Mutua t/a Mulingana Enterprises v Kilatya t/a Manna Cereal Stores (Civil Case 64 of 2019) [2025] KEHC 10753 (KLR) (11 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10753 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL CASE 64 OF 2019

TM MATHEKA, J

JULY 11, 2025

BETWEEN

FLORENCE NDUNGE MUTUA T/A MULINGANA ENTERPRISES ..... APPELLANT

AND

SIMON MUTETI KILATYA T/A MANNA CEREAL STORES ..... RESPONDENT

RULING

1. By a plaint dated 15/5/2015, the plaintiff/respondent filed Makueni MCC 90/2015 against the defendant/appellant seeking orders:

    a. The sum of Kshs.600,000/= as at 3rd December, 2014.

    b. Interest on (a) above at the rate of 8.5% per annum from July, 2014 until payment in full.

    c. Cost of this suit

    d. Interest on (c) above

    e. Any other/further relief that this honorable court may deem fit to grant.

    f. ins

2. The cause of action arose out of the written contract dated 10/7/2014 in which:

    > Florence Ndunge Mutua T/a Mulingana Enterprises Of Id No. 113 and of P.O Box 107 – 90300 Makueni (hereinafter called the "contractor" which expression shall where the context so admits include her legal representatives, heirs and/or assigns) of the one part, and Simon Muteti Kilatya T/a Manna Cereal Stores of ID NO. 7809535 and of P.O Box 96174 Likoni (hereinafter called the "subcontractor" which expression where the context so admits shall include his personal representatives successors and / or assigns) of the other part

Whereas: -

> The contractor has been awarded the tender No. GMC/T/065/2013/2014 to supply and deliver a quantity of maize and beans to the government of Makueni County by way of Letter of Notification of Award dated 21/6/2014.

And Whereas the subcontractor is ready and willing to supply and deliver to the contractor a quantity of 4000 (four thousand) 90kg bags of maize and 200 (two hundred) 90kg bags of beans hereinafter "the goods" to the order of the contractor within the time specified so as to fulfill the terms of the tender by the government of Makueni county.

3. It was agreed that the plaintiff would supply 4000 90kg bags of maize each at Kshs3200 and 200 bags of beans each Kshs.5900.

4. The total value of the contract was Kshs. 13,820,000/= to be paid within 30 days of delivery and receipt of the goods.

5. It was a term of the agreement that any default whatsoever by either party would draw an interest on top of the loss incurred at 20% per annum computed from the date of the agreement to date of payment of outstanding and sum or loss incurred.

PARA 6.

The plaintiff's claim was stated thus:

> However, I did not supply the quantities as indicated in the agreement and undertaking between the contractor and myself. I only supplied three thousand (3000/=) 90kg bags of maize at the agreed rate of Kenya shillings three thousand two hundred (Kshs.3200/=) per bag making an aggregate sum of Kenya shillings nine million six hundred thousand (Kshs.9600,000).

7. The defendant filed defence and counter claim.

8. She contended that the parties did not vary the terms of the agreement save that the price of maize which was varied to Kshs.3000/= from 3200 per 90kg bag. That the plaintiff delivered 3000 bags of maize but did not deliver a single bag of beans: Further that the plaintiff did not supply within the contracted 30-day period but did so over six months. That as a result of the plaintiff's breach there was threat of termination of the defendant's contract and she was forced to bring in other people to supply to avoid the same. That the plaintiff owed her Kshs.804, 000 being 20% of the value of undelivered goods.

9. She sets out her counter claim viz:

    1. The defendant reiterates the foregoing and counter claims against the plaintiff for a sum of fKshs.804,000/= on the following basis.

    2. The defendant entered into an agreement with the plaintiff dated 10/7/2014 in which the plaintiff was to supply the county government of Makueni 4000(90kg) bags of maize at kshs.3200/= and 200 (90kg) bags of beans at Kshs. 5100/=.

    3. This agreement was in partial satisfaction of a tender awarded to the defendant by the county government of Makueni 25/6/2014.

    4. The defendant avers that it was a term of the agreement dated 10/7/2014 that the cereals were to be delivered to Wote cereals board within 30 days of the agreement.

5. The defendant avers that later on the parties agreed in the presence of one Clementina Mukii Musembi that the prices of maize be reduced to Kshs.3000/= down from the agreed Kshs.3200/=.

6. The defendant avers that the plaintiff breached the terms of the agreement in material ways.

   Particulars of breach of contract

   a. Failing to deliver the cereals within the stipulated timelines.

   b. Failing to deliver the quantities stipulated in the agreement i.e., delivering only 3000/= bags of maize and zero bags of beans.

10. She seeks judgment in the following terms

> The defendant prays that the plaintiff case against it, be dismissed with costs and judgment be entered against the plaintiff for;
>
> a. A declaration that the plaintiff is in breach of the agreement between him and the defendant dated 10/7/2014.
>
> b. Kshs.804,000/= being the default sum in accordance with the agreement dated 10/7/2014
>
> c. Costs of this suit.
>
> d. Interest on (a) above at commercial and or court rates.

11. The plaintiff filed a reply to defence and counter claim where he denied all the allegations and claims.

12. On the issue of the supply of beans he took the following position as stated in the plaint:

> the plaintiff refers to the contents of paragraph 6 and 7 respectively of the defendant's statement of defence and counterclaim and denies the contents thereof and states that the defendant of her own volition sought to have the beans supplied by a third-party Winfred Nduku Malika who was said to be supplying the same at a lesser cost than what had been agreed on between the plaintiff and the defendant. The plaintiff therefore was following the express instructions of his principal. The defendant is put to strict proof of her allegations.
>
> The plaintiff in reply to the defendant's statement of defence and counterclaim further states in the strict sense of the agreement dated 10/7/2014, the defendant would be in breach for having stopped him from supplying the beans which were supplied by Winfred Nduku Malika.

13. On the alleged delay in the supply of the maize he avers: -

> In reply to paragraph 8 of the defendant's statement of defence, the plaintiff states that he supplied a total of 2000 bags of maize between the months of July and August within the prescribed contract period before the defendant instructed him to halt the supply as stated in paragraph 2 herein above. The defendant's pursuit for payment was unsuccessful as payments would be made upon the LPO being satisfied. The defendant therefore advised the plaintiff to complete the supply of the remaining 1000 bags which was done by September 2014.

14. He avers further that

> The plaintiff avers that the defence and counterclaim herein was filed out of time without leave of court and no proper service was effected on his advocates on record and hereby gives notice that it shall apply for the same to be expunged from record.
>
> The plaintiff prays that the statement of defence and counterclaim herein be struck out and judgment entered against the defence as prayed in the plaint.

15. The matter was heard by way of viva voce evidence where each party testified – reiterated their pleadings and called one witness each.

16. The Plaintiff denied ever accepting to reduce the price of supply of maize to 3000. He said he declined to supply the other balance of the maize because the defendant wanted the supply at a cheaper price which he declined and she stopped him from the supply. That his claim was for the balance of payment of what he had supplied. His witness confirmed to have delivered 3000 bags of maize to Makueni Cereal Board.

17. The defendant testified and produced in court contract documents with the county government of Makueni and sub-contract with the plaintiff – she called her sister DW1 to testify that plaintiff had agreed to the reduction of the price of maize from 3200 to 3000/= she produced some documents to prove that she brought in other people in to supply the deficit created by the plaintiff's undersupply. She claimed that she brought in other suppliers at higher costs and none of the other suppliers were complaining.

18. After the full trial the learned trial magistrate delivered judgment on 7/8/2019 and found in favour of the plaintiff thus:

> In the end the court finds the plaintiffs claim and the defendants counter claim successful and entered judgment for the parties as follows;
>
> a. In regard to the plaintiffs claim, the plaintiff is awarded Kshs.1,240,000/= computed as follows:
>
> i. Kshs.600,000/- as the balance on the maize supplied.
>
> ii. Kshs.640,000/- for frustration of contract by the defendant over the maize supply.
>
> b. In regard to the defendant counter claim the defendant is awarded Kshs 204,000/= for breach of the contract by the plaintiff on supply of the beans.
>
> By way of check off the defendant owes the plaintiff a sum of Kshs.946,000/= as the difference between the amount awarded to the parties respectively above.
>
> In the end the court makes orders that the defendant do pay the plaintiff a sum of Kshs.946,000/= [Nine hundred and forty-six thousand only).

19. Aggrieved the defendant filed this appeal on the following grounds

1. That the learned magistrate of subordinate court erred in law and in fact in awarding the respondent Kshs.640,000/= for frustration of contract, which prayers were never sought.

2. That the learned trial magistrate erred in law and fact by not holding that parties are bound by their pleadings.

Seeking orders:

a. This appeal be allowed with costs.

b. The order awarding the respondent Kshs.640,000/= for frustration of contract by the defendant over the maize supply be set aside.

20. Parties filed witness submissions.

21. The appellant reminded this court of its duty citing Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1 EA 123:

> " ..... This court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

27. It was submitted for the appellant that

> The main issue by the appellant is that the lower court determined the matter on an issue that was never pleaded –

The appellant relied on several authorities including;

Gandy -vs- Caspair Air Charters Ltd (1956) EACA 139 where Sir Sinclair V.P said;

> " The object of pleading is of course to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given."

Billey Oluoch Okun Orinda V Ayub Muthee M'igweta & 2 others [2017] eKLR where it was stated

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainly and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleading of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved, for a decision a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered

to. In such an agenda, there is no room for an item called 'Any other Business' in the sense that points other than those specific may be raised without notice.

28. It was also submitted that it was necessary for the respondent to have pleaded "frustration" of contract specifically. The appellant cited Kenya Commercial Finance Co. Ltd Vs Kipng'eno Arap Ngeny & Another - Civil Appeal No. 100 of 2001 where the court stated;

> " A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the amended plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned judge was clearly wrong."

29. It is further submitted that the plaintiff/respondent did not fall in the exception to the rule as explained in Odd Jobs Vs Mubia [1970] EA 476 as applied in Vyas Industries Vs Diocese of Meru [1982] KLR 114

a. "a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to court for decision;

b. On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."

30. 29. That the issue of frustration was not raised in the pleadings on the evidence. It was contended that even where frustration is pleaded and proved, it does not render a contract null and void. That the supervening event simply makes the further performance of a valid contract impossible and releases the parties from further obligations under the contract.

31. On the second ground of appeal, it was submitted that it is now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Reliance was placed on the case of Independent Electoral & Boundaries Commission & Anor -vs- Stephen Mutinda Mule & 3 Others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) -vs- Nigeria Breweries PLC SC 91/2002 as follows;

> " ..it is now trite principal in law that the parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....in fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

Respondent's Submissions

32. The Respondent submitted that he testified on how he got frustrated when the Appellant breached the agreement and that the trial court made a finding that the Appellant had breached the agreement. That, based on that fact, the trial court deemed it fit to award damages for frustration and the same is proper. It was submitted that there is no reasonable ground to interfere with the trial court judgment.

33. I have carefully considered the record the grounds of appeal and the rival submissions and the issue for determination is whether the trial court erred by awarding Kshs 640,000/= to the Respondent.

Analysis & determination

34. The Respondent pleaded that he was sub-contracted by the Appellant to supply 4,000 bags of maize - each weighing 90kgs and 200bags of beans -each weighing 90kgs. That he however supplied 3,000 bags of maize at the agreed rate of kshs 3,200/= per bag as instructed by the Appellant. On the other hand, the Appellant averred that the Respondent was unable to supply the remainder of 1000 bags of maize and did not supply a single bag of beans.

35. This case revolves around the contract set out herein above between the parties dated 10/07/2014 and duly executed on the same day. Both parties have acknowledged the contract hence there is no dispute about its validity. The basic law of contract is that written agreements constitute the complete intentions of the parties and the parties are bound by its terms and conditions unless coercion, fraud or undue influence are pleaded and proved. In Total Kenya Ltd -vs- Joseph Ojiem: NBI HCCC 1243 of 1999, the court affirmed the legal position that: "Parties to a contract that they have entered into voluntarily are bound by its terms and conditions."

36. In this case, the contract required the Respondent to deliver 4,000 (90kg) bags of maize and 200 (90kg) bags of beans. The Respondent admitted and the evidence shows that he delivered 3,000/= bags of maize and did not deliver any beans. He attributed the failure to complete his obligation to the Appellant's request for price reduction which he declined. The Appellant's sister testified that she witnessed a verbal agreement between the parties to reduce the price of maize from kshs 3,200/= per bag to kshs 3,000/=. The Respondent's position however is that he never agreed to the reduction. Evidently the variation of the price was a unilateral decision by the Appellant which could not override the express terms of the written contract. This is exemplified in Housing Finance Company of Kenya Limited -vs- Gilbert Kibe Njuguna: Nairobi HCCC No. 1601 of 1999, where the court stated that;

> " Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

37. Additionally, Gimalu Estates Ltd & 4 Others -vs- International Finance Corporation & another [2006] eKLR; the learned Judge stated

> " Parties to a contract effect a variation of the contract by modifying or altering its terms by mutual agreement...a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract."

38. Undoubtedly the Appellant breached the terms of the agreement by purporting to vary the price of maize unilaterally. Whereas the Appellant claimed that the Respondent was in breach for failing to deliver the agreed quantities, it appears to me that the Respondent was telling the truth when he said that indeed, he was told to stop supplying as the Appellant had found someone who would supply for less. The consequence of that breach is that the Respondent was discharged from further performance under the contract. Paragraph 1591 on page 876 of Chitty on Contracts, 25th Edition, Vol. 1, under the heading Discharge by Breach, states:

> " One party to a contract may, by reason of the other's breach be entitled to treat himself as discharged from liability further to perform his own unperformed obligations under the contract..... The rule is usually stated as follows: Any breach of contract gives rise to a cause

of action; not every breach gives a discharge from liability. Thus, the question ....is whether a party who admittedly has a claim for damages is relieved from further performance by the other party's breach. Secondly although sometimes the innocent party is referred to as "rescinding" the contract and the contract as being "terminated" by the breach, it is clear that the contract is not rescinded ab initio. The innocent party or in some cases both parties are excused from further performance of their primary obligations under the contract; but there is then substituted for the primary obligations of the party in default a secondary obligation to pay monetary compensation for his non - performance."

39. In Photo Production -vs- Securicor Ltd (1980) AC 827 at page 848, Lord Diplock stated that;

> " ....breaches of primary obligation give rise to substituted or secondary obligations on the part of the party in default and ... may entitle the other party to be relieved from further performance of his own primary obligations. These secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligation also arise by implication of law generally common law....
>
> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by ....common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach."

40. I find therefor that the Respondent was discharged from the obligation of supplying the remaining 1,000 bags of maize and was entitled to payment for the bags already supplied.

41. On the other hand, however, the Respondent was in breach of his obligation to supply 200 (90kg) bags of beans as the evidence shows that he did not supply a single bag of beans.

42. The Respondent was also accused of breach for failing to deliver the cereals within the stipulated timelines. Clause 4 of the contract states that; "The Sub-Contractor shall supply the goods to the order of the Contractor within 30 days of notification by the contractor of the place of delivery." Clause 5 states that; "The place of delivery shall be Wote Cereals Board, Wote." Looking at these two clauses together, the place of delivery was disclosed in the contract hence it can be argued that the 30 days period started running on 10/07/2014 when the contract was signed by both parties.

43. On the other hand, clause 2 states that; "Time shall begin to run according to the terms of this contract when the Contractor signs the Letter from the Government of Makueni County which shall state the place of delivery." Further, clause 3 states that; "The Contractor shall notify the Sub-Contractor immediately she signs the letter stating the place of delivery." These two clauses reveal that at the time of signing the agreement on 10/07/2014, the Appellant had not yet signed the letter from the County Government and secondly, the specific act of signing and subsequent notification of the same to the Respondent were significant events in determining when the time would start running. Consequently, the real intention of the parties on this aspect are in clauses 2 & 3 and not in clauses 4 & 5.

44. The Appellant did not produce the letter from the County Government which she signed and did not also avail evidence of the date she notified the Respondent. I have noted that clause 3 is silent on the mode of notification. Be that as it may, the Appellant produced a letter of notification of award dated 21/06/2014 which states that; "The contract shall be signed by the parties within 30 days of the date of this letter but not earlier than 7 days from the date of this letter." The conclusion to be drawn here is that the Appellant and County Government signed the contract on 21/07/2014. PW2, the Respondent's driver testified that he was instructed by the Respondent to start transporting the maize sometimes in July 2014. It is therefore highly probable that the Respondent was notified immediately

after the Appellant and County Government signed the contract and the date of 21/07/2014 renders itself as the date when the time started running. Consequently, the Respondent was expected to have supplied all the cereals by 21/08/2014.

45. PW2 stated that he had delivered 3,000 bags of maize at the end of 2 months but the Respondent stated that the bags were supplied on diverse dates between July and December 2014. The Respondent's statement is corroborated by the Appellant's averment, in the defence, that the supply was done in a span of about 6 months. It is therefore factual that the Respondent supplied 3,000/= bags of maize within 6 months hence he was in breach of an express term of the contract. The evidence however shows that despite the breach, the Appellant continued to accept the supply of maize way beyond August 2014 and is therefore estopped from complaining about the breach. In Halsbury's Laws of England, Vol. 16 (2) at paragraphs 1076 and 1079 the doctrine of estoppel is explained as follows;

> " Common law estoppel by representation arises where a person has by words or conduct made to another a clear and unequivocal representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position. In such circumstances an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

46. On the issue of estoppel in Serah Njeri Warobi -vs- John Kimani Njoroge [2013] eKLR, the court held as follows:

> " The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

47. It emerges from the foregoing that I find both parties to have been in breach to the extent set out herein above . Paragraph 12 of the contract provides that; "If for any breach whatsoever caused by the default of either party the defaulting party shall pay to the injured party an interest on top of the loss incurred or outstanding at the rate of twenty (20%) percent per annum computed from the date hereof until the date of payment of the sum outstanding or loss incurred as the case may be in full both days inclusive."

48. Just as observed by the trial magistrate, the default clause was not drafted clearly but the meaning to be deciphered is that the guilty party was to pay a penalty of 20% of the loss incurred by the injured party. Consequently, the Respondent incurred a loss of supply of 1,000 bags of maize which translates to (1,000 x 3,200) x 20/100 = 640,000/=.

49. The Appellant's loss was (200 x 5,100) x 20/100 = 204,000/=.

50. The price for the 3,000 bags supplied was (3,000 x 3,200) = 9,600,000/= and the evidence shows that 9,000,000/= was paid to the Respondent hence leaving a balance of kshs 600,000/=.

51. The total amount owing to the Respondent was therefore (640,000 + 600,000) = 1,240,000/= and after subtracting the Appellant's loss of 204,000/= the balance was 1,036,000/=. Consequently, the trial magistrate erroneously arrived at kshs 946,000/= instead of 1,036,000/=.

The Appellant submitted extensively that it was erroneous for the trial court to award damages for frustration of contract but it is evidently clear that the award of kshs 640,000/= was for damages for breach of contract. The mistake by the trial court was in the use of the word 'frustration' but it does

not in any way invalidate the award and there is no evidence to show that the trial court travelled out of the pleadings to award for something that wasn't pleaded and proved

52. I find therefor that the appeal is not merited as there was no error on the part of the trial court save for the erroneous calculation of the sums.

53. The appeal is therefor dismissed.

54. Judgment of the subordinate court be and is hereby set aside and substituted with judgment in favour of the respondent in the sum of Kshs 1,036,000/=, plus costs and interest at court rates from the date of the award in the subordinate court.

55. Orders accordingly****

DATED, SIGNED AND DELIVERED VIA CTS THIS 11TH JULY 2025

MUMBUA T MATHEKA

JUDGE