



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1879 of 2000**

**MORTAJ CONSTRUCTION LIMITED ..... PLAINTIFF**

**VERSUS**

**RED BULL ENERGY DRINK LIMITED ..... DEFENDANT**

**JUDGMENT**

This suit was fully heard by Mbaluto J. The judgment was reserved for 26<sup>th</sup> September 2003. However the judgment was not delivered perhaps because the judge left the judiciary. The matter was subsequently mentioned before other judges and on 28<sup>th</sup> September 2009 Justice Apondi directed the file be placed before me for further directions. The parties appeared before me on 5<sup>th</sup> October 2009, and they agreed that the court should write a judgment based on the proceedings that were recorded by Mbaluto J.

This matter relates to a claim by the plaintiff arising out of services rendered by the plaintiff to the defendant in respect of certain building works carried out by the plaintiff on the defendants property known as LR NO. 5943/MN/1/Mombasa, sometimes in or about September 1997. The plaintiff was contracted to construct a single storey structure of traditional block wall with a makuti roof. The structure was to comprise a drink store, managers offices, clerks and secretary's office excluding drainage, plumbing, fall water drainage and electrical installation at a cost of 1.250,000/-.

The plaintiff commenced the work but in the process, the defendant increased the scope of work by enlarging the building to accommodate the Managing Directors office, a reception and a preparation room. During the negotiations the plaintiff insisted on a fixed period for completion and payment but the defendant stated that there was no need as the work comprised of a minor contract. The defendant also undertook to pay the plaintiff as and when the work was done. The plaintiff went on constructing the extended work, was paid the agreed price of 1.250.000 for the original work and for the additional work was paid 100,000/-.

On 28<sup>th</sup> January 1998, the defendant suspended the contract by the plaintiff before completion and denied the plaintiff entry into the site and seized the plaintiff's tool, equipment and building materials. After this termination the plaintiff engaged the services of a quantity surveyor Mr. Stephen Ndibui Kamau (PW2) who assessed the work on the site and prepared a valuation report. He valued the work at Ksh.2.584.903.85/-.

The defendants filed a defence and a counter claim, in the cause of the proceeding counsel for the defendant withdrew the counter claim. No evidence was adduced by the defence but counsel submitted that the plaintiff's contract was terminated because of breach of the contract. This is obviously

inadmissible because the defence did not adduce evidence and counsel cannot give evidence from the bar. Moreover the plaintiff was paid Ksh.2.500.000/= and when the plaintiff was put to strict proof he failed to prove the claim of Ksh.1.334,903.85/-.

In this regard counsel relied on the Court of Appeal decision in the case of **Mohammed Hassan Musa & another vs. Peter M. Mailany & another CA No. 243 of 1998 at Nyeri** where it was held;

***“It has been held time and again by this court that special damages must be pleaded and, of course, strictly proved. The claims for the loss of earnings are matters of special damages which ought to have been strictly pleaded but was not done. Nor were they proved. We refer to the case of OUMA V NAIROBI CITY COUNCIL 1976 KAR 297 at 304 where Chesoni, J (as he then was) held***

***“Although special damages had been specifically pleaded by listing in the plaint the items alleged to have been stolen or damaged, the plaintiff’s failure to prove such damage at trial with certainty and particularity preclude the court from making any award of special damages”***

***Also, see KENYA BUS SERVICES V MAYENDE 1991 2 KAR 232 AT 235 where it was held referring to the remarks by this court in MARIAM MAGHEMA ALI V JACKSON M NYAMBU T/a SISERA STORE CA 5 OF 1990 and in IDI AYUB OMARI SHABANI V CITY COUNCIL OF NAIROBI (1985) I KAR 681 AT 684:***

***“Special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard, C.J. in Bonham Carter v Hyde Part Hotel Ltd (1948) 64 T.L.R. 177 thus:***

***“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying “this is what I have lost, I ask you to give me these damages.”***

Counsel further urged the court to disregard the report by PW2 because it was prepared two months after the contract had been constructed and there was already another contractor on site.

On the part of the plaintiff Mr. Lugadiru submitted that the facts are not disputed and the plaintiff was able to prove that construction work was carried out and the contract was cancelled by the defendant by a letter dated 28<sup>th</sup> January 1998 which was produced as exhibit No.3. That letter admitted that the final account will be prepared to find out whether the plaintiff was owed any money for the addition work. No accounts were taken by the defendant despite confiscating the plaintiff’s tools, equipment and materials. Evidence was tendered by PW2 who submitted a detailed report valuing each and every item of work that was constructed by the plaintiff. The plaintiff was able to prove the claim. The defendant did not offer any evidence to controvert the evidence by the plaintiff and the valuation report. He urged the court to enter judgment for the plaintiff.

The plaintiff’s claim is based on a contract of construction. It is not disputed the plaintiff was contracted by the defendant to carry out construction work. It is not also not disputed the defendant terminated the contract on 28<sup>th</sup> January 1998. According to that letter of termination, it is stated as follows under paragraph 3:

***“Without prejudice to any other rights, the client will make arrangements to have the works completed by others and monies otherwise payable to you shall be used to pay other persons to carry out the works at the end of which the final account shall be prepared. Should the cost of completing the works be less than the amount otherwise payable to you, the balance in your favor shall be paid to yourself. However should the cost of completing the works exceed the amount otherwise payable to you, you will be called upon to pay the additional cost to the owner of the project.”***

The defendant did not adduce any evidence especially to support the allegations contained in the defence. The issues to determine are whether the plaintiff was able to prove the claim for special damages and general damages. The plaintiff relied on the evidence of PW2 who produced a detailed valuation report which has described and costed each and every item of the work carried out by the plaintiff in execution of the contract. On page 5/3 of the report PW2 has shown how the sum claimed was arrived at. He took into account a sum of Ksh.1.350,000 which was paid to the plaintiff and the amount outstanding is Ks.1.234,903.85/- that is the amount the plaintiff was able to prove.

Although the plaintiff claims that there were equipments, tools of trade and building materials, no evidence was adduced regarding their value. This is incidentally admitted by the defendant in their letter dated 28<sup>th</sup> January 1998. However since no evidence was adduced to prove the value, the court is unable to determine what to award the plaintiff. The plaintiff did not also adduce evidence to support the prayer for general damages for the depreciation of the said goods.

I find the plaintiff has on a balance of probability proved that he was not paid a sum of Ksh.1,234.903.85/- and I hereby enter judgment for the plaintiff with costs and interest at the court rates.

JUDGMENT READ AND SIGNED ON 23<sup>RD</sup> NOVEMBER 2009 AT NAIROBI.

**M.K. KOOME**

**JUDGE**