REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 685 OF 2004

WAMUYU DECORATORS COMPANY LIMITED .....PLAINTIFF

VERSUS

MUGOYACONSTRUCTION & ENGINEERING LIMITED.....DEFENDANT

JUDGMENT

Important background information

[1] By a Ruling dated 18th July, 2005 delivered by **Kasango J,** the Court struck out the defence dated 14th February, 2005 and entered summary judgment in favour of the Plaintiff for the sum of Kshs. 896, 528/= with interest at the court rate from the date of filing suit until payment was made in full. In the same Ruling, the Court ordered the claim for general damages for breach of contract to proceed to formal hearing.

[2] On 23rd January, 2012, the suit was dismissed for want of prosecution but was reinstated on 17th September, 2012 presumably with all the orders that had been granted. Consequently, parties agreed the assessment of general damages to be determined through submissions, witness statements and the documents which had been filed in court. the Parties also agreed on the two issues for determination to be:

1) Whether the Defendant breached the contract of service between the parties; and

2) If so, whether general damages for breach of contract are available to the plaintiffs.

Assessment of general damages

[3] In the plaint filed by the Plaintiff, there is a claim for general damages for breach of contract. The breach of the subcontract is expressed in paragraph 5 of the plaint that:

Under the subcontract for the paintworks the Plaintiff was to provide to the

Defendant the services of painting for Phases I through to III. However, in breach of the subcontract the Defendant unilaterally stopped the sub-contract and the project even before the completion of Phase II. The Plaintiff had expected to do three coats of paint in Phase II but only did two coats before the Defendant unilaterally stopped the sub-contract. The Plaintiff suffered damages.

[4] From the submission of the Plaintiff, it seems the basis of the plaintiff's claim comprises in various sub-contracts entered into between 1994 and 2002 whereby the Plaintiff agreed to carry out painting woks on buildings in which the Defendant was the main contractor in the NSSF Housing Complex in Embakasi. However, the parties have filed in court a contract dated 11th June, 1994 (hereinafter "the contract") whose terms applied in all subsequent sub-contracts between the parties. The Plaintiff has averred that it rendered the paintworks completely and to the satisfaction of the Defendant. But, before the paint works could be completed for Phase II, the Defendant unilaterally terminated the sub-contract and failed to pay the Plaintiff for the paint works completed despite the issuance of payment certificates for the amounts due and accruing to the Plaintiff.

[5] The Plaintiff relied on the witness statement of Samson Nzioka dated 24th March, 2012 and filed on 22nd October, 2012 and the list of documents filed on the same day. According to the said Samson Nzioka, the contract made specific provisions in respect to the payment of the services rendered. In particular, the contract provided that the amounts due to the Plaintiff would be as per the monthly certificates approved by the Site Agent of the Defendant. In addition, it was stated that the contract explicitly provided that payment was to be made fifteen days from the date of approval of each interim certificate. According to Mr. Nzioki, the Defendant issued payment certificates numbers 49917 and 50423 to the Plaintiff of sums owing and due of Kshs. 896,528/= on account of works successfully completed. The amounts due and owing were to be paid 15 days from the approval date of each interim certificate issued by the Defendant in accordance to the Contract. But instead of paying the sum due, the Defendant by a letter dated 8th August, 2002, unilaterally terminated the contract and never allowed the Plaintiff to continue the painting work on account that it needed to complete other works such as plumbing, electrical wiring, tiling and skirting. The contract provided that in the event that the contract was terminated, the plaintiff would be entitled to be paid the value of the contract works completed at the date of such termination and the value of work began and executed but not completed at the date of such termination, plus all other costs occasioned by the termination.

[6] In its submissions by its Learned Counsel Mr. Ndungu, the Plaintiff proposes a sum of Kshs. 8, 500,000/= as general damages for works contracted by the Defendant but were never carried out to the completion after the Defendant unjustly terminated the contract. According to Plaintiff's counsel, that amount was for past performance of works done and was therefore a fair assessment of those works. They submitted that the said assessment was based on the principle of *quantum meruit* which applies where an express contract is mutually modified by implied agreement of the parties, or not completed. To them the principles allows the court to determine damages based on how much the Defendant has benefited from the transaction or by looking at how much the the plaintiff has expended in materials and services. The four elements to be proved are: 1) that valuable services were rendered; 2) that services were rendered to the defendant; 3) that services were accepted by the defendant; and 4) that the defendant was aware that the plaintiff, in performing the services, expected to be paid by the defendant. There was no contention as to whether the services were offered, since the services were accepted vide the Defendant's letter to the Plaintiff dated 8th August, 2001. Since that there was part performance of the contract, the court should award the damages sought. Mr. Ndungu therefore urged the Court to award the Plaintiff a sum of Kshs. 8.5 million as damages. The plaintiff cited the cases of: 1) **PLANCHE v COLBURN [1831] EWHC KB J56; 2) UPTON-ON-SEVERN RDC v POWELL [1942] 1 All ER 220;** and **3) BRITISH STEEL CORP v CLEVELAND BRIDGE & ENGINEERING CO LTD [1984] 1 All ER 504.**

Defendant's view on the matter

[7] On its part, the Defendant filed the witness statement of Lawrence Muga, the Personnel Administrator Officer of Defendant Company filed on 6th December, 2012 together with a bundle of documents and supplementary bundle of documents dated 13th December, 2012 and 18th February, 2013 respectively. According to the witness statement of Mr. Muga, the Plaintiff through a letter dated 25th July, 2001, wrote to the Defendant, requesting that it be allowed to do the third coat of painting on both the ceilings and walls of the Maisonettes in numbers 157 A to 224 of the contract properties. But the Defendant thought such a request was premature, because the said Maisonettes had not been completed. It was averred, however, that the Defendant responded to the said letter through their letter dated 8th August, 2001 and accepted the Plaintiff 's proposal on condition that instead of the Plaintiff doing the ceiling and walls as proposed, it would be allowed to do only the ceilings. That the Defendant was categorical that as the Plaintiff had agreed to take full responsibility of making the satisfactory surface touch ups and colour matching at its own costs, it would be allowed to do the third coat on the ceiling of the Maisonettes.

[8] According to the Defendant, the Plaintiff subsequently confirmed the contents of the Defendant's letter through their undated hand written letter received by the Defendant on 16th August, 2001. After the said correspondences, it was agreed and the Plaintiff continued with the work and as at 12th May, 2004, the Plaintiff had completed works totaling to Kshs. 10,965,279/= out of which a total of 10, 318,759/= had been paid, leaving a balance of Kshs. 895, 528/=. The said balance was the retention of 10% of what was payable upon completion of the works and has been paid to the Plaintiff by the order of the court. The Defendant, therefore, contended that the Defendant never terminated the contract as alleged by the Plaintiff and all sums due have been paid in full.

[9] The Defendant submitted that the claim of Kshs. 8,500,000/= had no legal basis. Learned Counsel Mr. Kiche argued the Defendant's case and submitted that there can be no general damages for breach of contract as held in the case of **JOSEPH UNGADI KEDERA v EBBY KANGISHA KARAI, C. A. NO. 239 OF 1997(UR)**. The Defendant also relied on the case of **HCCA 137 OF 2001 MUNICIPAL COUNCIL OF THIKA v ELIZABETH WAMBUI MUKUNA** and **HCCA NO. 561 OF 1999 ELIUD NGUGI MUNGAI v SAMUEL KANGAU NJENGA** in support of these submissions. On this point alone, Mr. Kiche urged the Court to decline the Plaintiff' claim. He cited the definition of general damages in ***Halsbury's Laws of England***, as

> ***''…those damages which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the Plaintiff is required only to assess that damage that had been suffered''.***

And further:

> ***''…general damages are those losses, usually but not exclusively pecuniary, which are not capable of precise quantification in monetary terms''.***

[10] Counsel, therefore, argued that in this case the Plaintiff's claim of Kshs. 8,500,000/= is exaggerated with no basis in law. The court should not apply the quantum meruit principle but rather apply the principle of *Restitutio ad integrum,* which promotes the restoration of an injured party to the situation which would have prevailed had no injury been sustained. It was further submitted that the letter dated 8th August, 2001 did not constitute a unilateral termination of the contract as contended by the Plaintiff since the Plaintiff continued working with the Defendant until 12th May, 2004 as proved by the various correspondences provided by the Defendant. That there was therefore no breach of contract as alleged by the Plaintiff and therefore the claim for general damages for breach of contract cannot suffice. Mr. Kiche, therefore urged the court to dismiss the Plaintiff's claim.

COURT'S RENDITION

[11] I have considered the rival submissions of the parties, the documents and statements filed in court as well as the judicial authorities cited by the parties in support of their respective standpoint on the matter. There is a dichotomy in approach within the judicial ranks as well as the eminent chairs of the legal practitioners on the subject of general damages for breach of contract. However, there is no absolute prohibition for courts to make an award of general damages for breach of contract. Except I should state that a claim which is capable of being quantified for instance expenses incurred on materials or on labour expended or services rendered or works done or expected returns or loss of business etc. should be so pleaded and particulars given in the pleadings of the parties. Such quantifiable expenses, according to me should not be left to general damages. See the statement by Odunga J in the case of **GIDEON MUTISO MUTUA v MEGA WEALTH INTERNATIONAL LIMITED [2012] eKLR** that;

> ***"The principle guiding the award of general damages for breach of contract was restated in Provincial Insurance Company of East Africa Ltd. vs. Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [1995-1998] 2 EA 289 in which the Court of appeal citing Dharamshi vs. Karsan [1974] EA 41, held that it is quite clear that no general damages may be granted for breach of contract (emphasis mine). In my view the Court of Appeal did not hold that general damages are not awardable for breach of contract.***
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> ***That notwithstanding the general law of contract is that 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 either arising naturally i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The plaintiff is to be paid compensation in money for the loss of that which he would have received had the contact been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract. It may however exceptionally include compensation for physical discomfort or inconvenience or loss of time. Otherwise the damages which are recoverable in an action for breach of contract are either nominal damages, that is to say, where a party has proved breach of contract but not proved that he sustained any actual loss consequent to the breach; or substantial damages, that is to say, where a party has not only proved a breach of contract but has also proved that he sustained some actual loss as a result of the breach. See Hadley vs. Baxendale 156 ER 145; Addis vs. Gramophone Company (1990) AC 488; Bailey vs. Bullock (1950) 2 All ER 1167; Sutton and Shammon on Contracts, 7th Ed Page 399." Emphasis mine***

[12] Having said that, I am able to determine the two issues formulated by parties, which are:

> **1) Whether the Defendant breached the contract of service between the parties; and**
>
> **2) If so, whether general damages for breach of contract are available to the plaintiffs.**

Whether there was breach of contract

[13] As a good beginning point, it is profitable to state what a breach of contract entails. I will borrow from the decision in a Ugandan Case of **HAJI ASADU LUTALE v MICHAEL SSEGAWA HCT-OO-CC-CS-292-2006** that a breach of contract entails

"…a breaking of the obligation which a contract imposes, which confers a right of action for damages on the injured party. It also entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible, or totally or substantially fails to perform his promises".

[14] In the instant case, the Plaintiff claims that it was prevented from completing its part of the bargain by the unilateral act of the Defendant in terminating the contract in question through its letter dated 8th August, 2001. That is the only evidence adduced to support the alleged breach of contract and that the Plaintiff was stopped from carrying out the services under the sub-contract. The said letter is annexed as **Exhibit SW8** on the Plaintiff's bundle of documents. The contents of the aforesaid letter reveal that the Plaintiff had requested the Defendant in a letter dated 25.7.01 to allow it to paint a third coat on the ceilings and walls of Maisonettes in question. The letter dated 25.7.01 was also produced and confirms the request was made by the Plaintiff. However, after considering the request, the Defendant was of the opinion that such works can only be done after other works, such as plumbing, electrical, P.V.C tiling, skirting, curtain boxes fixing to the houses have been completed. The Plaintiff was nevertheless, and after correspondences between the parties, allowed to undertake certain works on the ceilings of the Maisonettes in zone 2.2. at its own cost and to the satisfaction for the architect in charge of the buildings. The work was agreed to be done before the Defendant had completed the other related works on the premise that the Plaintiff had agreed to take full responsibility of making the satisfactory surface touch ups and colour matching at the Plaintiff's own cost, and the work was to be done to the satisfaction of the architect and the Defendant.

[15] The evidence adduced in form of letters, does not show that the Defendant unilaterally terminated the sub-contract. Indeed, the contents of those letters do not amount to termination of the sub-contract or any contractual obligation by the Defendant as alleged by the Plaintiff. The mere fact that the Defendant could not undertake certain works on certain houses as requested, because certain other works were to be carried out by the Defendant such as plumbing, electrical, tiling, skirting etc. was not a termination, much less a breach of the contract. The sub-contract by its very nature and in accordance with the terms of the contract itself was dependent upon the Main contract in many respects. There were works which needed to be done in the main contract before the sub-contractor could embark on its work and plumbing, skirting, electrical, tiling were such works. For instance, it does not require high wit or engineering knowledge to understand that paint will not be applied to the walls before plumbing work is done. The contract also provided for issuance of instructions to sub-contractor from time to time for variation of work or any other matter on the work of the sub-contractor. See clause 8 of the contract. The instructions given after the request by the Plaintiff did not amount to breach of contract whatsoever.

[16] Further, from the documents produced by the Defendant and the Plaintiff, the Plaintiff continued working until 12th May, 2004 pursuant to the agreement of the parties following the various correspondences exchanged between them. These documents were agreed upon and provided to court and the Plaintiff did not raise any or any serious challenge to them.

Whether Plaintiff Entitled to Damages

[17] In the circumstances, it is clear that the Plaintiff has not proved to the satisfaction of this court that there was any breach of contract as alleged. And without a finding of breach, there can be no award of general damages. In any event and in light of my holding on the alleged breach of contract, the works which were carried out as agreed by the parties were quantifiable and the balance thereof of the sum of Kshs. 896, 528.00/= was paid. The upshot is that the plaintiff's claim for an award of general damages is dismissed. Costs are awarded on the principal and liquidated sum of Kshs. 896, 528.00/=. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 31st day of July 2014

F. GIKONYO

JUDGE