REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 10 OF 2017

CATHOLIC DIOCESE OF MALINDI

REGISTERED TRUSTEES .....PLAINTIFF

VERSUS

ABENGROUP LTD.....DEFENDANT

Coram: Hon. Justice Reuben Nyakundi

Kilonzo & Aziz Advocate for the plaintiff

The defendant in person

JUDGEMENT

The plaintiff in this case **Catholic Diocese of Malindi** filed suit against the defendant **AbenGroup Ltd** seeking the following reliefs:

a. A declaration that the defendant has breached the Solar System Installation agreement.

b. Damages for breach of contract and interest thereon at court rates.

c. A declaration that the reason of the defendant's breach of the solar systems installation agreement, the plaintiff is not under any legal obligation to pay the defendant any alleged dues for the Solar System Installation agreement.

d. A declaration that by defendant ought to pay the plaintiff all sums or monies expended and/or used to remedy the defects caused by the defendant in the Solar Systems Installation agreement.

e. An injunction restraining the defendant by itself, its servants, agents and employees from interfering with the Solar Systems installation works already undertaken by the defendant until the suit is heard and determined.

f. Costs of this suit and interest thereon at court rates.

The contract

It is averred in the plaint that the plaintiff entered into a contract with the defendant around the month of July 2015 for the design and installation of a Solar System at the plaintiffs premises located at Malindi.

That the conditions of the aforesaid contract are as reduced in the agreement annexed to the plaint. The copy of the agreement was admitted in evidence as exhibit 1.

That it was a term of the contract that the installation works were to commence and end within four weeks from the date of signing the agreement in July 2015 meaning that the works were to be completed by end of August 2015.

The plaintiff further alleges that dispute the defendant having been paid a total of Euros 64, 330, the defendant has nevertheless breached the solar installations agreement.

That the contract provided several other conditions and warranties which were breached by the defendant. The clauses of the contract which were of particular significance to the plaintiff were:

a. Failing to finish the installation works within the period agreed upon but shoddily finishing the works on 29th August 2016, a year after the agreement was executed.

b. The defendant did a shoddy and unskilled installation whereby the following defects are evident;

(i). 2 solar modules are damaged (glass is broken).

(ii). Not all solar panels are securely fastened on the mounting frames.

(iii). The solar mounting does not provide adequate space to easily inspect the module corrections.

(iv). The solar PV cables are not well protected from environmental elements exposed to them and some cables are not well guided and pose a safety hazard to persons working on the roof.

(v). The solar PV inverters at the Catholic Institute are not functioning as well as that at the defendant's office.

(vi). The battery inverter on the plaintiff's second site is optimally sized and not grid interactive.

(vii). The batteries installed at the plaintiff's Catholic Institute, Malindi are generic and thus hard to know the name of the manufacturer.

(viii). The switch guard accessories at the defendant's Catholic Institute college is damaged.

c. The defendant has failed to commission and handover the installations to the plaintiff as required under the agreement.

In essence, the defendant had covenanted to satisfactorily complete the works in time as per the terms and conditions in the agreement. According to the plaintiff witness, the assessment report dated 25.10.2016 outlines the following defects:

(i). Solar Modules – It was observed that two (2) modules are damaged (broken glass). The full extent of the damage on the electrical performance of the entire system could not be easily verified. It was not also ascertained as to when the damage may have occurred.

(ii). Solar Mounting – The solar panels are mounted on the trapezoidal tin roof in both the systems. However, it was observed that not all panels are securely fastened on the mounting frames as required. The solar mounting employed does not also provide adequate space to easily

inspect the module connections. There was also no evidence of earthing (ground connection) of the solar mounting frames.

(iii). Solar PV cables – The PV cables are of the required UV protection standard. However, it was observed that some electrical joints on the cables are insulated using normal electrical insulating tape leaving them not well protected from the environmental elements exposed to them. The PV cables are also not well guided and are thus pausing a safety hazard (tripling) on persons working on the roof.

(iv). Solar PV Inverter – The solar PV inverters are from a reputable manufacturer (ABB) and are installed as per the manufacturer's requirements. The wiring terminations on both the AC and DC side of the inverter are mechanically and electrically sound. The inverters at the Institute (1st Site) were however NOT functioning at the time of the inspection primarily because they did not have a grid reference source for the voltage and frequency to operate with. Being Grid-Tied inverters, these inverters can only operate when a voltage and frequency source is applied to them. The solar PV inverter at the office (2nd Site) was ON but not fully functional as there was no generation from the solar PV.

(v). Battery Inverters – The battery inverters have the duty of forming an AC Grid to provide interface for the PV inverters to synchronize on and feed power into the system for the purpose of supplying the load and recharging the batteries. It was observed that the battery inverters on the 1st Site are not adequately sized to meet the system requirements. The battery inverter on the 2nd site is optimally sized however it is not Grid interactive and hence may require additional automation to achieve functionality.

(vi). Batteries – Both sites had Valve Regulated Lead Acid (VRLA) batteries. Batteries installed in Site 1 are generic and it was not clearly established who the manufacturer of the batteries was. The Batteries in Site 2 are manufactured by Victron. Both sites had a 24 Volts configuration.

(vii). Switchgear and Accessories – The beakers and related switchgear on both sites were well sized. However, one contactor in Site 1 had one contact line damaged as a possible result of loose termination that caused arching.

The defendant was served but failed to enter appearance or defence. That means the plaintiff's suit proceeded as undefended claim. The issues which arose out of the plaintiff case are:

Whether the defendants owe fiduciary duties to the plaintiff and if so were there breaches?

Which of the parties to the contract is liable to any of the contractual remedies is the scope breach capable of an imposition of damages.

Issue No. 1

Even the unchallenged testimony by the plaintiff witness and examining the circumstances prevailing at the time, it would appear to the court there was a communal contract between the plaintiff and the defendant. The purpose of the agreement was for the design and installation of solar system at the premises owned by the plaintiff.

In considering whether there was a valid contract concluded between the plaintiff and the defendant, the court is guided by the undated solar system agreement and copy of the solar PV assessment report dated 25.10.2016.

On the facts as described by the plaintiff witness through the agreement is silent on the value of the consideration. There must have been legal relationship created by the agreement giving rise to the rights

and dates between the parties.

I take it that the plaintiff and the defendant had opted to agree on certain interim conditions and warranties as it appertains to the installation contract with an option of incorporating further terms and conditions binding them for completeness their intention to perform. It was advanced by the plaintiff witness that there was a legitimate expectation both expressly and implied from the for the defendant to provide satisfactory quality materials and installation works to meet the standard person, taking into account the prevailing circumstances.

In situations such as those explained by the plaintiff witness were clearly captured by chitty on contracts **25th Edition Vol 1** on the following passage:

> ***"One party to contract may, by reason if the other's breach be entitled to treat himself as discharged from liability further to perform his own unperformed obligations under the contract. The rule is usually stated as follows. Any breach of contract gives rise to a cause of action, not every breach gives a discharge from liability. Thus, the question is whether a party who admittedly has a claim for damages is relieved from further performance by the other party's breach.***
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> ***Secondly, although sometimes, the innocent party is referred to as rescinding the contract and the contract as being terminated by the breach. It is clear that the contract is not rescinded abinitio. The innocent party or in some cases both parties are excused from further performance of their primary obligations under the contract, but there is their substituted for the primary obligations of the party in default a secondary obligation to pay monetary compensation for his non-performance. The falter expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Moreover, in principle, only those primary obligations falling due after the date of discharge will come to an end. Those which have accorded due at that time may still be enforceable as such."***

In the English case of British Westinghouse **Electric and Manufacturing Co. Ltd v Underground Electric Railways Co. of London Ltd 1912 A.C. waive the Viscount L. C. held at paragraph 688** as follows:

> ***"I think that there are certain principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted, to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."***

It is presumed that parties to a contract have a duty to ensure they comply with their respective obligations set out in the agreement. In line with the efficacy principles to a contract **Sleyn L. J.** in **Percy Trentham Ltd v Archital Mixfer Ltd {1993} Illoyds Rep 25** adverted to the scheme of contractual process and he said:

> ***"It is important to consider briefly the approach to be adopted to the issue of contract formulation. It seems to me that four matters are of importance. The first is that Law generally adopts an objective theory of contract formation. That means that in practice our Law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead, the governing criterion is the reasonable expectations of honest man. That means that the yardstick is the reasonable expectations of sensible businessmen.***
>
> ***Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formulation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessary so in the case of a contract alleged to have come into existence during and a result of performance. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels…….***

Fourthly, if a contract only comes into existence during and as a result of performance of the transactions, it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance."

From the pleadings and evidence adduced by the plaintiff, there is credible evidence of a contract with the defendant inspite of some are not guilty and certainty to timeliness to complete the project on installation of solar lights.

In applying the Learned Authors chitty on contracts, the plaintiff has demonstrated that the defendant was in breach of the term of contract by failing to complete the work and also to deliver and apply quality equipment and accessories to perform the contract. Some of the reliefs sought by the plaintiff is to have them restored to their position and be absolved from the existence, and future obligations within the contract.

What are the consequences of such a failure, as stated by the plaintiff in his evidence. There is a relevant and helpful passage in the case of **RadFord v De Frobevale {1977} 1 WLR 1262** where Lord Oliver said as follows:

"If he contracts, for the supply of that bench he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party. I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted split."

It follows therefore that there was a binding contract between the plaintiff and the defendant, upon terms dependent on the solar installation agreement.

Likewise, because of the alleged breach, the plaintiff would be entitled to repudiate the contract. The question is whether the plaintiff has suffered any damage. The plaintiff has raised several issues and declarations in the plaint against the defendant. One such relief prayed for being reimbursement of the alleged dues for the solar system installation agreement to remedy the defects caused by the defendant. The character of this remedy is formulated with certainty as a special damage claim.

In **Ouma v Nairobi City Council {1976} KLR 304** the court observed:

"Thus for a plaintiff to succeed on a claim for special damages, he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage, the court's view is as laid down in the English leading case on pleading and proof of damages, (Ralchliff v Evans {1892} 2 GB 52Y) the court stated:

"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves, by which the damages is done. To insist upon less would be to relax old and intelligence principles, to insist upon more would be, the vainest pedantry."

In the instant case the plaintiff gave evidence deduced from a copy of solar PV assessment report dated 25.10.2016 detailing the defects assessed and the rectification undertaken to cover the breach.

It is now generally accepted that special damages must first be pleaded and such strictly proved (See **Richard Okuku Oloo v South Nyanza Sugar Co. Ltd {2013} eKLR, Coast Bus Service Ltd v Mumunga & Others Nairobi CA No 192 of 1992**

In the claim before me, failure by the plaintiff not to specifically plead special damage and loss suffered as a result of the breach and further not to strictly proof each item by way of evidence is fatal to the remedy in terms of clause (a) of the plaint.

Secondly, whether or not the plaintiff has proved an award of general damages for breach of contract. It is crucial to lay down once again the principle on this limb of damages in the case of **James Maranya Mweta v South Nyanza Sugar context HCA No. 92 of 2015** held that:

> ***"an award of general damages for a claim on breach of contract, however the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred. The measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time, the contract was made and that such damages are not at large but in the nature of special damages."***

In the instant matter, the plaintiff placed reliance on the solar assessment report which was prepared to audit the functionality or dysfunctionality of the installation equipments and electronics. The sum total of the report confirms the extent of the damage and what was done to rectify the defect. The framework of the report establishing the actual loss suffered by the plaintiff as a result of the breach.

Based on the report and there being a fundamental breach of the contract it was incumbent upon the plaintiff to tender, documentary or other cogent proof of any other loss that had been suffered. The general damages entitled to the plaintiff are actually based on the report which detailed the breach to the initial agreement.

In consideration of the contract as a whole, its obvious that the primary contract and the Audit report on implementation are inconsistent with each other. The scope of the consideration was not defined in the main contract nor was time made of essence as the plaintiff witness wants this court to believe the position in this case which is inconceivable from the evidence is whether the plaintiff identified the defendant that the contract was to be terminated and the expiry of the specified period.

In absence of any real weighty evidence at this stage, this court is called upon to make a difficult and important decision as to the measure of general damages payable to the plaintiff on repudiation of the contract.

Thus, the plaintiff has shown that the defendant was in breach of a term of the contract for installation of solar system but any specific award on general damages would be speculative to the extent of ambiguity in the agreement.

In the case of **Koompoltoo Local Aboriginal land Council v San pine Pty Ltd 2008 234 CLR** on repudiation of a contract, the court held that:

> ***"The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it while in Shevill v Builders Licensing Board. The court held that a contract may be repudiated if the party renounces his liabilities under it. If he evinces an intention no longer to be bound by the contract, or shows that he intends to be bound by the contract or some that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way."***

The facts of this case as deducible from the pleadings and evidence is that the defendant agreed to undertake several aspects on design and instruction of Solar System.

According to the site meeting report of 14.4.2016 with parties identified accurate reflection of the actual work done and the ultimate action to be carried out that night plausibly ascertain the content and ambit of the agreement dated July 2015. The parties to a contract are regarded as masers of their intention and enforcement of their contractual fate.

The underlying stipulated document of 14.4.2016 parties agreed that the plaintiff was to make payment of 6000 Euros for back up, presumably to the defendant.

There is no evidence that the promise to pay owed directly to the defendant was rendered by the plaintiff within the four day period conditioned in the document neither the evidence by the plaintiff witness nor the agreement provides any insights of payment of consideration.

In **William v Roffey Bros & Nicholls Ltd {1991} 1 QB 1CA the English Court** took this approach:

> ***"Considerations there must still be but, in my Judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect the true intention of the parties."***

In the instant case the plaintiff's claim against the defendant is for repudiation of the contract and recovery of general damages for breach of contract.

In my view as identified above taking the evidence by the plaintiff, payment of consideration to the defendant remained obscure. Apart from the aspects of the case which showed some defects bearing on the parties agreement of July 2015 there seems to be no evidence as to whether the defects were to oust the intentions of the parties to fulfil the contract.

The court wonders whether the plaintiff has discharged the evidential burden to be discharged from the contract and at the same time be awarded damages.

Fairly looked at from the perspective of the English case in **Hoenig v Isaacs {1952} 2 ALL ER 176,** the court held:

> ***"The first question is whether on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract but that does not mean that entire performance was a condition precedent to payment with a contract provides for a specific sum to be paid or completion of a specific work, the courts lean against a construction of the contract which would deprive the contract of any payment at all simply because there are some defects or omissions."***

Taking the sequence of events as narrated to the court by the plaintiff as deduced from the primary agreement and subsequent report of 14.4.2016 no estimate of repairs was placed before me to justify quantification of damages.

If the argument by the plaintiff is to the effect that the defendant breached the contract as to the design and installation works, I find no definite consideration. There was no appraisal and valuation of the work agreed and the subject matter of non-performed obligations under the contract.

In the event that the installation was not erected according to the specifications and designs outlined in the contract the burden to prove the amount of loss for the breach is in the plaintiff.

In this claim on breach by non-performance that gives rise to an award for damages for total breach or on repudiation, the plaintiff would only be entitled upon providing prima facie evidence against the defendant. Under the circumstances of this case, in a subsequent historical account the plaintiff's reliefs sought in clause (a), (b), (c), (d) and (e) shows that there are many possibilities which might have rendered the contract in operative:

> ***(1). There is no adequate disclosure or representation as to the quantum of consideration as a pre-condition to the contract.***
>
> ***(2). It is therefore possible that the contract may have become voidable for lack of consideration***

or payment for works done.

(3). The averments and viva voce evidence failed to produce any documentary payment vouchers to the defendant which the Law recognises as giving rise to enforceable obligations.

The price, the performed and non-performed contract as intended in the agreement remains uncertain. For the above reasons, I am of the conceded view that the evidence which was laid before me does not meet the justice of the case. The claim though undefended is hereby dismissed for lack of proof on a balance of probabilities.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JANUARY 2020.

…….

R. NYAKUNDI

JUDGE