



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CIVIL CASE. 3695 OF 1993

HORT LIMITED..... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. By a Plaint dated 29th July, 1993 and filed in Court on the same date, the Plaintiff prays for Judgment against the Defendant for :-

- a. Kshs. 75,535,750/=
- b. General Damages for loss of profits;
- c. Interest on Kshs. 26,435,750/= at the prevailing bank rates in Kenya from 1st August 1993 until payment in full;
- d. Interest on (a) above at Court rates;
- e. Costs;
- f. Such further or other relief or reliefs that this Honourable Court shall deem fit to grant.

2. The Plaintiff's case is that vide a letter dated 29th November, 1998, it applied to the Ministry of Regional Development ("the Ministry") through the Director of Fisheries for a license to develop and operate a commercial prawn farm at Ngomeni in Malindi.

3. That following this application, the said Ministry and the Plaintiff engaged in diverse discussions and negotiations, whereby on 1st July, 1990, the parties entered into a 5 year Lease Agreement. Under the Lease, the Plaintiff was to operate and develop the said commercial prawn farm and would pay an annual rent of Kshs. 150,000/=.

4. The Plaintiff further averred that the agreement was renewable for a further term of five years at a reviewed rent. Pursuant to and on the strength of the Agreement, the Plaintiff entered into a joint venture agreement (hereinafter "JVA") with MacAlister Elliot and Partners Limited, a fisheries development and trading company that was based in the United Kingdom.

5. Under the JVA, the Plaintiff was responsible for developing the site and covering the operational costs, while MacAlister Elliot and Partners Limited was to provide the technical management, training and marketing of the Project. Construction of the said facilities commenced on or about of January 1991 and was purportedly carried out with the full knowledge supervision and approval of the Ministry through the

Department of Fisheries.

6. However, the Plaintiff states that in breach of the lease agreement, without notice or valid reason, the Government of Kenya unilaterally and unlawfully terminated the agreement and took over possession of the farm on or about 2nd July, 1992. The Plaintiff contended that as at the said date, it had expended a great deal of money, provided services and materials for building the infrastructure in the farm including stocking the ponds.

7. Particulars provided as follows;

a. Survey and design costs	Kshs. 1,932,750/=
b. Site acquisition costs	Kshs. 1,501,500/=
c. Construction costs	Kshs.17, 376,000/=
d. Operation Costs	Kshs. 4,413,000/=
e. Other expenses	Kshs. 1,312,500/=

8. Additionally, the Plaintiff claimed that on the strength of the said contract it borrowed Kshs. 26,435,750/= from one of its directors named Mr. Pulin Shah and Macalister Elliot & Partners. The said loan was to accrue interest at prevailing commercial bank rate from 1st December, 1989 until payment was made in full.

9. That had the project been completed as envisaged under the lease agreement, the Plaintiff would have harvested and sold products at a projected profit of Kshs. 36,000,000/=. That as a result of the aforementioned breaches to the contract, the Plaintiff has suffered loss and damage amounting to a global sum of Kshs. 75,535,750/=.

10. The Plaintiff reiterated that it developed the infrastructure to the farm on the strength and belief that the Department and/or Ministry of fisheries had followed the right procedure in granting it the license to do; that on its part, the Plaintiff had expended a lot of resources in improving the farm in question and it would therefore be unjust for the court to allow the Government to retain the said benefits without paying compensation to the Plaintiff.

11. In its Amended defence dated 18th March, 1995, the Defendant denies the entirety of the Plaintiff's suit. In the defence, it was pleaded that the Plaintiff did not add any developments to the farm, as the same had already been developed by the Government. The Defendant further denied the claim of Kshs. 26,535,750 borrowed by the Plaintiff for the infrastructural upgrade of the firm and put the Plaintiff to strict proof.

12. The Defendant also denied the Plaintiff's claim for loss of profits. The claim of unjust enrichment was also denied as the Defendant stated that it never received any money from the Plaintiff. Defendant prayed that the Plaintiff's claim be dismissed with costs.

Evidence

13. The Plaintiff called one witness in support of its case. PW1, Pulin Shah, described himself as a Director and Chairman of the Plaintiff Company. PW1 Adopted his witness statement dated 16th January, 2014 and adopted the exhibits in the Plaintiff's List of Documents dated 16th January, 2014 as well as the supplementary list of documents dated 21st May, 2014 and filed on 22nd May, 2014.

14. He stated that he was aware of the matters in the instant suit. According to him, on 29th November, 1988 in his capacity as a Director of the Plaintiff, he sent a proposal to the Permanent Secretary, Ministry of Regional Development through the Director of fisheries requesting for authorization to operate a

commercial shrimp farm at Ngomeni Shrimp Culture.

15. That vide letters dated 8th December, 1988 and 21st September, 1989 respectively, the ministry informed PW1 that the Government was considering the proposal. Subsequently, on 1st July, 1990 the parties entered into a 5 year Lease Agreement, where the Plaintiff acquired the piece of land (inclusive of all the ponds and other structures on the land) measuring 101.0 hectares known as Ngomeni Shrimp Culture Project.

16. A consideration of Kshs. 150,000/= was to be paid in advance on an annual basis for the term of the lease. Mr. Shah, also restated that on the strength of the said agreement, the Plaintiff entered into a JVA with MacAlister Elliot and Partners Limited to further develop the farm.

17. That as required under the agreement, the Plaintiff paid annual rent in the year 1990/1991 payment which was duly acknowledged by the Permanent Secretary of the Ministry in a letter dated 24th July, 1990 to the then Director of Fisheries.

18. PW1 also testified that pursuant to the lease agreement, the Ministry handed over the site to the Plaintiff where it resumed construction works of the infrastructure with MacAllister Elliot and Partners, under the direct supervision of the Director of Fisheries. Mr. Shah explained that the existing ponds could not work for the pilot project of the Semi-Intensive production of Shrimps, and that's why construction of other ponds was necessary. Mr. Shah also explained that the Plaintiff borrowed Kshs. 26,535,750/= for the building of the ponds and other infrastructure, including the stocking of the said ponds. The same was financed by various banking and financial institution namely, Fidelity Shield Insurance Company Limited, Finance Institution of Africa Limited and Southern Credit Banking Corporation Limited.

19. The said facilities were advanced to the Plaintiff at the prevailing commercial interest rates. The witness further testified that he sold a school he had started for Kshs. 9,000,000/= to further finance the project. PW1 additionally affirmed that a Ministry official came to the site in his absence for inspection though no letter or report was issued with regard to the same.

20. He however told the court that in vide a letter dated 12th may, 1992 the Ministry informed the District Commissioner of Kilifi that the Project had reverted back to the Department of Fisheries on the grounds that allegedly, there was no agreement between the Plaintiff and Ministry of Regional Development. PW1 insisted that the Plaintiff's eviction from the farm was illegal since the same was done in total breach of the agreement between the parties.

21. That further, the Plaintiff was not allowed to leave with its equipment and materials. As such, PW1 told the court that the Plaintiff should be compensated for the loss it has suffered due to the actions of the Government. It was also Mr. Shah's testimony that the government vide a letter from the Attorney General dated 6th October, 1994 informed the Plaintiff that it had identified various areas the Plaintiff could develop a shrimp farm but the Plaintiff declined the offer.

22. According to the witness the offer was declined because the costs to develop another shrimp was untenable. PW1 therefore asked the court to award the damages sought for the losses the Plaintiff had suffered due to the Government's breach of the lease agreement.

23. In cross examination, PW1 told the court that the Plaintiff was still in existence though inactive. That the said company only engaged in the business of aqua culture. PW1 further stated that the Ngomeni project was jointly handled by the Government and FAO. PW1 also told the court that he consulted widely with regard to the viability of the prawn farm.

24. He further reiterated that the MacAlister Elliot and Partners Limited carried out the feasibility study with regard to the viability of the project. PW1 denied using public influence to obtain the lease but could not recall whether the site was advertised for leasing. He added that he was not aware of any laid down procedure with regard to acquisition of the site in question.

25. Mr. Shah, told the court that the project was still at the pilot phase at the time the Government evicted the Plaintiff, he however insisted that the Plaintiff developed infrastructure to support the project, including building and stocking the ponds. The witness was firm that there was a valid lease agreement between the parties as he had even sought legal advice on the same.

26. He however admitted that the lease agreement was not counter signed by the Permanent Secretary of the Ministry of Regional Development. With regard to the payment of Kshs. 150,000/=, PW1 admitted that the receipt issued indicated that the same was for the purchase of fish as opposed to rent under the lease.

27. On examination of the letters of offer dated 28th July, 1992 and 4th June, 1997 at page 80 and 96 of the Plaintiff's bundle of documents, admitted that the same were loans acquired by himself and his other companies. PW1 also told the court that he also had receipts and invoices from MacAllister Eliot for consultation fee, sale acquisitions etc which evidenced the startup costs of the farm.

28. Mr. Shah further affirmed that he had annexed all the documents that they could retrieve with regard to the project. He however mentioned that since the company and its employees were forcefully evicted at gun point, they had left some other crucial documents with regard to the project in the said farm at the administrative block. Further PW1 admitted that his claim for loss of profits was based on projections and a harvest report by MacAlister Elliot on the harvest of the shrimp farming.

29. On re-examination, PW1 clarified that he had borrowed from various institutions through himself and his other companies to pay off the accumulated debts that had been incurred to finance the project.

Defendant's Case

30. On behalf of the Defendant, Benjamin Wale Kavũ, a Deputy Director with the Kenya Wildlife Service, testified as DW1. He adopted his witness statement and further witness statement dated 20th May 2014 and 26th June, 2014 respectively. On examination in chief, DW1 confirmed that he was the designated Project Manager of the Ngomeni Aquaculture project also known as the Ngomeni Prawn Farm in 1985.

31. According to the witness, as at 1985, the farm had a total of 11 ponds of which 9 were under production and 2 under preparation. That the farm was well maintained and the ponds under preparation were performing to the expected results of producing at least 2 harvests per year.

32. DW1 also told the court that he was not aware of the takeover of the farm by the plaintiff company until he received a letter from the Director of Fisheries dated 19th September, 1990. That the same instructed him to withdraw the departmental staff from the farm, of which he did. He added that no competitive bidding of the leasing of the land in question.

33. He also told the court that the Plaintiff's failed to provide any data of their operations, however, the same was requested in writing, but the Plaintiff allegedly failed to provide the data as requested. Mr. Kavũ in his testimony, added that the Plaintiff's staff were not trained in aqua culture. He further told the court that the Plaintiff was evicted from the farm in March, 1992 when an Officer from the Ministry of Regional Department directed that the Department of Fisheries should take over the farm. A letter was issued to the Plaintiff on 12th May, 1992 to that effect.

34. DW1 in his testimony, stated that when the Fisheries Department took over the farm from the Plaintiff, the farm was not functional. That the main dyke to the ponds was broken and the ponds were empty of shrimps and unattended. According to DW1 the Plaintiff had changed the design of the initial ponds that resulted in complete destruction of some ponds. He told the court that the farm required reconstruction to make it functional of which the government undertook for 2 years.

35. Upon cross examination, DW1 stated that the Department took over the farm since there was no binding agreement between the parties. He however stated that the letter dated 12th May, 1992 did not

mention deterioration of the farm.

36. The witness further admitted that no notice was issued to the Plaintiff when the Fisheries Department took over the farm/site. DW1 further confirmed on examined the Lease Agreement that the same was between the parties. He agreed that the Agreement was signed by the Permanent Secretary of the Ministry and granted the Plaintiff a lease over the farm. The Defendant closed its case without re-examining DW1.

37. At the conclusion of the case, the parties filed their written submissions as directed by the court on 30th June, 2015. The Plaintiff filed its written submissions and supplementary written submissions on 30th June, 2015 and 18th November 2015 respectively. The Defendant on its part filed its submissions on 6th October, 2015.

Plaintiff Submissions

38. The Plaintiff restated the contents of its Plaint. Through its Learned Counsel, Mr. Malonza, the Plaintiff submitted that the contrary to the Defendant's assertions, the agreement at the center of the dispute was signed by both parties and should therefore be enforced by the court. Mr. Malonza argued that the said agreement's validity was likewise acknowledged by the Ministry in its letter dated 24th July, 1990.

39. It was further pointed out that rent of Kshs. 150,000/= for the year 1990/1991 was paid and the farm was handed over to the Plaintiff. In Mr. Malonza's submission, the further improvements carried out on the farm were not prohibited and the Ministry was always briefed on the construction of the new ponds and any novel structural adjustments.

40. That no objection was given by the Ministries. In its submission, the Plaintiff argued that upon eviction, the Ministry through their letter dated 12th may, 1992 indicated that it was willing to offer compensation to the Plaintiff. That in the foregoing, any argument regarding the non-validity of the agreement was mute.

41. Mr. Malonza further submitted that the Plaintiff had illustrated that the Defendant was in breach of the Lease agreement when it unilaterally terminated the same without giving notice to the Plaintiff. He told the court that DW1 did not controvert this assertion. Learned Counsel, deemed as baseless DW1's testimony that the Plaintiff was evicted from the farm for alleged mismanagement of the Project.

42. In his, opinion, the same was contradictory to the reason disclosed in the Ministry's letter dated 12th may, 1992 which stated that there was no binding agreement between the parties. Mr. Malonza concluded that the points of contradiction only illustrated that the eviction was perpetuated by malice and bad faith on the part of the Defendant. Counsel to the plaintiff further argued that the Ministry created a proprietary estoppel in favour of the plaintiff rendering the government liable to compensate the Plaintiff for the losses incurred. According to him, the Ministry acquiesced to the Plaintiff's presence and the Plaintiff's project on the farm when it agreed to enter into a lease agreement.

43. That in reliance and pursuant to the agreement, the Plaintiff engaged other partners, including borrowing further capital, to improve on the farm's infrastructure. However when the Plaintiff was prematurely evicted from the farm, it suffered loss and damage. According to Mr. Malonza the plaintiff has been able to illustrate that the loss and damage it incurred and urged the court to grant the amounts as pleaded.

44. In answer to the Defendant's submissions, the Plaintiff submitted that the issue of the defectiveness of the suit was not pleaded. That in essence the same was a new issue introduced through the back door through its submissions. To buttress this point, the Plaintiff cited the case of Dakianga Distributors (K) Ltd -vs-Kenya Seed Company Limited (2015) eKLR. The Plaintiff therefore urged the court to enter judgement as prayed.

45. Counsel to the Defendant Mr. Mutinda in a rebuttal to the above submissions told the court that there

was no company resolution made to authorize the institution of the present suit. That therefore the suit as it stands was incompetent and ought to be struck out. Counsel further submitted that no legally valid contract/lease agreement between the Plaintiff and the Government.

46. According to him, even if the court was to find that there was an agreement in existence, the same would be vitiated by the fact that the same was not done in accordance with the laid down procedures of the Ministry. Further, Mr. Mutinda pointed out that the PW1 made an admission that the project in question was established on both government and private land.

47. That the same was subject to a suit whose outcome has not been disclosed to this court. In essence therefore, the Defendant argued that the government cannot contract to lease private land as purported. In totality, it was the Defendant's case that the court cannot enforce of a contract that is tainted with illegalities. The case of Scott-vs- Brown & Others (1982) Q.B.D 724 was cited in support of this argument.

48. It was also the submission of the Defendant that there was no breach of agreement as claimed by the Plaintiff. Mr. Mutinda added that the Government could not have been in breach of taking possession of a farm that it had established. With regard to the special and general damages sought, it was the Defendant's case that the Plaintiff had failed to prove on a balance of probabilities its alleged claims on borrowing and or expending the sums of Kshs. 26,535, 750/= and therefore the claim should be dismissed.

49. On the same breathe, the Defendant denied the claim for loss of profits since the same is merely speculative. According to the submissions of the Plaintiff, no evidence was led by the Plaintiff on how it arrived at the sum of Kshs. 36,000,000/= claimed as loss of profits.

50. That further PW1 indicated that the Plaintiff was at the pilot stage before it was evicted. That the said pilot phase was to check on the viability or otherwise project and therefore no actual commercial production of shrimp/prawns took place. Mr. Mutinda also urged the court to examine PW1's testimony that by the time the Government took possession of the firm, he was in India.

51. That this was a clear indication that the farm had been abandoned and or neglected supporting DW1's testimony that the infrastructure of the farm had been dilapidated. Mr. Mutinda further urged the court to dismiss the Plaintiff's claim for general damages for loss of profits. In light of the following submissions, the Defendant urged the court to dismiss the suit.

Analysis and determination

52. I have considered the pleadings and the evidence adduced in this case as well as the submissions. Before, outlining the issues for determination, it is important to deal with a preliminary issue raised by the defendant with regard to the competency of the instant suit. According to the submissions of Learned Council Mr. Mutinda, the Plaintiff did not produce a company resolution authorizing the institution of the present suit.

53. I note that this issue was raised during the submission stage of these proceedings. However, I find that the same is a mere afterthought, since the Defendant should have raised the issue either through a Preliminary Objection on a point of law as opposed to doing so after both parties have closed their respective case. I shall therefore not look at the said issue as it has been overtaken by events.

54. I shall now proceed to look at the issues for determination. In my view the following issues fall for determination in this suit:

- i. Whether there was an agreement between the parties herein.**
- ii. Whether the said agreement was validly terminated.**
- iii. Whether the Defendant created proprietary estoppel in favour of the Plaintiff.**
- iv. What if any are the damages arising from the said termination.**

v. **What order should be made with respect to costs.**

55. With regard to the first issue of whether or not there was a valid lease agreement between the parties, I bear in mind what the learned authors of *Cheshire, Fifoot and Formstons, the Law of Contract*, (14th Edition) stated with regard to the existence of a contract. At pages 34 and 35 they indicated that:

“The first task of the plaintiff is to prove the presence of a definite offer made....Proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offeree to accept that offer”.

56. Bearing the above in mind, I have perused the lease agreement on record at page 22 of the Plaintiff's bundle of documents. The same clearly states that it is between the Plaintiff and the Ministry of Regional Development. It is signed by the Permanent Secretary and the authorized officer of the Plaintiff Company. Further to this, vide a letter dated 24th July, 1990, the Permanent Secretary, of the Ministry of Regional Development wrote to the Director of Fisheries as follows;

25th July, 1990

Mr. N. Odero

Director of Fisheries

Fisheries Department

NAIROBI

RE : NGOMENI SHRIMP PROJECT

Please find enclosed two copies of Agreement duly signed between the Ministry and Hort Limited on the above project. You should therefore arrange to hand over the project soonest.....

I would like to add that the rental for year 1990/91 has already been paid.

- a. (D.R MBOYA)
- b. PERMANENT SECRETARY

57. From the above letter, there is no doubt that there was an agreement between the defendant and the plaintiff. The plaintiff had even paid the rent of Kshs. 150,000/= as rent for the year 1990/1991. The rent was duly acknowledged by the Ministry of Regional Development as indicated in the said letter. In my view the elements of a contract have been proved. There was an offer, acceptance and consideration given with regard to the transaction between the parties. The Defendant cannot therefore resile from the said agreement.

58. However, it was the Defendant's position that even though the court were to find that there was indeed an agreement, the same would be vitiated by illegality arising from the manner in which it was procured. According to the Defendant, the Plaintiff did not acquire the lease to said farm through the laid down procedures of procurement.

59. I have tried my utmost best to find merit in this argument. In my assessment of this issue, I find that

the same is an afterthought on the part of Defendant. I say so because, in my understanding it is not the business of the plaintiff to know whether all or any of the internal regulations had been duly observed by the defendant while entering into the lease agreement. My reasoning is fortified by the case of **GONDHO ENTERPRISES LIMITED v CONCORD INSURANCE COMPANY LIMITED [2008] eKLR** where Warsame J stated as follows;

“...The internal dealings and requirement of the defendant company cannot be used to the detriment of outsiders who dealt with the company in, good faith. In my view that is the essence and/or import of what is known as the Turquand’s rule in commercial practice. The basis of the Turquand’s rule is that a party who relied on a document issued by another party cannot be made to forgo his rights simply because the issuing party thinks certain internal management procedures were not followed. In such instance the company would be assumed to have exercised the act in conformity with its constitution and that the powers have been properly and duly exercised. The rule is designed to protect those who are entitled to assume just because they cannot know the internal procedures of a particular company and whether the person who signed, had the authority which he claims to exercise.”

60. Having the principles outlined in the above case, I find that though the Ministry was a public entity as opposed to a company, it cannot purport to forgo its duties under the said agreement, simply because internal procedures, such as procurement processes, were not followed when the agreement was being signed.

61. I agree with the reasoning of the above case that a person dealing with a corporation has no obligation to ensure that a corporation has gone through any procedures required by its articles, by-laws, resolutions, contracts, or policies to authorize a transaction or to give authority to a person purporting to act on behalf of the corporation.

62. In conclusion, it is my finding that the defendant’s argument, that the contract arose from an illegality, cannot be used to attack the validity and contents of the agreement between the parties. Accordingly, I find issue no. (a) in the affirmative.

63. With respect to the second issue, it is not in dispute that the lease agreement was terminated. However, a question arises as to whether there was breach of any terms of the agreement with regard to the termination thereof.

64. After assessing the evidence of PW1 and DW1, it is not in doubt that the Defendant ejected the Plaintiff from the farm in question before the lapse of the 5 year period of the lease i.e. around 1992. Indeed DW1 testified that on 26th March, 1992 he, a senior officer from the office of the Permanent Secretary, Ministry of Regional Development, and the District Commissioner of Kilifi held a meeting where it was directed that the farm should revert back to the Ministry of Fisheries Department.

65. Thereafter a letter dated 12th May, 1992 from the Ministry was sent to the Directorate of Fisheries and the District Commissioner, Kilifi with regard to the ejection, which was carried out on 1st July, 1992.

66. The question that then follows, is whether this action was acceptable under the agreement between the parties. I have examined the Agreement and find that it does not have a break clause. No letter was ever written to the Plaintiff with regard to termination.

67. Be that as it may, I am of the view that even though the agreement did not contain a termination clause including the period of such notice, the agreement could only be terminated by a reasonable notice. Since the Defendant did not lead any evidence with regard to such reasonable notice, I find that indeed the Defendant breached the terms of the 5 year lease agreement.

68. Further, I am aware of the evidence that has been led by the defence with regard to repossession of the farm. According to DW1, the farm had been dilapidated and run down by the Plaintiff which was contrary

to the agreement of the parties.

69. Be that as it may, it was still essential for the Plaintiff to receive adequate/reasonable notice of any alleged breach of the terms of the lease prior to the termination of the lease. In a nutshell, I find that the Defendant did breach the terms of the lease agreement when it forcefully evicted the Plaintiff without giving any reasonable notice of eviction.

70. I now turn to the issue of whether or not the conduct by the Ministry created a proprietary estoppel in favour of the Plaintiff rendering the government liable to compensate the Plaintiff liable for the losses incurred. The learned counsel for the Plaintiff presented arguments based on the equitable principle of estoppel.

71. It is possible to trace proprietary estoppel right back to the 17th century and for many years, there have been many attempts to lay down a definitive test for it. See the case of **Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another [2014] eKLR. In Taylors Fashions Ltd vs. Liverpool Victoria Trustees Co. Ltd (1982) QB 133, 151H-152A**, it was held by Oliver J that in determining whether or not proprietary estoppel operates in a case, the court will look for three elements;

1. **A believed that he had or was going to have a right in or over B's property;**
2. **B created or encouraged the belief; and**
3. **Acted in reliance of the belief.**

72. Has the Plaintiff satisfied the above elements for proprietary estoppel to attach? I have assessed this particular claim. However, upon further scrutiny, it is my finding that the issue of proprietary estoppel is an alternative claim to that of loss and damages for breach of contract. I would therefore have to agree with the Defendant's learned Counsel's argument that the Plaintiff in this instance elected to pursue the claim for breach of contract as opposed to proprietary estoppel.

73. I say so because the Plaintiff in this case only lead evidence with regard to the claim of alleged expenses and losses it incurred when the Defendant breached the contents of its lease agreement. It will therefore not be useful for this court to go into the rigors of trying to determine whether there was proprietary estoppel when it has already established that there was breach of the lease agreement by one party.

74. The question that therefore remains for the court to determine, is whether the Plaintiff is entitled to damages for the loss it suffered from the breach of the agreement in question. With regard to this, the Plaintiff urges the court for award the same of Kshs. 75,535,750/=. This global amount comprises of a cost of Kshs. 26,535,750/= for survey and design costs, site acquisition costs, construction costs, operation costs and other expenses; Kshs. 36,000,000/= for loss of profits and Kshs. 13,000,000/= as interest on the borrowed sum of Kshs. 26,435,750/=.

75. Before assessing the merits or otherwise of the these collective sum, it is important to note that the general rules with regard to damages in breach of contract were set out in the often quoted case of **Hudley'spaxendale [1854] 9 Exch 341** where the court stated :-

“where two parties have made a contract which one of them had broken the damages which the other party ought to receive in receipt of such breach of contract should be such as may fairly and reasonably be considered either naturally that is in accordance to the usual course of things from such a breach 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.”

76. Further in the Court of Appeal case of **CA 192/92 Coast Bus Service Ltd v Sisco E MurungaNdanyi & 2 others (UR)**, the learned Judges of Appeal stated as follows with regard to special damages :-

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Ltd and Another v Samson KiprutoChebon, Civil Appeal No 22 of 1991 (unreported). In the latest case, Cockar, JA who dealt with the issue of special damages said in his judgment:-

“It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni, J quoted in support the following passage from Bowen, LJ’s judgment on pages 532, 533 in Ratcliffe v Evans (1892) 2 QB 524, an English leading case of pleading and proof of damage: The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” (emphasis added)

77. Bearing the above principles in mind, I shall proceed to assess the claim for special damages. In this head, I shall assess the claim of Kshs. 26, 535,750/=. The Plaintiff claimed that it had expended a great deal of money, provided services and materials for the building of ponds, infrastructure, stocking of ponds all amounting to the sum of Kshs. 26,535,750/=. The particulars were broken down as follows;

PARTICULARS

Survey and design costs Kshs. 1,932,750/=

Site acquisition costs Kshs. 1,501,500/=

Construction costs Kshs. 17,376,000/=

Operation costs Kshs. 4,413,000/=

Other expenses Kshs. 1,312,500/=

Total Kshs. 26,535,750/=

78. Given that the Plaintiff has particularized its claim, what remains is to consider whether there was strict proof of the pleading. I have examined the Plaintiff’s bundle of documents and the exhibits therein. With regard to the survey and design costs, site acquisition cost and construction cost, I find that there was no breakdown by the Plaintiff on how it arrived at the figure of Kshs. 1,932,750, Kshs. 1501,000/= and Kshs. 17, 376,000/= respectively. All that was produced to the court was a report entitled **“Pilot Phase, December 1990 Report”** which contained purported expenditures from the date of the inception of the project to 30th June, 1992.

79. The same is contained at Page 49 and 50 of the Plaintiff’s bundle of documents. Respectfully, I find that this does not sufficiently prove that the Plaintiff is entitled to the sums sought. There is no documentary evidence presented by the Plaintiff to support the figures therein. For instance, with regard to the labour costs for a year for 110 men, all that was presented to the court was a salary schedule for 6 employees at page 238 of the Plaintiff’s bundle of documents.

80. In the said schedule, the total amount of salaries expended for the year 1991 and 1992 was Kshs.

533,210.85/=. The figures contained in the report are Kshs. 3,795,000/=. Further, with regard to the expert assistance from the MacAllister Elliot & Partners, the Plaintiff only attached the aforesaid company's invoices from Page 216 to 221.

81. There was no proof annexed to the pleadings that such payments were ever made. In other words, no payment receipts to the aforesaid company have been evinced. Further to this, I note that there were hotel invoices duly attached to the Plaintiff's documents at Page 222 to 233. The same were allegedly for the Plaintiff's stay while the project was being set up. Examining the said documents, I also find that they did not evidence proof of payment as the same are mere invoices for payment.

82. As for the petty cash vouchers from page 234 to 236, it is unclear what the same were in connection to. Were they per diem for the staff in connection to the farm? Under what expense did they fit in? The court cannot go on a speculative mission with regard to the same and cannot be required to do so.

83. Additionally, there were a host of other documents presented to the court to prove operation costs and other expenses. They included licenses to import the shrimp or the prawns, invoices for Hire of Plant at Page 237 of the bundle of document with regard to a site in Karen. The site in question in this particular case was in Malindi, and the aforesaid invoice does not support the instant case.

84. Other documents include invoices from clearing and forwarding companies at Page 143 to 146 of the Plaintiff's bundle of documents. The same are in the nature of invoices, no proof of payment has once again been duly attached. As from Page 147 to 163 of the Plaintiff exhibits Statements from Bahari Service Station Malindi from 30th September, 1990 to 31st August, 1991. It is uncertain what the said statements are in connection to, and once again the court cannot go on a theoretical mission, as the Plaintiff did not specifically plead on what the statements in linked to.

85. Specific damage is all about what one has lost and or incurred. It can never be left to speculation. It must be real. The manner in which the Plaintiff has pleaded in the plaint the alleged special damages, is speculative and left to conjecture which is not permissible.

86. In conclusion, I find that the alleged expenses as provided for in the particulars have not been proved on a balance of probabilities. The claim of Kshs. 26,535, 750/= has therefore not been proved sufficiently and the same ought to be dismissed.

87. I now turn to the issue of Kshs. 13,000,000/= claimed as interest on the borrowed sum of Kshs. 26,435,750/=. Under this head the Plaintiff had argued that to fund the project, it had to borrow Kshs. 26,435,750/= from various financial institutions. PW1 also testified that he had to sell off and mortgage most of his properties in order to finance the project.

88. That therefore due to the non- performance of the Plaintiff was forced to pay for the loans that had been used to finance the project. At the close of his case, the Plaintiff urged the court to allow this head of damage. On its part, the Defendant argued that the Plaintiff had failed on a balance of probabilities to prove this claim.

89. That the PW1s testimony and the submissions of the Plaintiff were full of inconsistencies on whether there was actual borrowing of the Kshs. 26,435,750/= to finance the project. The Defendant therefore urged the court to dismiss this claim as well. I have considered the arguments by the opposing parties. It is my opinion that the Plaintiff herein decided on its volition to borrow the monies towards funding the shrimp/prawn farming project. It was not induced by the Defendant to do so.

90. Additionally, the same was not agreed upon by the parties, neither was it a term of the contract. Indeed, there was no indication by either party on any borrowing. The court cannot therefore proceed to punish the Defendant for the actions of the Plaintiff with regard to borrowing Kshs. 26,435,750 which was done on its preference. It therefore goes without saying that the amount of Kshs. 13,000,000/= as interest on the aforesaid loan should not be allowed as damages to the Plaintiff. The same is therefore dismissed.

91. With regard to the loss of profits of Kshs. 36,000,000/=, it is trite that a party must prove to the satisfaction of the court that income would have accrued if a Contract would have proceeded to completion. In the Ugandan Supreme Court case of **Uganda Telecom Ltd v Tanzanite Corporation (Civil Appeal No.17 of 2004) ((Civil Appeal No.17 of 2004)) [2005] UGSC 9 (23 June 2005)**; the court held thus with regard to loss of profits ;-

“...In a claim for loss of profits, the normal measure of damages, as stated in section 50(3) of the sale of Goods thereby in co-operating the common law as stated in Barrow -V- Amand (1846) 8. QB 610, is that contract price less the market price at the contractual time for acceptance. This represents the amount the seller must obtain to put himself in the position he would have been in had the contract been carried out, since he can sell the goods in the market. See McGregor on Damages. Fifteenth Edition 1988.” (emphasis added)

92. From the foregoing principle, I note the submissions of both parties on this score. I examined the Plaintiff's bundle of documents and the testimony of PW1. In my humble view, in the instant case, the Plaintiff, did not, in my view, adduce evidence to prove how the figure claimed as loss of profit was arrived at. The only thing PW1 stated during his testimony was that according to a report done by its then Partner MacAllister Elliot & Partners, the projected profit for the yield production of the shrimp farm would amount to \$772,500 annual.

93. That therefore the likely profit over the 5 year lease period would have been Kshs. 90,382,500/=. PW1 based this assessment on the letter dated 5th April, 2004 by the said MacAllister Elliot & Partners to the Plaintiff's advocates. These in my view were figures that are speculative in nature. I agree with the submissions of the Defendant that since the project was at its nascent stages when the eviction happened, there was no evidence to prove that the project would have been commercially viable.

94. I note the PW1 also admitted that the Plaintiff was at the period of 1990-1992, undertaking the Pilot phase of the project to assess its viability. To this extent, it is my holding that the claim for Kshs. 36,000,000/= has not been proved. Likewise the court cannot therefore order for general damages on loss of profits as the Plaintiff has failed to prove the damages on loss of profits.

95. This then leaves with the question of whether the Plaintiff is entitled to any other relief as this court would deem fit. With this regard, I find that the answer is in the affirmative. In my opinion general damages would suffice in this particular case. My thinking is fortified by the rationale for such a claim as was aptly stated in **Vol. 12 Halsbury's Laws, 4th Edition, para. 1202** as follows:

“Damages are pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him.”

96. Having established an actionable wrong by the Defendant as against the Plaintiff, it then follows that the Plaintiff is entitled to recompense for the damage, loss or injury that it suffered. In the case of *Stroms versus Hutchinson* [1905] AC 515 it was held that general damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of.

97. To add to this, it is noteworthy that general damages are compensatory in nature in that they should offer some satisfaction to the injured plaintiff. Given the totality of evidence in this case and the fact that the Plaintiff was able to illustrate that there was breach of contract due to the conduct of the Defendant, I am of the opinion that the award of Kshs. 5,000,000/= would be sufficient as an award for general damages to adequately compensate the Plaintiff for the breach of the lease agreement.

98. The final issue to be determined is who should bear the costs of these proceedings. The applicable law on costs is found in **section 27 (1) of the Civil Procedure Act (Cap. 21)** which provides that costs largely follow the event, and this court is given discretion to determine which party will meet the costs and to what extent. The Plaintiff is accordingly entitled to the costs of this suit, since this Court has reached conclusions that are in its favour in the findings hereinabove.

99. Arising from the above-stated findings and reasons, this Court finds that the Plaintiff has proved its case on a balance of probabilities, and accordingly enters judgment for the Plaintiff as against the Defendant as follows:

- i. **The Plaintiff is awarded general damages for breach of the lease agreement dated 1st July, 1990 in the sum of Kshs. 5,000,000/= payable at court interest rates from the date hereof until payment in full.**
- ii. **The Plaintiff is also entitled to the costs of this case.**

It is so ordered.

Dated, signed and delivered in court at Nairobi this 29th day of February, 2016.

.....

C. KARIUKI

JUDGE