REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 503 OF 2013

ALBERT CHEBOI AND IVY CHEBIWOTT BOMET T/A KIPEVU

RESTAURANT.....PLAINTIFFS

-VERSUS-

INSURANCE REGULATORY AUTHORITY.....DEFENDANT

JUDGMENT

1. The 1st and 2nd plaintiffs herein lodged a suit vide the plaint dated 29th November, 2013 and amended on 21st August, 2015 and sought for the following reliefs:

> **a. An order of permanent injunction restraining the defendant by itself, its servants and/or agents from breaching, from terminating, from violating, from cancelling, from altering the plaintiffs' contract awarded under the notification of award-Tender No. IRA/216/2012-2013-PROVISION OF CATERING SERVICES dated the 14th of June, 2013 to the plaintiffs' disfavor and/or in any manner from interfering, from re-tendering by open tendering or otherwise, from requesting for proposals, from awarding, from signing contract with any other third party or parties and/or in any manner from interfering with the plaintiffs' contract aforesaid breach and/or in violation of the Public Procurement and Disposal Regulation 2005.**
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> > **(a)(i) THAT in the alternative and if prayer (a) is not grantable in the circumstances, then the plaintiff is entitled to an order of damages in substitution thereof and judgment do issue accordingly.**
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> **b. A declaration that the defendant's notice of termination of contract dated 29th October, 2013 to the extent that the same does not comply with the mandatory provisions of the law as set out in the Public Procurement and Disposal Act, 2005 and in terms of the contract herein between the parties, the same is a nullity, does not in law take effect, is void, is not only bad but incurably bad, is automatically null and void without much ado and is for setting aside ex debito justitiae by the court in exercise of its inherent jurisdiction and the said notice therefore is hereby ordered set aside in its entirety.**
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> **c. That in the circumstances of this matter, the plaintiff as an innocent party is entitled to reasonably continue and try to have the contract completed and hence an order for specific performance on the part of the defendant will ought to issue and will accordingly issue.**
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> **d. That in the alternative and in the event of default, breach or interference by the defendant persist, the plaintiff will in the circumstances be entitled to recover damages for expenses caused by gains foregone because of the breach or interference i.e. the loss of the profits for the unexpired nine (9) months term in amounts to be assessed by the court.**
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> > **(d)(i) An award of damages for breach of contract sufficient to restore the plaintiffs to the position they would have been had the contract been carried out in full or such other award of damages to assuage the plaintiffs' suffering as a result of the defendant's highhandedness, oppression and breach of contract.**
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> **e. Costs of the suit.**
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> **f. Any other or further orders that this Honourable Court may deem fit to grant.**

2. The plaintiffs pleaded in their plaint that following a tender by the defendant for the provision of catering services, they applied for and were granted the tender vide the notification of award and an acceptance letter signed on 17th June, 2013.

3. The plaintiffs pleaded that the contract was set to run for a period of one (1) year with effect from 1st July, 2013.

4. The plaintiffs further pleaded that in the midst amicable discussions on variation of the catering services prices between the parties, the defendant suddenly rejected the plaintiffs' request for review of the prices, and subsequently terminated the contract on 29th October, 2013 without giving sufficient notice.

5. It was the averment of the plaintiffs that during the course of the contract, the defendant accepted their services without reservations and that they continued to carry out the said services in accordance with the contract.

6. It was therefore the plaintiffs' averment that the termination by the defendant is a nullity and the same ought to be set aside.

7. Upon service of summons, the defendant entered appearance and filed its statement of defence dated 5th February, 2014 and amended on an unknown date, to refute the plaintiffs' claim. More particularly, the defendant pleaded that it is the plaintiffs who did not perform their contractual obligations in accordance with the terms set out in the notification of award, while pleading that it upheld its obligations under the contract.

8. The defendant further pleaded that the notice of termination was issued in accordance with the contract and the law, thereby making it valid. The defendant therefore denied being in breach of the contract.

9. It was averred by the defendant that the plaintiffs accepted the award for tender without reservations but that subsequently, the defendant noted that the plaintiffs' standards of service were low quality and severally urged them to improve the quality of their services but that this was not done; while at the same time the plaintiffs wrote to the defendant with the aim of reviewing their prices upwards.

10. At the hearing of the suit, the 1st plaintiff testified while the defendant called two (2) witnesses.

11. In his testimony, the 1st plaintiff adopted his signed witness statement and stated that he works as a businessman in the catering and hospitality industry together with his wife, the 2nd plaintiff. The plaintiff also produced the documents in his list and bundle as exhibits.

12. It was the testimony of the 1st plaintiff that they provided the catering services in accordance with the contract despite encountering some challenges, such as delayed payments.

13. The 1st plaintiff testified that a dispute arose between the parties concerning the variation in prices but that this was resolved amicably in writing, though he stated that he did not have the documentation in court. According to the 1st plaintiff, the contract was terminated without any reasons and just days after accepting their proposal on transportation costs.

14. The 1st plaintiff gave evidence that he was earning about Kshs.300,000/ every month and that on losing eight (8) months of the contract, he lost such earnings, totaling the sum of Kshs.2,400,000/. He also stated that it is not true that they provided poor quality services as alleged by the defendant.

15. In cross-examination, the 1st plaintiff restated that the basis for his claim is the unlawful termination of the contract, which they had initially won. The 1st plaintiff also stated that he never attended any meeting with the defendant to discuss concerns relating to the hygiene of the catering services offered.

16. It was the testimony of the 1st plaintiff that he invested heavily in the equipment used to offer the services to the defendant but that he did not have any evidence to that effect. Subsequently, the 1st plaintiff stated that he was at the meeting involving the defendant but that he was not given a copy of the minutes.

17. During re-examination, the 1st plaintiff stated that the purpose of the aforementioned meeting was to discuss the quality of food offered by themselves but that he cannot recall attending the meeting. This marked the close of the plaintiffs' case.

18. For the defence, Ahmed Mohammed Ismail who was DW1 adopted his witness statement and produced the defendant's bundle of documents as exhibits 1-14. The witness began by stating that he is a Senior Administrative Officer of the defendant.

19. The witness testified that under the contract, the plaintiff was to provide catering services and lunch time meals on need basis. That upon doing due diligence, the defendant ascertained that the plaintiffs' restaurant was clean and well managed, and that it is on this basis that it agreed to award the tender to the plaintiffs.

20. The witness testified that as the services went on, some of the staff members of the defendant began to complain about the quality of services offered by the plaintiffs, including the food and packaging; following which the defendant wrote to the plaintiffs to complain on the same.

21. It was the evidence of the witness that upon realizing that the plaintiffs had not made any positive changes, the defendant opted to terminate the contract pursuant to paragraph 3 of the notification of award.

22. In cross-examination, DW1 acknowledged that the termination letter is not accompanied by the reasons for such termination and that he could not tell whether the email communications sent by the defendant were received by the plaintiffs.

23. At the point of re-examination, the witness stated that the contract provides for termination by any party and that the minutes held in respect to the services being offered by the plaintiffs are a reflection of what transpired in the meeting.

24. Felix Chelimo who was DW2 similarly adopted his signed. witness statement and echoed the sentiments of DW1 that various complaints had been made concerning the quality of food and packaging services offered by the plaintiffs, and that prior to issuance of the notice of termination, the defendant had held various meetings in a bid to address the issue. The witness also stated that the plaintiffs were made aware of the nature of complaints.

25. In cross-examination, DW2 testified that the notice of termination did not provide reasons for the termination but stated that there was a breach of contract on the part of the plaintiffs.

26. The witness restated during re-examination that the complaints had been communicated to the plaintiffs. This marked the close of the defendant's case.

27. This court then invited the parties to file and exchange written submissions. In their joint submissions, the plaintiffs contended that despite performing their contractual obligations, the defendant chose to terminate the contract without giving any reasons, contrary to the provisions of **Rule 32 of the Public Procurement and Disposal Act 2005** which stipulates that:

> **"(1) A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable to termination.**
>
> **(2) The procurement unit shall obtain the approval of the tender committee which authorised the original contract, prior to terminating the contract and the request for approval shall clearly state—**
>
> **(a) the reasons for termination;**
>
> **(b) the contractual grounds for termination; and**
>
> **(c) the cost of terminating the contract."**

28. The plaintiffs further argued that the defendant approbated by telling them to proceed on delivery of the catering services and immediately thereafter reprobated by terminating the contract. According to the plaintiffs, the defendant cannot approbate and reprobate simultaneously, as stated by the court in the case of **Titus Muiruri Doge v Kenya Canners Ltd [1988] eKLR** thus:

> **"I would conclude by adopting and reiterating words of Denning LJ when he put it in the way the ordinary man understands and I quote:**
>
> > **"it is a principle of justice and equity. It comes to this: when a man by his words or conduct, has led another to believe that he may safely act on the faith of them – and the other does act on them – he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so." "**

29. To that end, the plaintiffs are of the view that the termination of the contract was unlawful and unreasonable.

30. On damages, the plaintiffs sought for the sum of Kshs.2,400,000/being the monies they would have received in the eight (8) months that the contract was to run for, were it not for the termination.

31. The plaintiffs also urged this court to award exemplary damages in the sum of Kshs.1,000,000/.

32. In their reply submissions, the defendant contended that it was a term of the contract that the plaintiffs do supply high quality services and observe proper hygiene.

33. According to the defendant, the plaintiffs were in breach of the contract by not ensuring their catering services adhered to the standards indicated in the contract and that complaints were made to them prior to issuance of the termination notice and hence the plaintiffs cannot claim to have no knowledge of the reasons for termination thereof.

34. The defendant submitted inter alia, that the plaintiffs ought to have ensured that the goods provided were fit for their purpose pursuant to the provisions of **Section 16(a)** of the **Sale of Goods Act** which expresses that:

> **"Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—**
>
> **(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:**

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose"

35. The defendant further argued that in any event, the contract between the parties provided for termination by either party through giving one (1) month's notice and that this was done. It is therefore the position of the defendant that this court ought simply to interpret the terms of the contract, as illustrated by the court in the case of **Trollope Colls Ltd v North West Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609** when it held thus:

> **"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."**

36. It was therefore the submission of the defendant that the termination of the contract was lawful and procedural. The defendant further submitted that the plaintiffs are not entitled to the reliefs sought in their amended plaint.

37. In their rejoinder submissions, the plaintiffs restated the averments made in their earlier submissions and further argued that the defendant did not bring any expert at the trial to elaborate on what constitutes high quality food and in not doing so, did not prove its allegation against them. The plaintiffs once again urged this court to grant them the reliefs sought.

38. I have considered the evidence tendered in court and the contending submissions coupled with the authorities quoted. I have identified the following as the key issues for determination:

a. Whether the plaintiffs entered into a contract with the defendant for the provision of catering services;

b. Whether there was a breach of the contract on the part of the plaintiffs;

c. Whether the notice of termination issued by the defendant is valid;

d. Whether the plaintiffs are entitled to the reliefs sought; and

e. Who should bear the costs of the suit.

39. I will now address the issues in the order set out hereinabove.

a. Whether the plaintiffs entered into a contract with the defendant for the provision of catering services.

40. From my study of the pleadings and material placed before me, it is not controverted that the parties herein entered into a contract whereby the plaintiffs were to provide catering services to the defendants for a limited period of time.

41. Going by the evidence, the defendant on 29th April, 2013 issued an invitation to tender, namely Tender No. IRA/216/2012-2013. It is clear from the evidence that the plaintiffs are among the persons who applied for the tender and vide the notification of award dated 14th June, 2013 produced by the parties as exhibits, the defendant notified the plaintiffs that the tender had been awarded to them for a period of one (1) year with effect from 1st July, 2013. The plaintiffs replied with the letter of acceptance dated 17th June, 2013.

42. Having established the above, I now turn to the second issue for determination.

b. Whether there was a breach of the contract on the part of the plaintiffs.

43. From my study of the pleadings and evidence, I observed that the defendant averred that the plaintiffs did not offer catering services to the quality and standard agreed upon in the contract.

44. Upon my perusal of the tender document produced as P. Exh 2 and D. Exh 1 respectively, clause 4.1 reads that during the subsistence of the agreement, the caterer; in this case the plaintiffs; are to observe the best business and standards of hygiene and culinary practices. Clause 4.2 goes on to express that the caterer shall ensure that the services be provided for with high quality and with due care and diligence. This is further expressed under Clause 4.3 of the tender agreement.

45. The defendant produced as D. Exh 4 a copy of a letter of due diligence report dated 13th June, 2013 signed by DW1 and Antony Macharia, averring that there is a variance in the quality of services offered by the plaintiffs across their various establishments and a recommendation that the contract do include a termination clause.

46. The defendant also produced as D. Exh 6 an email addressed to the plaintiffs, informing them of the concerns relating to the quality of services offered and a request that the same be looked into and improved.

47. The record shows that a meeting was held on 27th August, 2013 to discuss the same issue. According to the minutes produced as D. Exh 7 the 1st plaintiff; DW1 and DW2 among others were in attendance at the said meeting.

48. It is apparent from the documents adduced as exhibits that the parties herein thereafter exchanged correspondences relating to the review of prices for various items served by the plaintiffs and which review was declined by the defendant on the basis that the costs were deemed to have been included in the price schedule issued to the defendant by the plaintiffs.

49. From my examination of the above evidence, I note that concerns regarding the quality of services offered by the plaintiffs had been raised by the defendant and there is nothing to indicate that the plaintiff was not made aware of such concerns. In actual fact, the minutes relating to the meeting held to discuss this issue indicate that the 1st plaintiff was in attendance and this has not been refuted by the said plaintiff though he stated in his evidence that he cannot recall being present at the meeting.

50. Moreover, both DW1 and DW2 testified as to the reservations of the defendant concerning the low quality of catering services offered by the plaintiffs and their evidence is supported by the documentation tendered at the hearing.

51. It is noteworthy that the tender document adduced at the trial stipulated in clear terms the obligations of the parties and as I have set out hereinabove, the plaintiffs were obligated to provide high quality services and from the record, it is apparent that the plaintiffs did not directly address this issue with the defendant by way of a letter or other correspondence.

52. In view of the foregoing, I am of the view that in the absence of evidence to the contrary, the plaintiffs breached the terms of the contract by not showing that they made any improvements to the quality of catering services provided.

(c) Whether the notice of termination issued by the defendant is valid.

53. It is clear that the plaintiffs' claim fundamentally rides on the issue that the termination of the contract was invalid.

54. Upon my perusal of the evidence presented at the trial, I observed at paragraph 3 of the notification of award dated 14th June, 2013 that it was agreed between the parties that the contract may be terminated by either party by giving notice of one (1) month. There is nothing to indicate that the plaintiffs ever raised issue with the aforementioned clause.

55. From my examination of the notice of termination of the contract dated 29th October, 2013 it is apparent that the defendant did not provide any reasons for terminating the contract but made reference to paragraph 3 (supra).

56. On the one hand, the now repealed **Section 32 of the Public Procurement and Disposal Act 2005** provides that:

> **"(1) A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable to termination.**
>
> **(2) The procurement unit shall obtain the approval of the tender committee which authorised the original contract, prior to terminating the contract and the request for approval shall clearly state—**
>
> **(a) the reasons for termination;**
>
> **(b) the contractual grounds for termination; and**
>
> **(c) the cost of terminating the contract."**

57. Under the current **Public Procurement and Asset Disposal Act No. 33 of 2015** which replaced the 2005 Act**, Section 153(2)** expresses thus:

> **"A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable on termination."**

58. It is clear from the foregoing that a contract document involving a public entity such as the defendant ought to particularize the instances under which a contract can be terminated. From my perusal of the contract entered into between the parties herein, I established that no such grounds were set out and the clause on termination was open ended.

59. It is not in dispute that the contract was entered into willingly and consensually and none of the parties has challenged its validity. In the premises, I am of the view that upon looking at the circumstances preceding the termination, the notice of termination by the defendant was in tandem with the contract notwithstanding the fact that no reasons were set out therein. I say so in view of the fact that the parties did not agree on the specific instances under which termination would result and the only requirement under the contract was that notice of one (1) month be given.

60. Moreover, it is apparent from the evidence that the plaintiffs did not bring any credible evidence to prove that there was no breach of the contract on their part, by showing that they heeded to the requests to improve the quality of their services.

61. Might I add that it is not the duty of courts to rewrite contracts entered into between parties. The only duty of the court is to interpret the terms of the contract as they are. This was the position taken by the Court of Appeal in the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR** when it rendered that:

> **"We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."**

62. For all the foregoing reasons, I find that the notice of termination by the defendant was in accordance with the contract entered into between the parties and is therefore valid. Consequently, I arrive at the conclusion that the plaintiffs have not proved their case against the defendant.

d. Whether the plaintiffs are entitled to the reliefs sought.

63. Having arrived at the above finding, I am only left to dismiss the suit. However, I am enjoined by law to consider the reliefs I would have awarded had the plaintiffs' claim succeeded, which I will address in the order hereunder.

64. On damages for loss of profits, upon my perusal of the pleadings and evidence, I established that the plaintiffs did not bring any credible evidence to show that they had received the monthly sum of Kshs. 300,000/ as pleaded. No breakdown of the sums received in the months during which the contract subsisted was given, thereby providing no basis for the sum of Kshs. 2,400,000/ sought or any sum for that matter. Put another way, the plaintiffs did not prove the actual loss they suffered as a result. I would therefore have declined to award any damages here.

65. On general damages for breach of contract, I note that none of the parties suggested any awards under this head or cited any authorities before me that would guide an award. As earlier noted, the plaintiffs also did not prove any actual loss suffered neither did they did claim that the defendant was in arrears of sums payable to them for the services rendered during the existence of the contract.

66. In such instance, I would have been inclined to award nominal damages. In that respect, I would have considered the case of **Peter Umbuku Muyaka v Henry Sitati Mmbasu [2018] eKLR** in which the court upon noting that the actual loss suffered by the plaintiff therein was not proved, awarded nominal damages of Kshs. 20,000/. The court referred inter alia, to the case of **Kinakie Co-operative Society v Green Hotel (1988) KLR 242, and I quote:**

> **"…the court of Appeal held that 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…"**

67. The court in the above-cited case also made reference to the Halsbury's Laws of England, Third Edition vol. II which defines nominal damages as follows:

> **"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".**

68. Taking the above into account, I would have settled for a sum of Kshs. 50,000/.

69. As concerns the declaration sought that the notice of termination violates the Public Procurement and Disposal Regulation 2005 (now repealed), had I found that the termination notice was invalid, I would have granted such declaratory order.

e. Who should bear the costs of the suit.

70. It is trite law that costs follow the event.

71. Consequently, and for all the foregoing reasons above, the plaintiffs' suit is hereby dismissed with costs to the defendant.

Dated, Signed and Delivered at Nairobi this 29th day of October, 2020.

…….…….

L. NJUGUNA

JUDGE

In the presence of:

…….. for the 1st and 2nd Plaintiffs

…….….. for the Defendant