REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 123 OF 2017

CHINA OVERSEAS ENGINEERING COMPANY LIMITED.....APPELLANT

VERSUS

ISAAQ KICHWEN KIJO.....RESPONDENT

(An appeal arising from the judgment and decree of the Hon. WK Cheruiyot,

Resident Magistrate (RM), in Vihiga PMCCC No. 2 of 2017 of 19th October 2017)

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant on grounds of breach of contract. The parties had entered into a contract sometime in 2015 for provision of security services by the respondent at premises owned by the appellant for an agreed consideration. The respondent averred that the said contract was then terminated by the appellant on 9th November 2016 without any reasons being assigned. The respondent alleged breach of the contract and sought redress by way of general damages, reinstatement of the services and costs.

2. The suit was defended by the appellant who denied the allegations made by the respondent, and instead alleged breach of contract on the part of the respondent by providing services that were below par. The appellant also averred that the respondent was an independent contractor and not an employee, and it was the role of the respondent to procure services of employees, and that upon breach of the contract by the respondent the appellant sought to terminate the contract.

3. The suit was deposed of by way of *viva voce* evidence. The respondent testified that he and the appellant, for whom he had previously worked as an employee, entered into a written contract dated 12th September 2015 for provision of security guards. Clause 11 of the contract allowed any of the parties to withdraw from the contract by giving to the other party a seven-day notice. He stated that the appellant did not give him any information of thefts at its premises, although he conceded that there had been a report to the police of theft at premises guarded by Bright Kings. He averred that he was not given the seven-day notice, instead he was given a letter terminating the contract immediately. He said that he did not report any thefts because there were none.

4. Dom You Yau testified on behalf of the appellant, with whom he worked as an engineer and manager. He conceded that there was a written agreement between the two parties for provision of security services. He stated that the security situation was bad as the respondent's workers used to report to work late, without uniform and many items, such a batteries and mortars, were stolen. He said that sometime in October 2015 guards failed to report to work on a Saturday. He notified the respondent, who insisted that they had reported to work. He gave him seven days to rectify. Nothing changed after 20th October 2017, and so the appellant decided to terminate the contract. The appellant gave notice on 1st November 2016 terminating the contract. The termination notice was allegedly served on 9th November 2016. He stated that he called the respondent on 1st November 2016 to communicate the termination, although he had no documentary evidence of it. He said that the written notice was given on 9th November 2016. He stated that although property was being lost during the time the period of the contract, the company did not make any report to the police. He said that the respondent was at the time the sole provider of security services, and that the appellant only brought in another provider after the termination.

5. The appellant's second witness was Silas Obonyo, a plant operator with the firm. He testified that the respondent's guards did not have uniform and there were many incidences of theft. He said that it was the obligation of the respondent to report to the police, but he asserted that the respondent was always informed of such thefts and losses. He said that he did not personally make any reports to the police, but he did inform the management of the losses. Paul Otieno Oyaya testified next. He worked for the appellant as an electrician. He stated that some of the respondent's guards would have uniform while others did not have. He mentioned that various items would be lost at the sites and he would make reports of the losses to the management. He said that it was the responsibility of the respondent to file reports with the police. The appellant's last witness was Andrew Okute Owiti, a mechanic with the firm. He stated that property used to get lost or stolen. he said he was not called to a court of law to testify about any stolen property.

6. At the close of the oral hearings, the trial court directed the parties to file written submissions. There was compliance, for the parties did

lodge their respecive written submissions in court. The court delivered a judgement on 19th October 2017. The court found that there was breach of contract to the extent that no notice to withdraw the contract was not served within seven days as required by the written contract, and granted general damages of Kshs. 400, 000.00 and three months' pay in lieu of notice being Kshs. 65, 000.00 per month.

7. It is the said judgment that triggered the appeal herein. The appellant listed seven grounds of appeal. In summary, the appellant argued:

(a) That the trial court did not consider all the material that was placed before it;

(b) That the trial court erred in principle by awarding damages for breach of contract when in law such damages are not available and when no particulars were pleaded to warrant such damages;

(c) That the trial court erred in awarding the payment in lieu of notice when the same had not been pleaded and when the contract had provided for a seven-day notice;

(d) That the trial court failed to find that the respondent had failed its obligations under the contract hence the termination; and

(e) That the trial court failed to have any regard to the appellant's evidence and submissions.

8. I have gone through the record of the trial court. I am satisfied that the said court properly identified the three issues that it needed to address in determination of the dispute before it. That is to say whether there was a valid contract between the two parties, whether that contract was breached and, if the court found that there was a breach, whether the respondent was entitled to damages therefor.

9. On the first issue, I would agree with the trial court. Both sides did concede that they had between them a written contract for provision of security services by the respondent to the appellant.

10. The second issue was contested. The respondent alleged that there was breach of contract by the appellant in failing to give the seven-day notice stipulated in the contract. The appellant argued that it had not breached the contract, and said that it was in fact the respondent who was guilty of breach of contract, by failing to perform his obligations under the contract, which justified the appellant's termination of the contract. The trial court found that no notice was given prior to the termination, and faulted the appellant for that and condemned it to damages. The appellant's case is that had the trial court considered that it was justified to terminate the contract it would not have found it to have had breached the contract and thereby condemned it to damages.

11. The contract the subject of the proceedings is on record. Clause 11 thereof states:

"Any party want to withdraw form the contract shall give notice to another party before 7 days." (sic).

12. The clause is not in elegant language, but I understand it to say that any of the two parties to the contract were at liberty to withdraw from the contract by giving the other party notice of seven days.

13. The respondent's case is that Clause 11 was not complied with, to the extent that the appellant did not give him a notice to withdraw from the contract within the time stipulated of seven days. He stated that instead the appellant gave him a letter dated 9th November 2016, terminating the contract effective from the said date. The said letter says:

"Our company decides to terminate the contract since November 9th, 2016. The contract which we signed between you and the company on September 12th, 2015 will not be complied by both parties."

14. From the language of the letter of 9th November 2016 it is clear that the same was a not a seven-day notice of withdrawal from the contract in accordance with Clause 11, but a notification that the contract had been terminated forthwith. The notice was to take effect the same day. That would mean that the purported withdrawal from the contract was not in keeping with Clause 11, and there is merit in the decision of the trial court that there was breach of the contract.

15. Can the appellant argue that there was justification for the termination, and, therefore, the failure to give the seven-day notice did not amount to a breach? Is there evidence that the respondent breached the contract first, and the appellant was only acting on the said breach by the respondent?

16. The letter terminating the contract, which is dated 9th November 2016, does not assign any reasons to the withdrawal from the contract. The appellant did not, in that letter, cite any breaches of the contract by the respondent, and, indeed, does not state any reason for withdrawing from the contract. At the trial, the appellant's witnesses gave evidence that pointed to problems with the performance of the contract by the respondent. They stated that the respondent's guards did not have uniforms, they sometimes did not report to work and that they occasionally stole or occasioned loss at the appellant's premises. Other those oral testimonies, there was no documented evidence touching on those complaints. They did not produce any letters that might have been written to the respondent complaining that his workers had not reported on duty on certain dates, or had not worn uniform on given dates while on duty, or had stolen or occasioned loss at the premises they were guarding. There were records from the police of the alleged thefts or loses.

17. On uniforms, the contract stipulated that the respondent's guards were to report on duty in uniform and armed and on time. It is stipulated that should the clause the breached, by guards showing up on duty late or without uniform or unarmed, the appellant was not obliged to pay for the services provided by the said guards. The appellant did not provide any concrete evidence that the respondent breached those clauses.

Breach has financial consequences, it would be expected that a record be kept of the breaches, to show the dates when guards reported to work late, or without uniform or arms, for the appellant was not under obligation to pay in the circumstances. Without documentary proof it cannot be said that those breaches occurred. And, even if they did occur, there is provision in Clause 5 to address the breach, by not paying for the services.

18. On issues around theft and loss to the appellant, there are provisions in the contract to address the same. Clause 8 entitled the appellant to compensation from the respondent for any such losses, provided that reports thereof had been made to the police and damages awarded by a court of law. The appellant did not provide any proof of the losses that it alleged. Apparently no reports were ever made to the police, and, therefore, the can be no basis at all to conclude that there was such loss occasioned by the respondent through his employees.

19. The trial court, therefore, did not have any material before it from which it could conclude that the respondent had breached the terms of the contract to warrant the appellant terminating the same summarily without recourse to Clause 11. It cannot also be said, in the circumstances, that the trial court had failed to consider the appellant's evidence of the alleged breaches as no proof was provided of the alleged breaches. It is my finding, therefore, that the trial court quite properly disposed of the second issue.

20. The third issue turned on the damages payable for the breach of terminating the contract without the stipulated notice. The trial court awarded general damages and payment in lieu of notice. The appellant argues that the two awards ought not have been awarded. On general damages, it is argued that the same are not available for breach of contract. On the payment in lieu of notice, it is argued that the same was not pleaded, and, therefore, there was no justification for it.

21. I will first dispose of the second argument. In the plaint the respondent sought two principal prayers, general damages and reinstatement of services. There is no prayer for payment for three months in lieu of notice. There is no averment on the same in the body of the plaint, and I, therefore, agree with the appellant that there was no basis for the making of that award. Needless to say that there is no clause in the contract that such payment was available upon the contract being breached.

22. Regarding award of general damages for breach of contract, the appellant cited several authorities to make his point that such damages are not available. Some of the authorities cited include *National Industrial Credit Bank Limited vs. Aquinas Francis Wasike & another* Nairobi CACA No. 54 of 2007, and *Kenya Power & Lighting Company Ltd vs. Abel Momanyi Birundu* (2015) eKLR, among others. It was submitted that compensation for breach of contract lies in special damages, and that the same are awardable only where they are specifically pleaded and specifically proved. The appellant cited *Provincial Insurance Co. EA Ltd vs. Mordekai Mwanga Nandwa* KSM CACA No. 179 of 1995 (UR) and *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* Nairobi CACA No. 189 of 2014.

23. I have read through the authorities cited, and others such as *Kenya Tourist Development Corporation vs. Sundowner Lodge Limited* [2018] eKLR, *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* [2015] eKLR, *Peter Umbuku Muyaka vs. Henry Sitati Mmbasu* [2018] eKLR, and I agree with the appellant that it is trite law that the remedy of general damages is not available for breach of contract. The proper remedy where breach of contract is established is an award of special of damages. The trial court found for a fact that the appellant was guilty of breach of contract for terminating the contract between it and the respondent without following the process stipulated in the contract. The trial court ought, thereafter, to have considered whether or not grant of general damages was proper. It fell in error when it awarded general damages to the respondent having found that there was breach of contract.

24. I have equally perused through the authorities cited by the appellant in support of its contention that the remedy available for breach of contract is an award of special damages, and that the same ought to be specifically pleaded and specifically proved. I have also considered other authorities, such as *Abson Motors Limited vs. Dominic B. Onyango Konditi* [2018] eKLR, and I am fully in agreement with the appellant that where breach of contract is proved, the court ought to award special damages and not general damages. I agree too that such an award of special damages can only be awarded where the same had been specifically pleaded in the pleadings and, additionally, where the same had been specifically proved during trial.

25. From the material before me, it is plain that the trial court having found that there was proof of breach of contract, should have considered awarding special damages and not general damages as it did. As the respondent in his plaint had not pleaded special damages arising from the alleged breach, and at the trial did not adduce evidence to prove specific loss or damage flowing from the said breach, it follows that the respondent ought not have been awarded damages of any kind. The trial court should have found that there was proof of a breach of contract, but proceeded to decline to award special damages for the same had not been specifically pleaded nor specifically proved. The only monetary award available to the respondent should have been costs of the suit.

26. I have seen the submission by the appellant that the only specific damage or loss suffered by the respondent was the seven days' notice that he should have been entitled to under the contract, and that that should be the only compensation that was available, being a fraction of the amount due to him per month. However, as the same was not pleaded in the respondent's plaint there would be no basis for grant of the same.

27. In the end, I hold that the appeal herein succeeds for the reasons given. The same is allowed in the terms that the award of general damages by the trial court and the imposition of payment in lieu of three months' notice is hereby set aside. Each party shall bear their own costs. Any party aggrieved by this judgement has liberty to move the Court of Appeal appropriately within twenty-eight days. The trial court file shall be returned to the relevant registry. It is so ordered.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 15th DAY OF August, 019

W. MUSYOKA

JUDGE