



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 52 OF 1992

SAMAKI INDUSTRIES (K) LIMITED.....PLAINTIFF

-VERSUS-

GILFILIAN TECHNICAL SERVICES LIMITED.....DEFENDANT

JUDGMENT

1. For reasons not easily discernible from the court file, this otherwise straight forward matter has had a career spanning almost three decades. The suit was initiated by a plaint dated 25.01.1992 but subsequently amended resting with the Further Amended plain dated the 20.04 2017. I do consider that matter straight forward because, as pleaded, it seeks the recovery of the sum of Kshs 37,343,002 on account of lost profits, Kshs 72,655 being costs of repairs and Kshs 120,700 being further special damages on account of expenditure incurred in purchasing ice necessitated by inadequacy at the plaintiff's premises.

2. The facts leading to the claim are grounded on a contract made in May 1990 for the construction and installation of a blast Freezer, cooling tower and ice plant intended by the plaintiff to boost its then continuing fish processing plant. The terms of the contract bound the defendant to act professionally and within 45 day of the dates specified in the agreement.

3. The plaintiff's grief is that the work was never done professionally or satisfactorily and was never completed in time and an inspection by SGS Kenya ltd on 7th and 8th August 1991 revealed that the works were defective and unsuitable for the intended purposes. The plaintiff's case is that due to the defects it suffered loss and damage and seeks the recovery of the specific sums prayed for. In support of the plaint there was a bundle containing some 38 documents and the plaintiff's witness' statement bound together and filed on the 09.04.2014

4. When served with the Further Amended plaint, the defendant neither entered appearance nor filed a defence and an interlocutory judgment was requested and entered on the 5.4.2019. The request for judgment sought judgment without specifics required by Order 10 Rules 4, 5 & 6 and an interlocutory judgment was entered subject to formal proof.

5. On the date set for formal proof, the plaintiff presented the only witness who had filed a witness statement, Mr salim Verjee. The witness adopted his witness statement as evidence in chief and produced the bundle of documents which was marked **PEXh 1**. In seeking to be awarded the sums sought in the plaint the witness referred the court to an audit report by Ms D S TRIVEDI & CO, certified Public Accountants dated 25.09.1995 calculating the loss at 37,343,002 and said he was unable to trace receipts for repairs while in court.

6. There having been a default judgment and documents showing the contract between the parties including an inspection report showing the works were defective (pages 17-18 of PEXh 1), I do find that the plaintiff position that the works executed by the defendant were defective and insufficient has been adequately proved. Such proof establishes a breach of contract for which the wrongdoer is in fairness obligated to make reparations for by payment of damages.

7. The next question is whether the plaintiff has proved the losses claimed as special damages. I have no doubt that Further Amended plaint sufficiently pleads the damages in a clear and specific manner hence my only area of inquiry is the depth of proof.

8. The loss pleaded as loss of profits is supported by the audit report dated 25.09.1995 covering the period 1.9.1990 to 31.8.1995. The report says, at the covering letter, that it was informed by the audited books of accounts for the period between 1.9. 1990 31.12.1994. That report has not been controverted nor has its authenticity brought into question and I do accept it as establishing the plaintiff's losses. I accordingly enter judgment for the plaintiff against the defendant in the sum of Kshs 37,343,002.

9. There was a claim for costs of repairs of the equipment at a cost of Kshs 72,655 which was expected to be proved by if not receipt then other forms of payment. When the plaintiff's witness gave evidence, he said th.at he was unable to locate the receipts in the court file. I have made efforts to locate any such evidence in the bundle of exhibits without success. In the absence of the receipts evidencing payment, that sum remains unproved and the same is hereby dismissed.

10. The next claim was described as further special damages in the sum of Kshs 120,700 being the cost of purchasing as owing to the inadequacy of the the plaintiff's equipment. Apart from the auditor's analysis at page 61 of the exhibit, there are no document to show contract or payment by the plaintiff. Even though the document from the auditor suggests that he had seen a contract, evidence of payment and a refund, none of those documents were shown to court to satisfy the need for strict proof. That claim also fails.

11. The last claim was for general damages for breach of contract. The general position of the law is that such general damages should be aimed at putting back the wronged party, as near as possible, to the position he would have had the breach not occurred. In *Consolata Anyango Ouma vs South Nyanza Sugar Company Ltd [2015] eKLR* the court said:-

“As a general, principle the purpose of damages for breach of contract is, subject to mitigation of loss, that the claimant is to be put as far as possible in the same position he would have been had the breach not occurred. This principle is encapsulated in the Latin maxim/phrase, *restitutio integrum*”.

12. In this matter the court has awarded special damages for loss of profits. That sum is what I consider and measure as sufficient to compensate the plaintiff for the proved breach. To award general damages in addition would surpass the intended goal of the law and I am reluctant to venture that far. I hold that the plaintiff having been awarded damages for loss of profits, general damages have become inappropriate and cannot be awarded.

13. In conclusion, judgment is entered for the plaintiff against the defendant for Kshs 37,343,002 together with costs and interests at court rates from the date of the suit till payment in full.

Dated, signed and delivered this 30th day of April 2020

P J O Otieno

Judge