



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL CASE NO. 18 OF 2017

BETWEEN

GALEXON KENYA LIMITED.....PLAINTIFF

AND

CENTRE FOR YOUTH LINKAGES

AND EMPOWERMENT PROGRAMMES.....1ST DEFENDANT

COUNTY GOVERNMENT OF VIHIGA.....2ND DEFENDANT

ANNET ILAMUNYA & 2 OTHERS (Sued on their own behalf and as officials of

Mbale Open Air Committee (C.B.O).....3RD DEFENDANTS

RULING

1. By a Memorandum of Understanding (*hereinafter referred to as the MOU*) dated 21st July, 2016 between the Plaintiff and the 2nd Defendant, for various activities in the county which included construction of market stalls at Mbale Market.
2. The Plaintiff and 1st Defendant afterwards entered into an agreement dated 27.7.16 (*hereinafter referred to as the Construction Agreement*) in which it was agreed that Plaintiff would construct 500 modern entrepreneurial market stalls in Vihiga County at a cost of Kshs. 54,225,000/-.
3. The Plaintiff completed the construction of 201 stalls at Mbale Market and the 2nd Defendant terminated *the MOU* between it and the Plaintiff.. The 1st Defendant then failed to pay the Plaintiff for the 201 stalls whose construction had been completed and put into use.
4. By a plaint amended on 4.11.17 and filed on the same date, the Plaintiff sought the following orders as against the 1st and 2nd Defendants:
 - a) Kshs. 21, 798,450/- (Kshs. Twenty one million, seven hundred and ninety eight thousand, four hundred and fifty)
 - b) General damages for breach of contract
 - c) Payment of interest on (a) above at court rates from date of initial demand
 - d) Any other relief that this Honourable Court may deem fit to grant
 - e) Costs of the suit
5. The Plaintiff and the 2nd Defendant took cue from the dictates of Article 159 (2) (c) of the Constitution of Kenya and commenced serious negotiations through their respective Advocates with a view to settling the matter and bring a sensible and ultimate end to this protracted dispute. The said negotiations were concluded with a Deed of Settlement dated on 10th December, 2018 (*hereinafter "the Deed of Settlement"*).
6. Although *the Deed of Settlement* on its face appears to have been made by all the parties to this proceedings, it is apparent that the 1st Defendant was not a party to the negotiations.
7. *The Deed of Settlement* was by consent of the Plaintiff's and 2nd Defendant's advocates adopted as the judgment of the court on 14th

December, 2018.

8. **The Deed of Settlement** did not fully and finally settle the issue of amount payable to the Plaintiff and the parties agreed to file submission on the issue.

SUBMISSIONS BY THE PARTIES

Plaintiff's submissions

9. The Plaintiff holds the view that it is entitled to Kshs. 21, 798,450/- being the cost of construction of 210 stalls, Kshs. 10,000,000/- general damages, costs of the suit and interest. The Plaintiff places reliance on the following authorities.

i. **Livingstone v Rawyards Coal Co (1880) 5 App Cas.25** where damages were defined as **“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is not getting his compensation or reparation”**.

ii. **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR** where the court of appeal awarded general damages after finding appellants' conduct to have been oppressive, highhanded, outrageous, callous and underhanded

iii. **Francis Namatoi Obongita v Cocker Printers And Designers Ltd[1984] eKLR** where the court awarded general damages on the ground that the defendant had abruptly stopped the contract which affected the plaintiff's income

iv. **Nalinkumar M. Shah v Mumias Sugar Company Ltd [2010] eKLR**

v. **Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [2006] eKLR** where the Court of Appeal held, inter alia, that interest antecedent to the suit is only claimable where, under an agreement, there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between the parties.

vi. **Prem Lata v Peter Musa Mbiyu [1965] E.A 592** where the court held that **“The justification for an award of interest on the principal sum is, generally speaking to compensate a plaintiff for the deprivation of any money or specific goods through the wrong act of a defendant.”**

vii. **Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR** where the court held that consent recorded in settlement of a proceeding is not an automatic disentitlement of costs

2nd Defendant's submissions

10. The 2nd Defendant does not as much dispute the sum of **Kshs. 21, 798,450/-** being the cost of the constructed stalls. The 2nd Defendant however contends that there is no privity of contract between it and the plaintiff and that general damages are therefore not payable.

11. I have carefully considered the submissions of Counsel, the authorities relied on and the record generally.

12. The intention of the parties to **the Deed of Settlement** dated 10th December, 2018 was to settle these proceedings and the entire claim by the Plaintiff against the Defendant. That **the Deed of Settlement** is lawful and binding upon the Defendant is therefore not disputed. The principal amount payable under the Deed, interest and costs of the suit are similarly not disputed. What is disputed is the Plaintiff's claim for general damages.

13. The general legal principle is that courts do not normally award damages for breach of contract but there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive. In support of this proposition, the Plaintiff relied on **Delilah Kerubo Otiso v Ramesh Chander Ndingra** and **Francis Namatoi Obongita v Cocker Printers And Designers Ltd** (Supra).

14. The 2nd Defendant on the other hand maintained that there cannot be any award of general damages for breach of contract since there was no privity of contract between the parties.

15. In my considered view however, I find that **the Deed of Settlement** creates a relation between the parties that is recognized by law where it declares at clause (1.0) that the parties agreed that:

On the terms and conditions stated herein in this deed, the Parties hereby agree, without any admission of liability whatsoever, to a full and final settlement in all and every respect of all and every claim, relief, liabilities, loss and/or damage of whatsoever nature against or by whosoever that each party has or may have raised, pleaded, disclosed, referred to and/or relied on in relation to the matters pleaded.

16. To my mind, the 2nd Defendant bound itself to compensate the Plaintiff in all and every respect of all and every claim, relief, liabilities, loss and/or damage of whatsoever nature against or by whosoever that each party has or may have raised, pleaded, disclosed, referred to

and/or relied on in relation to the matters pleaded.

17. It was however incumbent upon the Plaintiff to lead evidence so as to bring the 2nd Defendant's conduct into the exceptions alluded to above. In the absence of evidence bringing the 2nd Defendant's conduct into the exceptions, I do not see how its conduct can be said to be oppressive, high handed, outrageous, insolent or even vindictive.

18. For the foregoing reasons, the Plaintiff's claim partially succeeds and there is judgment for the Plaintiff against the 2nd Defendant for the following:

a) Kshs. 21, 798,450/- (Kshs. Twenty one million, seven hundred and ninety eight thousand, four hundred and fifty) less Kshs. 1,000,000/- already paid and acknowledged

b) Interest on (a) above at court rates from date of initial demand i.e 6th June, 2017

c) Costs of the suit

DELIVERED AND SIGNED AT KISUMU THIS 28TH DAY OF MARCH 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant	- Felix
For Plaintiff	- Absent
For 1st Defendant	- Mr. Maua
For 2nd Defendant	- Absent
For 3rd Defendants	- Absent