



Tata Africa Holdings Kenya Ltd v Premier Care Diagnostics Narok Ltd (Environment and Land Case E004 of 2023) [2023] KEELC 22339 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CASE E004 OF 2023
CG MBOGO, J
DECEMBER 20, 2023**

BETWEEN

TATA AFRICA HOLDINGS KENYA LTD PLAINTIFF

AND

PREMIER CARE DIAGNOSTICS NAROK LTD DEFENDANT

JUDGMENT

1. On the 25th August, 2023 the plaintiff filed a plaint of even date praying for judgment against the defendant for: -
 - a. Payment of USD 102, 990.
 - b. Interest on the above sum from 31st December, 2021 till payment in full.
 - c. Damages for breach of contract.
 - d. Cost of interest at court rates.
2. The gist of the plaint is that prior to the institution of the suit, the plaintiff was the absolute proprietor with a freehold interest of all those parcels of land known as Cis-Mara/ Oleleshwa/ 5313, Cis-Mara/ Oleleshwa/ 5314, Cis-Mara/ Oleleshwa/ 5315 and Cis-Oleleshwa/ 5316 measuring 0.04 hectares.
3. The plaintiff stated that by an agreement dated 9th December, 2020, the plaintiff sold to the defendant the suit property together with all the developments for the sum of Kshs. 38,000,000/- being the consideration. Further, that the defendant paid a total sum of Kshs. 26,980,000/- on diverse dates being 3rd December, 2020 and 2nd September, 2021.
4. The plaintiff's claim as against the defendant is for the balance of the purchase price payable in United States Dollars as it was agreed in the sum of USD 102,900 being the sum due and owing to the plaintiff.



5. The service of the summons, plaint and the supporting documents was deemed to be served upon the defendant via email by dint of Order 5 Rule 22B of the Civil Procedure Rules on 25th August, 2023. The defendant did not enter appearance, and neither did it file its statement of defence. The said action prompted a request for judgment dated 11th September, 2023 and filed in court on 13th September, 2023.
6. This matter proceeded for formal proof on 8th November, 2023, where Edwin Cheruiyot Too (PW1) adopted his witness statements dated 25th August, 2023 and 7th November, 2023 as his evidence in chief. PW1 testified that the plaintiff conceived the idea of selling the property in the year 2020 due to financial constraints that it was facing as it wanted to reduce the local overdraft and loan facility with Absa Bank.
7. PW1 further testified that the plaintiff entered into an agreement for sale with the defendant on 9th December, 2020, which agreement had a completion date of 1st December, 2021. Further, that consequently in default of payment of balance of the purchase price, the plaintiff suffered loss. It was PW1 testimony that the purchase price was Kshs. 38,000,000/-. The defendant paid the first instalment of Kshs. 380,000/- and the second instalment of Kshs. 26,600,000/-. It was his evidence that the balance of Kshs. 11,020,000/- was to be paid in United States Dollars and the due date was 1st December, 2021.
8. PW1 testified that the balance of the purchase price was not paid and as a result of failure to pay the said balance, the plaintiff incurred loss as it was charged interest on the loan and bank overdraft interest. Further, that the loan accrued interest and as at August, 2023, the interest reflected in their bank statement was kshs. 3,686,369.60/- which continues to accrue until payment is made. Further, that had the money been paid within the completion date, they would not have incurred the interest. PW1 produced 4 documents in the list of documents dated 25th August, 2023 as P. Exhibit Nos. 1 to 4 respectively and 2 documents in the further list of documents dated 7th November, 2023 as P. Exhibit Nos. 5 and 6.
9. On 16th November, 2023, the plaintiff filed its written submissions dated 14th November, 2023. The plaintiff submitted that the principle upon which the courts act as to whether a matter is suitable for an award of damages was considered in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Limited* [2015] eKLR, and, although the amount of loss demonstrated by the plaintiff appears in the nature of special damages which requires to be pleaded, the law gives the court the latitude to assess damages upon some conventional yardstick. To buttress this submission, the plaintiff relied on the case of *Kimakia Co-operative Society v Green Hotel* (1988) KLR 242. The plaintiff further submitted that the losses incurred by the bank largely in terms of increase of the bank interest on the overdraft and loan, could have been significantly reduced if the outstanding sum was paid within the contract period. According to the plaintiff, an award of Kshs. 3,000,000/- will compensate the loss suffered as a breach of the agreement.
10. I have considered the pleadings, the evidence on record and the written submissions as well as the authorities cited by the plaintiff. The issue for determination is whether the plaintiff is entitled to the orders sought in the plaint.
11. I have considered the uncontroverted evidence adduced in court, the documents produced as exhibits and the fact that the defendant neither entered appearance nor filed its defence herein. I have also considered the fact that the parties entered into an agreement for sale dated 9th December, 2020 and that the defendant defaulted in payment of the balance of the purchase price. The said balance which



was the 3rd instalment as per the agreement was to be paid in USD being USD 102,990/- which has not been paid up until the date of filing of the instant suit.

12. The plaintiff sought for an award of damages in the sum of Kshs. 3,000,000/-, based on the defendant's failure to perform part of their bargain. According to the plaintiff, this amount would compensate for the loss incurred. The plaintiff, although he did not plead damages in the plaint, he supplied this court with a statement from Absa Bank, as well as a loan statement as at 31st July, 2022. However, I am not satisfied that the amounts contained in the statement are directly related to the claim before this court. There is no direct indication of deposits which the defendant paid through this account. The statements are not certified as well to confirm that indeed they originated from Absa Bank.
13. In declining to award damages for breach of contract, I am persuaded by the decision of the court in *Barclays Bank of Kenya Limited v Mema* (Civil Appeal E011 of 2021) [2021] KEHC 333 (KLR) (Commercial and Tax) (3 December 2021) (Judgment) which held as follows: -

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR)).”

14. Based on the foregoing, and on a balance of probabilities, I have no doubt that the plaintiff has established its case to warrant grant of the orders sought save for the award of damages. I, therefore, enter judgment for the plaintiff and against the defendant as follows: -
 - i. Payment of USD 102, 990.
 - ii. Interest on the above sum from 31st December, 2021 till payment in full.
 - iii. Cost of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 20TH DECEMBER, 2023.

HON. MBOGO C.G

JUDGE

20/12/2023

In the presence of:-



