



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 645 OF 2008

FRANCIS KIGO NJENGA.....PLAINTIFF

VERSUS

BODYMASTERS AUTOTECH LIMITED.....DEFENDANT

JUDGEMENT

1. The claim by Francis Kigo Njenga (**Njenga or The Plaintiff**) against Bodymasters Autotech Limited (**Bodymaster or The Defendant**) is for a sum of Kshs 6,953,000.00. This is presented in the Amended Plaint of 31st October 2008.
2. Through a financial facility organized by Equity Bank Limited, Njenga bought five (5) mini-buses at a cost of Kshs 11,720,000/-. The chassis to the Motor Vehicles were obtained from Associated Motors Limited (**hereinafter Associated Motors**) and the bodies were to be built by Bodymasters. Bodymasters are said to have a long standing business relationship with Associated Motors and an arrangement to build bodies for their customers.
3. Njenga's case is that Bodymasters represented itself (in writing) to the Associated Motors and himself that it will have the mini-buses ready for collection within 45 days of delivery of each vehicle and in default it would pay Kshs 1,500/- per day for delayed delivery. It is common ground that Bodymasters was unable to complete construction of the bodies of the said vehicles on time.
4. Part of the claim being Kshs.5,558,000.00 is an alleged loss of income in respect to a contract to join the Kenya Bus Company Franchise worked at Kshs 7,000/- per day for each motor vehicle.
5. In its Statement of Defence Bodymaster avers that it received the sum of Kshs 3,300,000/- from Njenga which it applied towards making bodies for 3 vehicles and that any loss that may have been incurred by Njenga was as a result of failure by him to pay up for the services in time.
6. Pivotal to the case by the Plaintiff was a letter written by Bodymaster in respect to each chassis delivered promising to complete the body building and inspection within 45 days failure to which it would pay Kshs 1,500/- by way of liquidating damages. The sample letter is reproduced here below:-

“Date: 11-01-08

From: Bodymaster Autotech Ltd

P. O. Box

NAIROBI

To: Associated Motors Ltd

P. O. Box 30789 -00100

NAIROBI

Tel: No. 650560/70

Dear Sirs,

RE: ISUZU NO CHASSIS NO 77100071 ENGINE NO 537764

In consideration of you allowing the above motor vehicle to be brought to us for the purpose of building thereon a body in accordance with the specifications and terms of payments agreed we hereby undertake to ensure that the vehicle is kept in a safe place and that no damages or loss is caused to it whilst in our possession. Any loss or damage caused to the vehicle will be borne by us and you will be the sole judge for assessment of such damages or loss.

We further confirm that the body building and inspection will be completed within 45 working days after receipt of chassis failing which we will pay you Kshs 1,500/- per day by way of liquidating damages.

We further confirm that no responsibilities rests with you with regard to any payment in respect of work done by us and that this is solely a matter between us and the customer.

We also confirm that the vehicle will not be released to the customer or to any other party except upon your written authority and that you will be at liberty to recall the vehicle at any time regardless of whether or not the work has been completed or paid for.

Yours faithfully

Signature:...

Name:...

Designation:... (my emphasis)

7. No issues for determination were agreed by the parties. However from the pleadings herein the following come to mind:-

- a) Was there a contract for the building of bodies between Njenga and Bodymasters?
- b) Did Bodymasters breach that contract?
- c) What measure of damages, if any, is Njenga entitled to?

8. While the issue of existence of a contract may not have been controversial because the same was not denied by Bodymasters, the question of privity of contract was taken up by Bodymasters in their submissions. But as parties are bound by their pleadings I would have to look at what their pleadings say in that respect. When I do so I find that the existence of a contract was admitted. Paragraphs 7, 9 and 10 contain those admissions. They read;

7) The Defendant admits receiving the stated amount under paragraph 8 of the Plaintiff but avers that the same was used to make the bodies on the three vehicles delivered to the Defendant yard and therefore was well utilized and invites strict proof thereof;

9) In response to the content of paragraphs 11, 12, and 13 the Defendant avers that it delivered the motor vehicles to the Plaintiff for what was paid for and any loss incurred by the Plaintiff as itemized therein was as a result of direct failure to fulfill his obligation towards the Defendant in making payments for motor vehicle bodies to be delivered to him on time;

10) Further the Defendant avers that the Plaintiff having admitted receiving the three motor vehicles from the Defendant there was no reason that would have hindered the Defendant from delivering the other two as agreed save for the default on the part of the Plaintiff.

11) To now deny the existence of the contract would be to blow hot and cold and that should not be permitted as to do so would be to allow a party to take a position that is inconsistent with its pleadings. That really, is the end of that matter.

12) But having chosen to sue Bodymasters directly and not Associated Motors, there would be some ramifications on the scope and breadth of Njenga's cause of action. For a start the standard letter upon which the vehicles were accepted must be taken as forming the bedrock of the Contract between the parties. This standard letter is reproduced:-

“Date: 11-01-08

From: Bodymaster Autotech Ltd

P. O. Box

NAIROBI

19) The old English decision of ***Hadley –vs- Baxendale [1854]*** EWHC 370 has not lost its flavor as a guide to how damages for Breach of contract should generally be assessed. The court famously held;

“where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

The core of the decision is that Damages for breach of contract ought to be in respect to that which should, as may fairly and reasonably, be considered as either arising naturally (according to the usual course of things) from the breach itself or such as may reasonably be in the contemplation of both parties at the making of the contract, as the probable result of the breach.

20) Now, Njenga has relied on the standard letters as setting out the obligation of Bodymasters to complete the works within 45 days. He however seeks loss of income at Kshs 7,000/- per day on account of loss of income in respect to a contract with Kenya Bus Services. But the standard letters, which form the contract, provided liquidated damages at Kshs 1,500/- per day. That was the ceiling. Njenga cannot in my view seek to rely on that contract as showing the obligation of Bodymasters to complete the works within a certain period and then look outside the terms as providing his relief. What is good for the goose is good for the gander! The damages agreed and therefore contemplated by the parties was liquidated damages of Kshs 1,500/- after 45 working days of delivery.

21) There is evidence, and this may not be contentious, that the aggregate number of lost days for all vehicles put together is 794. The agreed liquidated Damages would work at Kshs 1,500 x 794 = 1,191,000/-.

22) The other limb of Damages was what is said to be the sums needed to complete the works. The promise of Bodymasters was to complete the works within 45 days at a consideration of Kshs 3,300,000/- which was fully paid by Njenga (see P exhibit page 56). There is common evidence that the works were either not complete at all by Bodymasters or done at an extra cost to Njenga. Whilst the liquidated Damages of Kshs 1,500/- per day was to compensate for the delay, one must pose the question whether Njenga must in addition be compensated for the extra expenses he had to put up.

23) If the obligation of Bodymaster was to build the bodies to completion at Kshs 3,300,000/- and they failed to do so at that price or at all, then it must be in the natural course of things that Njenga would have to be compensated for any costs (reasonably incurred) in bringing himself to the position where he would have been if breach had not happened. Those damages are in my view deserved quite separate and distinct from the liquidated Damages.

24) Shown to this court are various petty cash vouchers and receipts (P Exhibit page 11-17, 22-26, 31-34, 38) on the extra cost. The same add up to Kshs 954,920/-.

25) The upshot is I enter Judgment for the Plaintiff as follows:-

	<u>Kshs.</u>
a) Damages	1,191,000/-
b) Extra costs incurred	<u>954,920/-</u>
Total	<u>2,145,920/-</u>

Interest on Kshs 1,191,000/- shall be at Court rates from the date of Judgment. Interest on Kshs 954,920/- shall be at court rates from the date of filing of the suit. The Plaintiff shall also have costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 26th day of October, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Kirimi h/b Maina for Plaintiff

Genga for Defendant

Nixon - Court Assistant