



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 97 OF 2016**

**WOOD PRODUCTS LIMITED.....APPELLANT**

**-VERSUS-**

**RUFUS KITHELA KOBIA.....RESPONDENT**

***(Being an appeal from the judgement of the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi (Ms. L. W. Kabaria Resident Magistrate) dated 19<sup>th</sup> February 2016)***

**JUDGEMENT**

**BACKGROUND:**

1. Rufus Kithela Kobia filed suit against the defendant Messrs Wood Products Limited by a plaint dated the 20<sup>th</sup> September 2002 claiming a refund of a sum of Kshs.77,800/= on account of goods sold to him by the latter which goods he avers failed to meet the standard required or fit the purpose for which they were purchased and a sum of Kshs.78,000/= for expenses. This claim the defendant denied in a statement of defence filed in court on the 15<sup>th</sup> November 2012.

2. The case was heard and respondent succeeded and judgement was awarded as prayed.

3. This triggered the filing of the appeal herein in which 6 grounds were set out:-

**(1) The honourable learned magistrate erred in fact and law in holding that the respondent had proved his case against the appellant on a balance of probabilities to warrant an entry of judgement on account of breach of contract.**

**(2) The honourable learned magistrate erred in law and in fact by holding that there was a breach of contract by the appellant and by so doing she failed to take into consideration the fact that the respondent was the sole author of his own misfortune.**

**(3) The honourable learned magistrate erred in law by failing to take into consideration the fact that the Kenya Bureau of Standard (KEBS) a body charged with the responsibility of verifying the quality of products in the country had exonerated the appellant from blame.**

**(4) The honourable learned magistrate erred in law and fact by totally ignoring the evidence of PW2, as well as the appellant's pleadings, evidence and submissions to the effect that the product was of merchantable quality when sold to the respondent and at the time it was laid on the floor by PW2 and the appellant could not take responsibility for subsequent damage.**

**(5) The honourable learned magistrate misdirected herself in law by awarding the respondent a sum of Kshs.77,800/= as special damages yet the respondent did not adduce any documentary evidence to support that claim (the claim was not proved to the standard set for special damages claims).**

**(6) The honourable learned magistrate misdirected herself in law by awarding the respondent a sum of Kshs.50,000/= as general damages (in a claim for breach of contract) in addition to an award of special damages.**

4. Parties were directed to file submissions to canvass the appeal which they did.

**APPELLANT SUBMISSIONS:**

5. The appellant submitted that even if it were to be argued that the parquets were defective (which was not the case), the appellant would still have been exonerated from liability by the proviso to section 16(b) of the Sale of Goods Act which is to the effect that:-

**“Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed.”**

6. The respondent has purchased the first batch of the wood parquets on 6<sup>th</sup> December 2006, when he took delivery of them from the appellant’s premises, and kept them, in his house under construction until sometime in the years 2007/2008, when he contracted PW2 to lay them for him.

7. The respondent, therefore, had sufficient opportunity to examine the wood parquets and reject them, if at all they did not satisfy the merchantability test.

8. Ground 3 of the appeal relates to failure by the learned magistrate to take into consideration the report by Kenya Bureau of Standards (KEBS), issued pursuant to a complaint lodged with it by the respondent.

9. The respondent’s claim in his statement, KEBS report dated 11<sup>th</sup> March 2011, stated at paragraph 2 and 3 as follows: -

**“The period in question to date is over 3½ years and if the products were sub-standard, then they should have shown failure within a shorter period. The Wood Products (K) Ltd only sold to you the products and was not involved in the laying. It was therefore not practicable to pursue the issue further from the KEBS side. It will be difficult to sustain a case in court on the same.”**

10. The appellant contend that, in the case before the lower court, KEBS who had been invited by the respondent, found as a fact that if the wood parquets had been sub-standard, at the time of sale, the failure should have been manifested after a shorter period of time as opposed to over 3½ years later.

11. The appellant submitted that, the trial court determination on the KEBS report was, therefore, erroneous and unsustainable, as she did not have sufficient expertise to dispute such finds or interpret them in favour of the respondent.

12. Grounds 5 of the appeal challenges an award of special damages made by the learned magistrate in favour of the respondent in the sum of Kshs.77,800/=, contrary to the settled principle of law that special damages must be specially pleaded and strictly proved.

13. The respondent did not produce any receipt in support of the alleged parquets he said he purchased to replace the “bad ones” sold to him by the appellant. He could also not claim the full refund of the purchase price because he said in his evidence that some of the parquets were good. The net value of the “bad parquets” was, therefore, not proved.

14. In as much as the items are classified under sub-heading general damages, they are by their very nature special damages, which appellant submitted should have been strictly proved by production of receipts in respect of hiring the sanding machine, purchase of 9 tins of parquet glue and purchase of 5 tins of two pack clear vanish. Actual out of pocket expenditure cannot be passed off as general damages.

15. It relies on the case of Francis *Muchee Nthiga vs David N. Waweru [2014] eKLR, Justice Ngaah Jairus*, which held, thus;

**‘..... Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial.’**

16. Appellant further submitted that the trial court misdirected herself in awarding general damages in the sum of Kshs.50,000/, in addition to special damages of Kshs.77,800/= on the following grounds:-

**i) The learned magistrate did not give any reason for the award of general damages given that the claim before her was one of quantified damages.**

**ii) It is now settled law that general damages are not awardable in addition to quantified damages given that such an award amounts to a duplication, as was held in the case of *Dharamshi vs Karsan [1974] EA 41 at page 43* thus: -**

**‘2) Shs. 1,500/=, damages for breach of contract. I can see no reason for damages to be awarded under this head in this case. The plaintiff had quantified his claim for damages, and was awarded a sum on that basis as a result of the breach of contract on the part of the defendant.....’**

#### RESPONDENT’S SUBMISSIONS:

17. The respondent submitted that, it had never been in dispute that the parties entered into a legally binding agreement for the supply of wood tiles. The said agreement resulted into implied terms and was thus bound by the Sale of Goods Act Cap 31, Laws of Kenya.

18. Section 16 of the aforementioned Act provides that the goods supplied must be fit for purpose and should have been of the right quality.

This section creates an obligation on a seller to ensure that goods are reasonable fit for the purpose to which the buyer has disclosed expressly or implication.

19. The goods supplied to the respondent were of a substandard quality and could not meet the implied warranty of the sale. This was proved in court by both the testimony of the expert who ensured first before laying the wood tiles down that the surface was clean and dry, and that of the Kenya Bureau of Standards' report that indicated that the tiles were not of the right quality.

20. On the weight a court of law should attach an expert opinion, the case of *Stephen Kinini Wangonde vs The Ark Limited [2016] eKLR* held that:-

**“Expert testimony like all other evidences must be given only approximately weight. It must be as influential in the overall decision – making process as it deserves, no more, no less.”**

21. No evidence was adduced by the appellant on their allegations of the condition/status on the storage area where the parquets were stored which led to the state of the parquets.

22. It was DW1's contention in court that the storage caused the rot and defects in the parquet tiles. He ought to have demonstrated by clear cogent evidence that the storage place was dump or wet hence the destruction of the commodities. This was never the case.

23. Section 109 of the Evidence Act, Cap. 80 of the Laws of Kenya stipulates that:

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

24. On the failure by the learned magistrate to take into consideration the report by Kenya Bureau of Standards (KEBS), he respectively submitted that:

**“A letter from the Ministry to the respondent stated:**

**‘As has been disproved from the discussion, the Ministry has played its role within its legal provisions that includes of the Kenya Standard, KS488:2010 on wood mosaic parquet through its implementation agency, Kenya Bureau of Standards (KEBS) and noted the difficulties inherent with its application, pass installation of the panels. In addition, KEBS has confirmed that it does not have the capability to accurately determine the cause of the rotting of the panels given the time from their installation into the house.’**

25. The respondent's claim was as contained in paragraph 3 of the plaint as follows:-

**For the refund of the sum amount of Kshs.77,800 being the cost of the substandard wood tiles sold to him and/or alternatively substituted replacement of the same product with better quality ones on diverse date between December 2006 and May 2007 as follows:-**

<u>Sale Receipt No.</u>	<u>Sale Date</u>	<u>Value (Kshs)</u>
14429	6 <sup>th</sup> December 2006	62,000/=
14823	17 <sup>th</sup> May 2007	10,000/=
14843	23 <sup>rd</sup> May 2007	5,800/=
<b>TOTAL</b>		<b>77,800/=</b>

26. In *Civil Case No. 12 of 2016 Christine Mwigina Akonya vs Samuel Kairu Chege* it was held:

**“In regard to special damages the law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the court...”**

27. In *Butt vs Khan [1981] KLR 349* where it was held that:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”**

ISSUES, ANALYSIS AND DETERMINATION:

28. The respondent's claim was as contained in paragraph 3 of the plaint as follows:-

For the refund of the sum amount of Kshs.77,800 being the cost of the substandard wood tiles sold to him and/or alternatively substituted replacement of the same product with better quality ones on diverse date between December 2006 and May 2007 as follows:-

Sale Receipt No.	Sale Date	Value (Kshs)
• 14429	6th December 2006	62,000/=
• 14823	17th May 2007	10,000/=
• 14843	23rd May 2007	5,800/=
<b>TOTAL</b>		<b>77,800/=</b>

29. The said goods supplied to the respondent were said to be of a substandard quality and could not meet the implied warranty of the sale. The respondent side availed the testimony of the expert who ensured first before laying the wood tiles down that the surface was clean and dry, and that of the Kenya Bureau of Standards' report that indicated that the tiles were not of the right quality.

30. On the weight a court of law should attach an expert opinion, the case of *Stephen Kinini Wangonde vs The Ark Limited [2016] eKLR* held that: -

***“Expert testimony like all other evidences must be given only approximately weight. It must be as influential in the overall decision – making process as it deserves, no more, no less.”***

31. No evidence was adduced by the appellant on their allegations of the condition/status on the storage area where the parquets were stored which led to the state of the parquets.

32. **Section 16 (b)** provides that, where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that they are of "merchantable quality. Although "merchantable quality" is not defined by the Act it is generally stated in legal textbooks that goods are of "merchantable quality" if they are reasonably fit for the purpose or purposes for which the goods of that kind are generally bought.

33. There was letter from the Ministry of trade in testimony to the respondent which stated:

***‘As has been disproved from the discussion, the Ministry has played its role within its legal provisions that includes of the Kenya Standard, KS488:2010 on wood mosaic parquet through its implementation agency, Kenya Bureau of Standards (KEBS) and noted the difficulties inherent with its application, pass installation of the panels. In addition, KEBS has confirmed that it does not have the capability to accurately determine the cause of the rotting of the panels given the time from their installation into the house.’***

34. The trial court was thus justified in ordering the refund of the goods supplied which did not fit the purposes they were bought for. However, the appellant could not claim the full refund of the purchase price because he said in his evidence that some of the parquets were good. Thus he was entitled to net value of the “bad parquets”. He will thus return the bad ones as a condition of payment for the refund for the same in the next 30 days and in default the claim will stand dismissed.

35. On general damages awarded, the law is that general damages are not awardable in addition to quantified damages given that such an award amounts to a duplication, as was held in the case of *Dharamshi vs Karsan [1974] EA 41* at page 43 thus: -

***“Shs. 1,500/=, damages for breach of contract. I can see no reason for damages to be awarded under this head in this case. The plaintiff had quantified his claim for damages, and was awarded a sum on that basis as a result of the breach of contract on the part of the defendant.....”***

36. Thus the court in sum arrives into a conclusion that, the appeal succeeds to the above extent. And the court makes the following orders;

***i) The award of Ksh.77,800/= is set aside and the court orders only price of the bad goods supplied shall be paid upon return of the same to the appellant within 30 days and in default the claim to stand dismissed.***

***ii) The award for general damages Kshs. 50,000/= is set aside.***

***iii) Parties bear their costs.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**