



**Prudential Building Society (In Liquidation) v Gathinji & another (Civil Case 182 of 2015)
[2024] KEHC 3301 (KLR) (Commercial and Tax) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 182 OF 2015
JWW MONG'ARE, J
MARCH 14, 2024**

BETWEEN

PRUDENTIAL BUILDING SOCIETY (IN LIQUIDATION) PLAINTIFF

AND

NDUNG'U GATHINJI 1ST DEFENDANT

LAWRENCE NGAMAU 2ND DEFENDANT

JUDGMENT

1. This judgment is in respect of the 1st and 2nd Defendants Counterclaim filed on 4th October 2016 together with an Amended Defence amended on 28th September 2016. The Counterclaim was filed pursuant to a consent order dated 28th April 2016. The Plaintiff's suit was dismissed for non-attendance and for want of prosecution through a ruling delivered on 12th March 2020.
2. As can be gleaned from the plaint, the backdrop to the suit is that in 1994 the Plaintiff advanced a loan of Kshs.120,000,000/= and an overdraft facility of Kshs.60,000,000/= to Mayfair Services and Investments Limited (in receivership) (Mayfair). The loan was secured by a charged dated 7th April 1994 over Title Number Eldoret Municipality/ Block 4/69 Uasin Gishu, where the Hotel Sirikwa, Eldoret was operated from. Following its default, Mayfair was placed under receivership and the 1st and 2nd Defendants, Certified Public Accountants working under Francis Drummond and Company Limited, were appointed as the Joint Receiver Managers of the charged property. The Plaintiff agreed to pay them a fee of 10% of the income recovered from the property.
3. The Defendants collected several sums on behalf of the Plaintiff and raised several fee notes for their receiver manager fees together with disbursements paid to service providers for the various services provided at the Hotel Sirikwa premises. The receivership went on until December 2011 when Mayfair



- through court action and settlement discussions, redeemed their indebtedness with the Plaintiff, without involving the Defendants.
4. Despite the effective termination of the receivership, the sub-tenants of the charged property continued to remit their rent to the Defendants as the joint Receiver Managers. The amount remitted amounted to Kshs.648,000/= as at November 2011, being rent received from August 2010 to November 2011.
 5. The Plaintiffs in the counterclaim claim against the Defendants was for Kshs.257,472/= being the net of the rent collected set off against the Defendant's receivership fees of Kshs.64,800/= and the sum owed to Inter Security Services who provided security at the Hotel Sirikwa Premises.
 6. The Defendants filed a defence and counterclaim, Amended on 28th September 2016, claiming that at the time of their appointment Mayfair's debt had risen to over Kshs. 1 billion. The Defendants averred that the 10% arose out of agreements entered into between the parties distinct from the instrument of their appointment as the joint receiver managers. They denied that the eventual redemption of Mayfair's indebtedness was without their input. Contrarily, the debt was redeemed by a payment arising out of Eldoret HCCC No. 50 of 2005 in which they actively participated as they had been sued as joint receiver managers.
 7. Out of court negotiations led to an agreement for an out of court settlement of the debt on a discounted sum of Kshs.178,000,000/= and a consent was recorded and the sum paid. The Defendants contended that the said amount was an income for purposes of the receivership and that they were still entitled to payment of their fees of 10% of the amount together with the receivership disbursements of Kshs.325,728/= due to Inter Security Services for security services rendered during the receivership period. The Defendants also contended that the Plaintiff acknowledged the Defendants' entitlement to the payment of fees but failed to effect the payment. They faulted the Plaintiff for dealing directly with the defence advocates, Musyoka Wambua and Katiku Advocates in Eldoret HCCC No. 50 of 2005, so as to avoid paying the Defendants' fees.
 8. The Defendants pleaded that the Plaintiff's failure to pay their fees was illegal, irregular and in breach of contract. The Defendants also pleaded that the Plaintiff intentionally misrepresented the facts of the redemption of the debt and failed to disclose that it arose out of Eldoret HCCC No. 50 of 2005 in which the Defendants were parties and participated in the proceedings and settlement negotiations.
 9. The Defendants averred that as a result of the non-payment of their fees, they have been unable to file the requisite statutory returns with the Registrar of Companies to close the receivership. The Defendants also averred that they have not refused to remit the sum of Kshs.648,000/- but have used the same to meet part of the disbursement of the receivership and that even though of the said sum there is a balance of about Kshs.240,000/= in the receivership bank account, a fact that has always been within the knowledge of the Plaintiff, the said sum is not sufficient to meet the outstanding receivership and the unpaid Defendant's fees.
 10. Through their counterclaim, the Defendants prayed for entry of judgment against the Plaintiff for:-
 - a. Special damages Kshs.18,189,725/=, being
 - i. Kshs.17,800,000/= being 10% of the said sum of Kshs.178,000,000/= realised in 2011 on the redemption of the debt.
 - ii. Kshs.64,800/= being 10% of the said sum of Kshs. 648,000/-.
 - iii. Kshs.325,728/= due and payable to the said Inter Security Services as receivership disbursements.



- b. General damages for breach of contract.
- c. An order that the Plaintiff do avail to the Defendants all details of all the fees payments they made directly to Musyoka Wambua & Katiku Advocates to enable the Defendants file the requisite returns with the Registrar of Companies on the receivership herein to close it.
- d. Costs and Interest.

Evidence

11. The matter was heard by Hon. Lady Justice Okwany' J. on 12th March 2020. There was no appearance by the Plaintiff or its counsel on record despite the fact that the hearing date was taken by consent on 21st November 2019.
12. The Defendants called the 2nd Defendant, Lawrence Ngamau who testified on his own behalf and behalf of the 1st Defendant. He adopted his witness statement dated 19th March 2017 and relied on it as his evidence in chief. He produced the Defendants' bundle of documents from pages 15 to 141 as the Defendants' exhibit 1.
13. The Defendants filed written submissions dated 28th May 2020.

Analysis And Determination

14. I have considered the counterclaim, the evidence and the submissions. The issue for determination is whether the Defendants have proven that the Plaintiff breached the agreement to pay fees of 10% of the amount recovered from Mayfair and whether they are entitled to the prayers sought.
15. In this case the Plaintiff's suit was dismissed for non-appearance. The Plaintiff did not file a reply to the Defendant's counterclaim. Therefore, before I consider the issues I take cognizance to this Court's duty as discussed in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014]* EKL.R, where the Court of Appeal stated as follows:-

“It is a firmly settled procedure that even where a Defendant has not denied the claim by filing a defence or an affidavit or even where the Defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the Defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

16. The Defendants' first prayer is for:-
 1. Special damages Kshs. 18,189,725/-, being
 - i. Kshs.17,800,000/= being 10% of the said sum of Kshs.178,000,000/= realised in 2011 on the redemption of the debt.
 - ii. Kshs. 64,800/= being 10% of the said sum of Kshs.648,000/=
 - iii. Kshs.325,728/= due and payable to the said Inter Security Services as receivership disbursements.



17. From the record, it is manifest that the Defendants were appointed as receivers over Mayfair Services and Investments Limited and the charged property through the deed of appointment dated 25th July 2003. I note that the deed of appointment is silent on the receiver/managers' fees.
18. The Defendants' claim is that the receivership remuneration was agreed at 10% of the amount redeemed, outside of the deed of appointment. The Plaintiff confirmed at para. 5 of the plaint that under the terms of the receivership it was agreed that the fees would be charged at 10% of the income recovered from the property plus disbursements.
19. The Plaintiff's case was that the receivership continued until December 2011 when the directors of Mayfair entered into an out of court settlement and redeemed their indebtedness to the Plaintiff without any input from the Defendants. However, the record reveals that the out of court settlement emanated from Eldoret HCCC No. 50 of 2005. The directors of Mayfair instituted the said suit against the Plaintiff herein and the 1st and 2nd Defendants herein (as receiver managers) as the 1st to 3rd Defendants.
20. The record also shows that the Defendants herein were involved in the out of court negotiations as they were copied in all correspondences. The parties agreed that Mayfair would pay the discounted sum of Kshs.178,000,000/= in full and final settlement of the debt to the Plaintiff herein. The final payment was received on or about 11th December 2011.
21. Although the Plaintiff took the position that the receivership ended with the redemption of the debt in December 2011, the Defendants' fees and disbursement of Kshs.325,728/= were left pending.
22. Taking the whole matter into consideration, I find that the Defendants have proved their claim for breach of contract against the Plaintiff to the required standard.
23. The second prayer is for general damages for breach of contract. It is well founded that general damages for breach of contract are not allowed in addition to special damages. This principle was espoused in the case of Dharamshi v Karsan [1974] EA 41, where the Court of Appeal for East Africa observed that:-

“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. 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. 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.”

24. Accordingly, the prayer for general damages fails.
25. In sum I find and that on a balance of probabilities, however, that the Defendants have established their claim under the counterclaim and hereby do enter judgement for the Defendant as prayed in the counterclaim in the following terms:-

Judgment is entered for the 1st and 2nd Defendants against the Plaintiff for:-

- a. Special damages of Kshs. 18,189,725/-, being
 - i. Kshs.17,800,000/= being 10% of the said sum of Kshs.178,000,000/= realised in 2011 on the redemption of the debt.



- ii. Kshs. 64,800/= being 10% of the said sum of Kshs.648,000/=.
 - iii. Kshs.325,728/= due and payable to the said Inter Security Services as receivership disbursements.
- b. An order that the Plaintiff do avail to the Defendants all details of all the fees payments they made directly to Musyoka Wambua & Katiku Advocates to enable the Defendants file the requisite returns with the Registrar of Companies on the receivership herein to close it.
 - c. Interest at court rates from the date of filing the counterclaim till payment in full.
 - d. Costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF MARCH, 2024

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Mr. Emmanuel Ole Ntome for the Plaintiff.**
- 2. Ms. Florence Mwangangi for the Defendant.**
- 3. Amos - Court Assistant**

