



REPUBLIC OF KENYA



**Blast Contractors & General Supplies Ltd v County Government of Meru
(Civil Case 15 of 2020) [2024] KEHC 2806 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE 15 OF 2020
TW CHERERE, J
MARCH 14, 2024**

BETWEEN

BLAST CONTRACTORS & GENERAL SUPPLIES LTD PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MERU RESPONDENT

JUDGMENT

1. Plaintiff is a limited liability company incorporated under the *Companies Act*. Defendant on the other hand is a County Government established under the provisions of Article 176 of the *Constitution*.
2. Defendant put up a tender notice in the Star Newspaper of 25th March, 2006 advertising numerous services among them Tender No. CGM/ONT/036/2015-2016 for Construction of Kianjai Water Project.
3. Robert Njonjoro Michuki, the director of the Plaintiff testified that Plaintiff tendered and won the tender Tender No. CGM/ONT/036/2015-2016 for Construction of Kianjai Water Project and was on 05th May, 2016 issued with a notification of award of the said tender at the cost of KES. 54,184,160,80 cts which was accepted by letter dated 10th May, 2016.
4. The witness stated after carrying out some of the works, an invoice dated 14th September, 2019 for KES. 22,570,000/- was raised and settled.
5. It was additionally the evidence by Plaintiff's witness that after carrying out additional works, a request for payment of KES. 18,325,150/- and after inspection of the works, Defendant issued an Inspection and Acceptance Report dated 19th October, 2017 but the sum remains unsettled to date
6. It was the witness' further evidence that by letters dated 12th August, 2016, Plaintiff requested for variation of the tender to include a 6' casing valued at KES. 700,000/- that was omitted from the tender, 21st July, 2016 for construction of the access road to the project at the cost of KES.252,000/- and 04th



- February, 2017 supply and installation of a generator at the cost of KES. 2,245,000/-. The witness tendered letters dated 04th October, 2016, 10th November, 2016 and 10th August, 2017 signed by the Defendant's Director Water Technical Services by which the variations were approved.
7. The witness stated the variation works were completed and in spite of demands to Defendant vide letters dated 21st February, 2017 and 17th January, 2018, Defendant declined to pay.
 8. Flowing from the foregoing, Plaintiff seeks the following orders:
 1. Payment of KES. 18,325,150/
 2. Payment of KES. 3,197,000/-
 3. Interest at the rate of 14% per annum from 02nd August, 2017 till payment in full
 4. Damages for breach of contract
 5. Special damages of KES. 14,116,200/- for loss attributed to interests on unpaid loans occasioned by non-payment by the Defendant
 6. Costs and interest
 9. The Plaintiff's second witness Juliano Mithika Mikangu who was the project manager of the works in issue confirmed that he issued the Inspection and Acceptance Report dated 19th October, 2017 to confirm that works valued at KES. 18,325,150/- had been completed and the sum was therefore payable.
 10. The witness in addition stated that variation works valued at KES. 3,197,000/- were completed but that no completion certificate was issued by the Defendant for the project was completed only to the extent of 90%.
 11. Joseph Mwenda Arimi, a Senior Superintendent Water Engineer testified on behalf of the Defendant and confirmed that he was one of the persons that inspected and accepted the works valued at KES. 18,325,150/- for 75% and issued an Inspection and Acceptance Report dated 19th October, 2017 to confirm the works had been carried out to the satisfaction of the client. He also confirmed that the project had stalled.

Analysis and Determination

12. I have considered the evidence on record and written submissions filed on behalf of the parties and the cited authorities.
13. That there was a binding contract between the parties for Construction of Kianjai Water Project is admitted by the Defendant.
14. That an invoice dated 14th September, 2019 for KES. 22,570,000/- supported by an interim payment certificate dated 07th September, 2016 was paid to the Plaintiff is similarly admitted.
15. Consequently, the issues for determination are as follows:
 1. Whether the sum of KES. 18,325,150/- is payable
 2. Whether the sum of KES. 3,197,000/- is payable
 3. Whether damages for breach of contract are payable
 4. Whether special damages of KES. 14,116,200/- are payable



5. Whether interest at the rate of 14% per annum from 02nd August, 2017 till payment in full is payable
 6. Who bears the costs of the suit
16. I shall now proceed to address each of the issues as hereunder.

1. Whether the sum of KES. 18,325,150/- is payable

17. Plaintiff's witness stated that the works valued at KES. 18,325,150/- were inspected and accepted vide an Inspection and Acceptance Report dated 19th October, 2017 but the sum remains unpaid to date.
18. The Plaintiff's and Defendant's witnesses confirmed that as at the time of signing the Inspection and Acceptance Report dated 19th October, 2017, they were satisfied that 75% works had been carried out to the satisfaction of the client and they therefore supported the Plaintiff's claim for payment of the said sum.
19. From the foregoing, I find that the issuance of the Inspection and Acceptance Report dated 19th October, 2017 is a confirmation that the 75% of works had been completed to the satisfaction of the Defendant and Defendant cannot be heard to say that the sum of KES. 18,325,150/- is not due to the Plaintiff.

2. Whether the sum of KES. 3,197,000/- is payable

20. Plaintiff has tendered evidence which the Defendant's witness did not dispute that Defendant approved variations to the tender to include installation of a 6' casing valued at KES. 700,000/-; for construction of the access road to the project at the cost of KES.252,000/- and supply and installation of a generator at the cost of KES. 2,245,000/-.
21. It is trite law that "whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states as follows:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
22. Other than the oral evidence by Plaintiff's and Defendant's witnesses that the variations works were carried out, no iota of evidence was placed before the court in support of the said claim.
23. Consequently, I find that the Plaintiff has failed to discharge the burden to prove that the approved variation works were carried out and therefore the sum of KES. 3,197,000/- is not payable.

3. Whether damages for breach of contract are payable

24. It is settled law, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it (See *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* [2018] eKLR).



25. There is undisputed evidence that Defendant did not pay the sum of KES. 18,325,150/- when it fell due. However, neither in the Plaintiff's witness' evidence nor in the submissions in support of the Plaintiff's case has it been demonstrated that any term of the contract between the parties herein provided for payment of damages for breach of contract.
26. A case for breach of contract arises from the agreement between the parties and since the court cannot rewrite the contract between the parties herein, it can also not impose payment of damages that were not contracted.
27. Furthermore, in *Dharamshi v Karsan* [1974] EA 41, the Court of Appeal for East Africa held that general damages for breach of contract are not allowed in addition to quantified or special damages. The legal position on this issue was summarized in the case of *Consolata Anyango Ouma v South Nyanza Sugar Company Limited* MGR HCCA No. 53 of 2015 [2015] eKLR as follows:
- “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. 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)).
28. From the foregoing, I find that no case has been made for the award of general damages for breach of contract.

4. Whether special damages of KES. 14,116,200/- are payable

29. It is trite that special damages must be both pleaded and proved. Suffice it to quote from the decision of the Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
30. What the Plaintiff has done is what the Court of Appeal said in *David Bagine v Martin Bundi*, Nairobi, Court of Appeal, Civil Appeal 283 of 1996 [1997] eKLR), throw damages at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages.
31. The claim for special damages in the sum of KES. 14,116,200/- though specifically pleaded was not specifically proved and it is thus rejected.



5. Whether interest at the rate of 14% per annum from 02nd August, 2017 till payment in full

32. As a legal principle, special damages that are pleaded and proved ought to accrue interest at court rates, or any other rates as may be pleaded from date of filing the suit. Section 26(1) of the Civil Procedure Act is explicit that;

“Where and in so far as decree is for payment of money, the court may, in the decree, order interest at such rate, as the court deems reasonable to be paid on the principal sum adjudged on sum principal sum for any period before the institution of the suit, with further interest as sum rate as the court deems reasonable on the aggregate so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.”

33. The above principle was well explained by the Court of Appeal in *Ajay Indravadan Shah v Guilders International Bank Ltd* [2002] 1 EA 269 clarified thus;

This section in our understanding confers upon the court the discretion to award and fix rate of interest to cover three stages, namely, the period before the suit is filed the period from the date the suit is filed to the date when the court gives its judgment; and from the date of the judgment to the date of payment of sum adjudged due or such earlier as the court may, in discretion, fix.

We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable.

34. There is no evidence that the parties herein fixed the rate of interest payable. Plaintiff has on the other hand not explain why it seeks interest specifically from 02nd August, 2017.

35. In exercise of this court’s discretion to award interest, this court awards interest at court rates from the date of filing suit until payment in full.

6. Costs

36. Section 27 of the Civil Procedure Act Cap 21 Laws of Kenya provides: -

“(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

37. Since costs follow the cause/event, a successful party such as the Plaintiff is entitled to the costs of the suit.

38. From the foregoing analysis, I find that the Plaintiff’s case has been partially proved.

39. In the end, judgment is entered in favour of the Plaintiff as against the Defendant for:

1. KES. 18,325,150/- (eighteen million, three hundred twenty-five thousand, one hundred and fifty)
2. Interest at court rates from the date of filing suit



3. Costs of the suit

DATED AT MERU THIS 14TH DAY OF MARCH 2024

WAMAE.T. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munrne

For Plaintiff -Mr. Michuki for E.Kinyanjui & Co. Advocates

For Defendant - Mr. Ashaba for Mutuma Gichuru & Associates Advocates

