



**Dyme and Co Inc v Bravie Group Limited & 2 others (Civil Case E048 of 2022)
[2024] KEHC 11135 (KLR) (Commercial and Tax) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11135 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E048 OF 2022
FG MUGAMBI, J
SEPTEMBER 20, 2024**

BETWEEN

DYME AND CO INC PLAINTIFF

AND

BRAVIE GROUP LIMITED 1ST DEFENDANT

SAMUEL WAITHIKA 2ND DEFENDANT

JACKSON KAHORA 3RD DEFENDANT

JUDGMENT

Background

1. The background to this suit, as contended by the plaintiff, is an agency relationship in which the plaintiff appointed the 1st defendant as its agent to facilitate the purchase of a consignment of gold from Butembo Mineraux Sarl.
2. The 1st defendant was required to facilitate the export of the consignment of gold to New York City, where the plaintiff is based. This included receiving money from the plaintiff, paying applicable fees for the export of the gold to concerned agencies and bodies, and processing all requisite documentation.
3. The 2nd and 3rd defendants, as director and agent of the 1st defendant respectively, engaged with the plaintiff's director, Mr. Jorge De Yarza, and sent him invoices for payment of the services. The plaintiff sent the 1st defendant a total of USD 282,460 through bank transfer, credit card, and Mpesa mobile money transfer.
4. Despite receiving the payments, the 1st defendant failed to perform the services or ship the gold to the plaintiff. Additionally, the 1st defendant did not comply with the plaintiff's demand to either fulfill



the contract or refund the amount paid, which led to the filing of this suit. Through a plaint dated 8/2/2022, the plaintiff sought judgment against the defendants for:

- i. Liquidated damages in the sum of USD 282,460;
 - ii. General and punitive damages against the defendants for breach of their fiduciary duty; and
 - iii. Interest on the liquidated sum of USD 282,460 at court rates computed from 30/11/2021 until the last day of payment.
5. The defendants neither entered an appearance nor filed their defenses despite service. As a result, an interlocutory judgment was entered against them on 22/4/2022 for the liquidated sum of USD 282,460. The defendants applied unsuccessfully to set aside the interlocutory judgment and subsequently the matter proceeded to formal proof hearing on 13/7/2023 for the remainder of the claim.

The Evidence

6. There was no appearance by the defendants during the formal proof hearing. The plaintiff called one witness, Mr. Jorge De Yarza, a member and shareholder of the plaintiff company. He adopted his witness statement of 8/2/2022 as his evidence and produced the bundle of documents of even date, which were admitted as PExh1.
7. The testimony by PW1 mirrored the averments in the plaint and witness statement as summarized above.

Analysis and Determination

8. I have carefully considered the pleadings, evidence, submissions and authorities cited by the plaintiff. Following the interlocutory judgment, the sole issue for determination is whether the plaintiff is entitled to general and punitive damages against the defendants for breach of fiduciary duty.
9. The Black's Law Dictionary, 11th edition, defines a fiduciary duty as:
- “A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust; ... a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person. ... Also termed as duty of loyalty, duty of fidelity; duty of faithful service; duty to avoid conflict of interest.”
10. In order to prove the existence of such a fiduciary duty the plaintiff produced a contract titled Sale and Purchase Agreement for Bars of Gold. The contract, though entered into between the plaintiff and Butembo Mineraux Sarl (the seller), refers to an agreement between the plaintiff and the 1st defendant courtesy of which the plaintiff would use the 1st defendant to facilitate and expedite the legal and proper export of the goods
11. The plaintiff also produced a Power to Act dated 21/10/2021, signed by the 3rd defendant, through which the 1st defendant confirms its acceptance to act with authority from the plaintiff and the seller, to facilitate and expedite all the legal and proper export documents and to ship cargo to the plaintiff's destination.
12. In the absence of any proof by the defendants that they had performed their part of the agreement, I am satisfied that the plaintiff has proved its case to the required standard. Given that the plaintiff relied on the advice of the 1st defendant and expected the 1st defendant to act honestly and in the plaintiff's



best interest, I find and hold that the 1st defendant owed the plaintiff a fiduciary duty, which was to be executed through the 2nd and 3rd defendants.

13. I am equally satisfied that the plaintiff has proven the breach of that fiduciary duty by the defendants. This was demonstrated by producing invoices issued by the 1st defendant, bank statements showing corresponding entries, and World Remit payment receipts as evidence of payment to the defendants. The defendants acknowledged receipt of the payments from the plaintiff in execution of their duties. However, betraying the trust placed in them, the defendants took the money but failed to deliver the goods as contracted.
14. As to whether this entitles the plaintiff to an award of general and punitive damages, the plaintiff urges the court to consider the award based on the defendants' conduct. The plaintiff contends that the defendants' actions were calculated to make a profit that could exceed the compensation payable to the plaintiff. Furthermore, the plaintiff argues that the defendants have been in possession of the plaintiff's funds since the suit was instituted, resulting in the plaintiff losing the opportunity cost and use of its money during this period.
15. The plaintiff relies on this court's decision in *Nicholas William Bentley-Buckle & Another V Custody & Registrars Services Limited & Another*, [2019] eKLR to urge the court to consider an award of Kshs. 10,000,000/- against each defendant. However, it should be noted that in ordering the payment of a similar amount to the plaintiff, the court (Kasango, J) based the award not on a breach of trust and fiduciary duty by the defendants, but on their acts of negligence. This is what distinguishes the two cases.
16. The Learned Judge in that decision in fact acknowledges that;

“General damages, it needs to be said are not recoverable for breach contract. The Plaintiff has prayed as a separate prayer for general damages. I am of the view the Plaintiff can recover general damages from both the Defendants for their wrongful acts and omissions of selling the deceased's shares. They are liable in damages for their negligent acts and omissions. In my view it is fair and just for the Defendants, each one of them, to pay the Plaintiffs Kshs. 10 million.”

17. I would further refer to the decision in *Dharamshi V Karsan*, [1974] EA 41. The Court of Appeal for East Africa affirmed the principle that general damages for breach of contract are not allowed in addition to quantified or special damages. It stated:

“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.”

18. From the foregoing, it is evident that the court will not award general damages for breach of contract but will instead award special damages. The *Halsbury's Laws of England*, Volume 12(1), at paragraph 1018, emphasizes that damages for breach of contract should compensate an innocent party's loss and



place them, as far as money can achieve, in the position they would have been in had the contract been performed.

19. General damages are awarded for non-quantifiable losses such as pain and suffering, emotional distress, or loss of reputation. The Halsbury's Laws of England, Volume 12(1), at paragraph 880, acknowledges that:

“General damages do not need to be specifically proved. However, the plaintiff must plead any material facts giving rise to a claim for general damages and must provide such evidence as is necessary and appropriate to support such a claim.”

20. In this case, the plaintiff is entitled to be returned to the position they would have been in had the defendants not breached their fiduciary duty. The court, in its interlocutory judgment, awarded the plaintiff special damages, including a refund of the agency fees paid to the defendants and the money that was allegedly used to purchase the gold.
21. Given that the plaintiff's loss is financial and directly tied to the breach of contract, an award of general damages is not justified. The financial loss has been adequately compensated through the liquidated special damages awarded, amounting to USD 282,460, which covers the incurred financial loss due to the defendants' breach of contract.
22. Regarding the issue of interest, the argument that the plaintiff has been deprived of the use of its money by the defendants is plausible. The appropriate remedy for this is an award of interest. I am satisfied that the plaintiff is entitled to interest from the date of filing the suit.

Disposition

23. Accordingly, the prayer for general and punitive damages fails. The plaintiff shall have interest on the special damages awarded in the interlocutory judgment at court rates from the date of filing suit until payment in full together with the costs of the suit on an undefended basis.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

