoiced on 9/9/2017, inspected on 27/6/2019 and payment made on 16/6/2020.

10. During cross examination, he affirmed that he knew PW1, having met him severally at their offices. He went on to state that the invoice for the first contract was made twice on 13/4/2016 and 6/4/2017, and it was due for settlement within 90 days. He stated that it took over 3 years for the second and third contracts to be settled. He admitted that they had two months to settle the second contract, but they did not. He further admitted that he had discussions with PW1 about his problems with financiers of his lorries. During re-examination, he maintained that they paid late due to the change of government which required verification and the late disbursement.

11. When questioned by the court, he confirmed that the three contracts were budgeted for and approved. He also admitted that contractual obligations of the county government did not change with leadership and employees.

12. The parties then filed their respective submissions on 27/05/2021 and 15/06/2021. The plaintiff submitted that he was only claiming damage and interest amounting to Kshs 11,010,325.15 flowing from the late payment of the contractual sums. He was also claiming loss of business and assets totaling to Kshs 30,660,000 and accrued interest from Dhabiti Sacco of Kshs 8,000,000. He relied on the cases of **Attorney General v Halal Meat Products Limited (2016) eKLR** and **Speed Wall Building Tech v The County Government of Migori (2016) eKLR** in support of his case that general damages and costs are merited for being awarded to it. Some of the submissions but the plaintiff are outrightly unwarranted and would appear to introduce evidence not led at the trial.

13. On its part, the defendant appeared to rather contradict itself by admitting that payments with regard to the projects awarded to the plaintiff were paid in full, yet on the other hand denied the very existence of a contract between itself and the plaintiff. It submitted that it was not party to the agreements between the plaintiff and his financiers, and therefore it could not shoulder liability arising therefrom.

14. The defendant maintained that the plaintiff had specifically failed to prove loss of business as was observed in the cases of **Nyamogo & Nyamogo Advocates v Barclays Bank of Kenya (2015) eKLR**, **David Bagine v Martin Bundi (1997) eKLR** and **Ouma v Nairobi City Council (1976) KLR 304**. It faulted the plaintiff for his failure to adduce professional documents to show how the alleged loss was tabulated. It cited the cases of **Kenya Tourism Development Corporation v Sundowner Lodge Ltd (2018) eKLR**, **Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd (2015) eKLR** and **China Overseas Engineering Company Limited v Isaaq Kichwen Kijo (2019) eKLR** to support its proposition that general damages are not recoverable in cases of alleged breach of contract. It was concluded that the amounts sought were exorbitant, imagined and unrealistic and as such the plaintiff's suit should be dismissed.

Analysis and determination

15. I have carefully considered the pleadings in light of evidence on record and the rival submissions of the parties. I have also given regard to the common position by both sides that the principal contractual sum was paid in full during the pendency of the suit. The uncontroverted position is that works were completed on 13.04.2016 for Athwana Youth polytechnic, 16.06.2017 for Maili Tatu stadium and 9.9.2017 for Thagata foot bridge. Demand for payment was made upon completion of the works but payments of the sums dues are agreed to have been made as follows;

11.07.2019	Kshs 1,914,710.00
15.04.2020	kshs 7, 603,611.80
16.06.2020	kshs 7, 603,611.80
16.06.2020	Kshs 3,465,991.80

16 That state of evidence leaves the outstanding issues for determination to be whether the plaintiff is entitled to general damages for breach of contract, general damages for loss of business and interest accrued on the Dhabiti Sacco loan.

17. The general principle of law on general damages, as affirmed in innumerable decisions of the High court and the Court of Appeal is that the same are not ordinarily awardable for breach of contract. See **Kenya Tourism Development Corporation v Sundowner Lodge Ltd (2018) eKLR** and **Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd (2015) eKLR**.

18. However, that general rule, like all other general propositions and principles, has known exceptions. These exceptions were reiterated by the Court of Appeal in **Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited (2016) eKLR**, as follows:

“...whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive.”

19. It is thus not the law that no general damages are ever awardable where a clear breach is established. My appreciation of the law is that every time there is a breach of a contract, the innocent party is, from the onset, entitled to nominal damages but will also get general damages where he proves an injury flowing as a natural consequence from the breach. I find this to be the congruent position in both text books and stare decisis. The author of **The Halsbury's Laws of England, Third Edition vol. II**, takes the position that: -

“where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant’s wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal. Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.”

20. In ***Kinakie Co-operative Society v Green Hotel (1988) KLR 242***, the Court of Appeal while taking the position that damages are indeed awardable for breach of contract in deserving cases held: -

“where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not, he cannot have more than nominal damages.”

21. DW1 admitted that the construction works for the first contract were completed on 6/4/2017, inspected on 8/5/2017 and paid on 11/7/2019. The construction works for the second contract were completed on 15/6/2017, inspected on 3/4/2017 and paid on 16/4/2020 while those for the third contract were completed on 9/9/2017, inspected on 27/6/2017 and payment made on 16/6/2020. Those delays in my considered view cannot possibly be said to be reasonable. The delays were rather deliberate because DW1 concurred that the said contracts were budgeted for and approved before being awarded. In his evidence upon cross examination, payment was due within 90 days and that he was aware of the financial constraints PW1 was going through with the financiers of his lorries. Despite such knowledge, the defendant blatantly failed to honour its contractual obligation, despite proof that the construction works had been undertaken and successfully completed. When DW1 said that the delay was occasioned by change of the occupant of the office of the governor, one finds it odd. Odd because a county government as conceived and created by Kenyans in the constitution is a state organ that need to operate and carry out mandates in accordance with the law and regardless of who is in charge of whichever office. When that witness says there was change of leadership leading to delay, that cannot be a valid justification at all. I do find that the delay for up to three years was high handed, oppressive and injurious to the plaintiff.

22. Having found the delay to have been unconscionable, oppressive and injurious, it becomes axiomatic that the defendant breached the contract with the plaintiff as far as payment was concerned. That no contract setting terms of payment was not availed to court is not a bar to court from finding that the delay was unreasonable and unjustifiable. In fact, DW1 was explicit that payment should have been affected within 90 days after completion. I take the reality that there is always cost of money and that when one keeps away another’s money unfairly, the innocent party suffers. That is when the remedy for damages for breach of contract sets in to reconstitute the offended to the position he would have been if not for the breach^[1]. I find that the facts here justify an award of substantial general damages over and above nominal damages. I do take the uncontroverted evidence that the plaintiff had to sell his lorries to pay a facility employed to execute the works to be an aggravating and relevant circumstance to consider in awarding the damages due. Having done so, I do assess damages in the sum of Kshs 6,000,000 for general damages for breach of contract. In arriving at that sum, I have given regard to the fact that had the money been availed to the plaintiff he would have used it to better his business and was otherwise unfairly kept for him.

23. It is trite law that loss of business is a form of special damages must first be pleaded and then strictly proved. See ***Ouma v Nairobi City Council (1976) eKLR 304***. The plaintiff alleged loss of business and termed it mesne profits (sic) on the basis of loss of income from the lorries but availed no document or indeed any evidence that each lorry would earn him Kshs 24,000 per day. In addition, no evidence was led on how the sum of Kshs 11, 856,000 was arrived at. I find that no proof has been availed to justify the award of special damages.

24. On the claim for interest resulting from a loan from Thabiti Sacco, I again find that no evidence was led that the said loan was tied to or indeed brought to the attention of the defendant at the time the contract was negotiated and executed. What is more no calculation was availed to satisfy the obligation for strict proof. That claim equally fails.

25. In conclusion, I do find that the plaintiff, has on a balance of probabilities, prove his claim for general damages for breach of contract only which is awarded in the sum of Kshs 6,000,000. The claim for specific performance (sic), if used to mean payment of the liquidated claim, was dissipated upon payment of the contractual sum and is not available to be made. Prayers c and d in the plaintiff are dismissed for lack of specific pleadings and proof.

26. On the damages the plaintiff is awarded interests at court rates from the date of the suit. The plaintiff also gets the costs of the suit.

Dated and delivered at Meru **virtually by Microsoft teams** this 11th day of August 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Mwirigi for the defendant

Mr. Otieno for the plaintiff

Patrick J.O Otieno

Judge

[\[1\]](#) *Hadley v Balendale (1854) 9 EX 341.*