



REPUBLIC OF KENYA



Okiri v Jiangxi Zhongmei Engineering Construction Co Ltd (Commercial Case 5 of 2019) [2024] KEHC 923 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 923 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 5 OF 2019
RE ABURILI, J
FEBRUARY 1, 2024**

BETWEEN

BONIFACE OWITI OKIRI PLAINTIFF

AND

JIANGXI ZHONGMEI ENGINEERING CONSTRUCTION CO LTD DEFENDANT

JUDGMENT

1. The plaintiff herein Boniface Owiti Okiri vide a plaint dated 9th July 2019 sought the following orders against the defendant Jiangxi Zhongmei Engineering Construction Company Limited:
 - a. Kenya Shillings Twenty-Nine Million One Hundred and Forty-Seven Thousand Three Hundred and Sixty (Kshs. 29,147,360)
 - b. General damages for loss of use of the land.
 - c. Exemplary and aggravated damages
 - d. The cost of this action and interest thereon
 - e. Interest on (a) at court rates and (b) above at 14% p.a.
 - f. Any other or further relief which the honourable court may deem fit to grant
2. The plaintiffs' case against the defendant is that vide an agreement dated 10th March 2014, he agreed to lease to the defendant his land wherein the defendant would extract construction materials for the contract price of Kshs. 280,000 with half of the amount being paid after signing of the lease agreement and the other half was paid after excavation of the construction materials.



3. The plaintiff averred that the defendant was required to back fill, level and return the suit property to its previous condition to enable the plaintiff carry out agricultural activities on the said land which the defendant failed to do and thus breached the lease agreement.
4. It is the plaintiff's case that as a result of the defendant's breach, the plaintiff has incurred losses of four farming seasons for the years 2015 – 2019, which loss amounts to Kshs. 787,360.
5. In its defence dated 16th September 2019, the defendant denied the averments made by the plaintiff and put him to strict proof.
6. The defendant contended that it was not in breach of the lease agreement dated 10th March 2014 as it back filled the dug hole before leaving the site, levelled and returned the land to its former self. The defendant further denied that the plaintiff had incurred the loss of four farming seasons as alleged.

Oral Testimonies

7. The parties adduced oral evidence to support their respective positions. The Plaintiff testified asPW 1 and adopted his witness statement dated 9th July 2019 as his evidence in chief in which he reiterated the averments made in his plaint. The plaintiff testified that he was praying for the cost of back filling the land as well as damages for loss of user of his land.
8. In cross-examination, the plaintiff testified that prior to leasing the land, he hoped to use it in future as he was not using it at the time of leasing it. He further admitted that the lease did not provide for a time frame within which the excavation would come to an end, or what would happen in case of breach of the said contract or failure to backfill.
9. The plaintiff further stated in cross-examination that the back filling was to be done by 2015 as the road construction ended in 2014. He further testified that he was farming in the portion of land next to the suit property particularly of sugarcane and that prior to getting payments from the sugar company, the farmer has to incur some expenses in terms of farm inputs and connected costs.
10. In re-examination, the plaintiff testified that according to the agreement, the defendant was to carry out back filling after completing excavation of the materials and that in this case, it had been nine years since excavation was completed yet the defendant had not approached him.
11. PW2 Sammy Chepchilat Ngeno, the sub-county Agricultural officer, Muhoroni sub county within Kisumu County testified and produced as an exhibit a review report dated July 28, 2023 of a 2018 report done by his predecessor over the suit land. It was his testimony that he visited the site on July 14, 2023 where he found the pit unfilled, which pit measured one (1) acre. It was his testimony that he valued the suit property that was dug and did a total loss of 8 harvests for 9 years which amounted to Kshs. 2,640,000
12. In cross-examination, PW2 admitted that horticulture, which field he was qualified in, did not involve sugarcane. He admitted that he did not know what was planted on the suit property prior to the excavation but that from his conversation with the plaintiff, he deduced that the plaintiff planned to plant sugarcane at the start of 2015. He admitted that in his calculations, he had not factored in the cost of production. It was his testimony that he had worked with the Sugar Research Institute for 13 years and was the link between the Research Institute and the farms.
13. PW3 Mark Otiende Ombwayo, a quantity surveyor adopted his witness statement dated September 26, 2023 as his evidence in chief. He stated that he did the costing of the cost of backfilling the excavated site and drew the Bill of Quantities which he produced in evidence as PEX7 and stated that the total



amount projected for back filling of the suit property was Kshs. 29,290,754 inclusive of VAT of 16%. In cross-examination, he clarified that the purpose of the money was to back fill the pit.

14. PW4 Lenard Ofula, the County Director, national Environmental Management Authority, Kisumu County testified and produced a letter dated July 31, 2023 in which he detailed that no Environmental Impact Assessment (EIA) report was done prior to the excavation of the suit property. He testified that he received a letter from the defendant's advocate asking his office to supervise the rehabilitation of the suit property.
15. In cross-examination, PW4 stated that the letter from the defendant's advocate indicated that the defendant was ready to do the rehabilitation as per PW4's specifications. In re-examination, he testified that he was not a party to the lease agreement and he could go to the site if there was an EIA license.
16. DW1, Jiang Peng, the defendant's production manager adopted his statement dated 23.10.2023 as his evidence in chief. He admitted that as per the lease agreement between the plaintiff and the defendant company, the defendant was to back fill the suit property but that they had less material to back fill the property and further, that the plaintiff brought them to court before they could finish the work. It was his testimony that they finished excavation in 2018 and were still willing to finish the back filling.
17. In cross-examination, DW1 stated that the claim for Kshs. 29 million was crazy as they only removed murrum and stones and as the defendant had the equipment that they used to do the excavation as well as waste material from their other site to complete the back filling.
18. He testified that they never agreed with the plaintiff on when to finish the back filling and further that there were no penalties for failure or delay to back fill the pit. DW1 testified that the defendant wanted to backfill the suit property by themselves.
19. In re-examination, DW1 testified that the defendant also carries out construction work and as such the amount proposed by the plaintiff was exaggerated especially considering that the land was valued at Kshs. 1.2 million. He further testified that they had the better equipment and labour to refill the suit property.

The Plaintiffs' Submissions

20. It was submitted that the Defendant was required as per the Agreement to backfill, level the land and return the same to its former self to enable the Plaintiff carry out agricultural activities on his land and that although there was no express stipulation from the clause or indication in the Lease Agreement as to the time for the defendant to complete excavation and extraction of material and back fill the borrow pit in the Plaintiff's property, time was of the essence. That however, the defendant subjected the plaintiff to unreasonable, inordinate and prolonged delay.
21. The plaintiff submitted that the Defendant's failure to backfill, level the land and return the same to its former self amounted to a breach of contract. Reliance was placed on the case of *Aida v John Mbiyo Njonjo & Charles Kigwe* (1962) EA 88 where it was held that:

“When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence.” .



22. It was submitted that vide the Letters dated 6th April,2016 and 29th November,2018 the Plaintiff made time to be of essence to the Defendant as a result of the Defendant's unreasonable delay in backfilling the land.
23. The plaintiff submitted that he engaged the services of an Agricultural Economist with regard to the claim of the loss of farming seasons for the years 2015, 2016, 2017,2018,2019,2020,2021,2022 and 2023 and thus claimed exemplary and aggravated damages and general damages for loss of user of the land.
24. It was submitted that the Defendant while seeking specific performance failed to show that it had performed all terms of the contract which it had undertaken to perform whether expressly or by implications which ought to be performed within the timelines set in the contract. Reliance was placed on the Court of Appeal case of *Gurdev Singh Birdi and Marinder Singh Ghatora and Abubakar Madhbuti* Civil Appeal No. 165 of 1996.

The Defendant's Submissions

25. It was submitted that the court ordered the National Government valuer to visit the suit premises and carry out a valuation of the said land which valuation was done and the land was valued at Kshs. 1,200,000. The respondent submitted that it offered to pay the plaintiff this amount but he declined and thus the matter proceeded to hearing.
26. It was submitted that the defendant did not deliberately refuse to comply with the terms of the agreement but was in the process of complying when the plaintiff moved to court. The defendant submitted that the prayers sought in the plaint were out rightly unreasonable, outrageous and totally beyond any logical imagination as the contract price was Kshs. 280,000.
27. The defendant submitted that the contract should be performed to the conclusion and satisfaction of both parties. On the plaintiff's claim for loss of four farming seasons amounting to Kshs. 787,360, it was submitted that the plaintiff was misleading the court as to the nature and value of the land which was rocky and lying bare prior to the defendant's excavation.
28. The defendant submitted that it had carried out all its obligations and that further, it was in the process of back filling the suit property when the plaintiff filed this suit against the defendant hence it merits an order of specific performance.
29. On costs, the defendant submitted that it was only fair that each party bear their own costs as it had engaged the plaintiff severally on settlement of the suit but the plaintiff was intent on proceeding with the hearing.

Analysis and Determination

30. I have considered the pleadings by both parties, their oral testimonies as well as the submissions filed herein. The issue for determination is whether the plaintiff has proved his case against the defendant on a balance of probabilities.
31. The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily agreed between the contracting parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. In the case of *Bunge SA v Nidera NV (formerly Nidera Handelscompagnie BV)* [2015] UKSC 43; Bus LR 987 this was described as the "fundamental principle of the common law of damages."



32. The principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party.
33. Accordingly, a plaintiff is required to demonstrate that:
- (a) a contract exists or existed;
 - (b) the contract was breached by the defendant; and
 - (c) the plaintiff suffered damage (loss) as a result of the defendant's breach.
34. The plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss. Therefore, a plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability.
35. In the instant case, it is undeniable that there was a contract between the parties herein. The lease agreement dated 10th March 2014 provided that the defendant would extract construction material for the contract price of Kshs. 280,000 with half of the amount being paid after signing of the lease and the other half paid after excavation of the construction materials and that the defendant was required to back fill, level and return the suit property to its previous condition.
36. The contract did not provide for any specific timelines within which the defendant was to carry out the excavation or penalties for breach of the contract by any of the parties. Accordingly, there was a divergence of views on when the breach arose.
37. The plaintiff testified that the road construction ended in 2014 and that the back filling and restoration of the suit property was supposed to be done in 2015 and that such back filling had not commenced as at the time he filed this suit. On his part DW1 testified that the defendant finished excavation in 2018 and even started the process of back filling the suit property before the plaintiff brought them to court.
38. This Court thus has to determine whether there was breach of contract by the Defendant and therefore whether the Plaintiff is entitled to damages for such breach. In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff has alleged that he entered into a lease agreement with the Defendant for the excavation of construction materials from his land by the defendant and thereafter the defendant would backfill the said land. Further, that the lease agreement was reduced into writing and signed by all the parties.
39. Section 3 (3) of the [Contract Act](#) provides that:
- “ 3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless
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- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:



Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

40. The Court has carefully perused the lease agreement produced as an Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties.
41. However, that agreement or signature of the plaintiff and the defendant's authorized person was never attested by any person. In other words, the lease agreement was never witnessed by anyone. Thus, albeit the agreement is not denied by the defendant, it does not meet the meet the threshold in Section 3(3) of the *Law of Contract Act*.
42. Further, although the agreement for lease contains the names of the parties and the price as agreed, as well as the conditions for the lease, the title of the property in issue was not provided by description.
43. The question is whether such document which is not witnessed is a valid lease agreement which is enforceable by the parties. In the case of *Kukal Properties Development Limited v Tafazzal H. Maloo & 3 Others* (1993) eKLR, the Court of Appeal pronounced itself in a dispute where only one party had signed the agreement for sale of land. Commenting on the legal framework in Section 3(3) of the *Law of Contracts Act*, Muli JA held as follows:

“With the greatest respect, the learned trial judge misdirected himself. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?

It is trite law on this point and is made beyond doubt under Section 3(3) of the Law (Cap 23 Laws of Kenya)

I hold that the intended agreement between the appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law.”

44. In the case of *Silverbird Kenya Limited v Junction Limited and 3 others* (2013)eKLR, the Court held that:

“...plaintiff did not have a contract that satisfied the mandatory provisions of the *Law of Contract Act*. In my view it matters not that the plaintiff had been let into possession of the premises if the Contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirement of Section 3(3) of the *Law of Contract Act* to be the foundation of the Plaintiff's claim against the Defendants. Section 3(3) of the *Law of Contract Act* is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the *Law of Contract Act*, the plaintiff's suit must fail for being in contravention of section 3 (3) of the *Law of Contract Act*, Cap 23 Laws of Kenya.”

45. Based on the Provisions of Section 3(3) of the *Law of Contract Act*, the entire of the Plaintiff's suit, would collapse. See also *Chirchir Arap Kuto v Nancy Cherotich Koeh & another* [2022] eKLR where similar issues were discussed by the court.



46. However, as the defendant is willing to backfill the land, I would not dismiss the plaintiff's case at this stage. I will determine whether the plaintiff is entitled to any other of the other reliefs sought.
47. The next question is whether the plaintiff was entitled to general damages for loss of use of the land. I reiterate that the contract between the parties herein failed to meet the threshold of a validly executed agreement and neither did it provide for instances of breach.
48. Nonetheless, in terms of a claim for general damages, even assuming that there was any valid contract capable of being breached in this case, it is well settled law that it cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of *Joseph Urigadi Kedeva v Ebby Kangishal Kawai* Kisumu Civil Appeal No. 239 of 1997 (UR) cited in *James Maranya Mwita v South Nyanza Sugar Co. Ltd* [2017] eKLR emphatically expressed itself thus:
- “... As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....”
49. In the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* [2015] eKLR the court explained why general damages cannot be awarded in cases of breach of a contract as hereunder:
- “The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase restitution in integrum (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.
50. The general damages for loss of use of land are in the form of special damages. Accordingly, they must be specifically pleaded and proven. In this case, I note that the plaintiff failed to plead specifically how much he lost for the use of his land. At the hearing, however, he relied on the the testimony of PW2 who testified that as a result of the defendant's failure to restore the suit property by back filling, the plaintiff lost a total loss of 8 harvests for 9 years which amounted to Kshs. 2,640,000.
51. PW2 also testified that he did not know what was planted on the suit property prior to the excavation but that from his conversations with the plaintiff, he discerned that the plaintiff planned to plant sugarcane at the start of 2015.
52. However, in cross-examination, PW2 admitted that he had not factored in the cost of production into his calculation. It was PW2's testimony that though he was qualified as a horticulturist, he had worked



with the Sugar Research Institute for 13 years and was the link between the research institute and the farms.

53. As regards the weight a court of law should attach on expert opinion, in the case of *Stephen Kinini Wang'ondou v The Ark Limited* [2016] eKLR it was held that:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.”

54. In my view, PW2'S testimony was unreliable. The fact that he failed to take into account the cost of production despite his alleged 13 years in service cast doubts on his ability as the right person to calculate loss of use of land.

55. There was thus no evidence adduced by the plaintiff to support his claim for loss of use of land. This claim thus lacks merit and fails in its entirety.

56. As to whether this court should award exemplary and aggravated damages, the Court of Appeal in the case of *Miguna Miguna v The standard Group Ltd & 4 others* [2017] eKLR while quoting the case of *John v GM Limited* [1993] QB 586 held that:

“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize.”

57. It seems then that aggravated damages are awarded where reputation of an individual has been tarnished such as in defamation cases. Exemplary damages go beyond compensation. Both damages are meant to punish the wrongdoer and act as a deterrent from similar conduct in future.

58. The Court of Appeal in the case of *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR stated;

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

59. In the circumstances, I am not satisfied that the defendant's actions were so arbitrary and oppressive so as to justify an award of exemplary damages. This award is equally denied.



60. The plaintiff also sought an award of Kenya Shillings Twenty-Nine Million One Hundred and Forty-Seven Thousand Three Hundred and Sixty (Kshs. 29,147,360) to undertake back filling of the suit property, a sum that was quantified by PW3.
61. This sum was deemed as exaggerated by the defendant on account of the value of the land being Kshs. 1.2 million and further on the basis that the lease agreement failed to provide when the defendant company was expected to finish the back filling or penalties for failure or delay to back fill the pit.
62. I am in agreement with the defendant that the claim of Kshs. 29,147,360 for back filling is unconscionable and exaggerated and unjustified. There is absolutely no basis for such a claim since the defendant's authorised witness all along in the testimony on oath stated that they were willing to backfill the land and that they had started the process although the materials were not enough then the plaintiff brought them to court. the plaintiff in my view, cannot claim that he is entitled to such monies when the value of the land is only 1,200,000 as valued by an independent government valuer. agreed upon by both parties during their negotiations for an out of court settlement which negotiations collapsed.
63. So, what then should this court do? In my view, the defendant having agreed to back fill the land despite the unenforceability of the agreement which was not witnessed as required by law, I thus find that this is an appropriate case and that it is in the interest of justice to order specific performance on account that the defendant has offered to backfill the land which is not even identified by description in the invalid agreement. I therefore order that the defendant shall commence the exercise of back filling of the plaintiff's excavated land and the process shall be concluded within ninety days and in compliance with the NEMA guidelines.
64. I order that each party to bear their own costs of this suit.
65. Decree to issue.
This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

