



**Njeri v Muinde (Commercial Appeal E071 of 2021)
[2023] KEHC 3555 (KLR) (Commercial and Tax) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E071 OF 2021
JWW MONG'ARE, J
APRIL 17, 2023**

BETWEEN

JAMES NJENGA NJERI APPELLANT

AND

GERALD MUTUNGA MUINDE RESPONDENT

(Being an appeal from the Judgment of the Honourable Court delivered on the 27th July 2021 at the Chief Magistrates Court at Nairobi, Milimani Commercial Courts in CMCC No. 1894 of 2019 by Hon. D.O Mbeja- Principal Magistrate)

JUDGMENT

1. By a Memorandum of Appeal dated and filed before this court on 13th August 2021, the Appellant has moved to challenge the decision of Chief Magistrates Court at Nairobi in CMCC No. 1894 of 2019 delivered on 27th July 2021 on the following grounds;
 - i. The learned Magistrate erred in fact and in law in interpreting some of the contract clauses in the contract in dispute in complete isolation of the entire contract as a whole and therefore arriving at the wrong decision.
 - ii. The learned Magistrate erred in fact and in law in entering Judgment in favour of the Respondents while at the same time making a finding that the Respondent himself was in breach of the contract in dispute.
 - iii. The Learned Magistrate erred in fact and in law by awarding the Respondent special damages while the Respondent produced no evidence to support the claim for special damages.



- iv. The learned Magistrate erred in fact and in law in awarding costs and interest from the date of filing the suit without giving any reason contrary to the law and known legal principles and therefore a wrong exercise of judicial discretion.
 - v. The learned Magistrate erred in fact and in law by ignoring or failing to consider the evidence of the Appellant, in particular the ruling and order in civil case number 248 of 2019 b the Hon. S Atambo(Senior Principal Magistrate) Which was directly related to the case before him.
 - vi. The learned Magistrate erred in fact and in law by condemning the Appellant to pay costs of the suit while no demand Notice had been issued to him by the Respondents before instituting the suit.
2. The appeal is opposed and the Respondent has filed his grounds of appeal dated and a replying affidavit sworn by Gerald Mutunga Muinde, the Respondent.
3. Briefly the background to this appeal emanates from a sale agreement by both parties for a sale of a lorry registration number KBZ 454Y entered into by the parties for a sum of Kshs.3,100,000/-. Subsequently, the Appellant, who was the seller, failed to meet his obligations and the Respondent filed a suit before the Chief Magistrate’s court at Milimani, Nairobi being CMCC No.1894 of 2019. The matter was heard and the court entered judgment in favour of the Respondent as follows;
- a. That a declaration be and is hereby made that the defendant’s action amounts to a breach of the sale agreement dated 22nd December 2016 between him and the plaintiff.
 - b. That a declaration be and is hereby made that the transaction failed to go through at the instance of the defendant, the vendor.
 - c. That a declaration be and is hereby made that the plaintiff, according to the sale agreement, is entitled to a refund of all the money he has paid the defendant’s banker with an interest at 30% as states in the sale agreement.
 - d. That a declaration be and is hereby made that the plaintiff is entitled to special damages for the loss of income suffered while the motor vehicle was in possession of the defendant’s banker as pleaded above.
 - e. That the defendant do refund to the plaintiff the whole amount of money paid to his bank being Kshs.3,100,000/- plus interest at 30%.
 - f. That the defendant do pay the plaintiff special damages for Kshs.2,480,000/-.
 - g. That interest in (e) and (f) above at court rate from date of filing.

Particulars of Decree:-

i.	Special damages	2,480,000.00
ii.	Interest of Kshs.3,100,000/- at the rate of 20%.....	2,209,578.08
iii.	Interest at 12% from 21/3/2020-10/3/2022.....	1,668,204.95
	Total.....	6,357,785.03

4. The Appellant being dissatisfied with the above decision filed the current appeal seeking to set aside the above decision. The appeal is opposed. Both the Appellant and the Respondent have filed written submissions and list of authorities which I have considered alongside the record of appeal.



The Appellant's Case:-

5. In the memorandum of Appeal the Appellant raises six grounds of appeal which upon perusal can be clustered into three;
 - i. Whether the trial court erred in its interpretation of the contract between the parties?
 - ii. Whether the trial court erred in awarding special damages without sufficient proof or evidence.
 - iii. Whether the trial court erred in awarding interest and costs to the successful party in the absence of a demand notice.
6. The Appellant has faulted the trial court in its interpretation of the sale agreement forming the crux of the suit herein. While admitting that the sale agreement was valid, the Appellant states that the same had conflicting clauses which the court ought to have taken into consideration when making its findings. The Appellant states that the trial court failed to interpret the contract as a whole but instead isolated certain clauses and gave them prominence in arriving at a decision. The Appellant submitted that clauses (a), (c) and (d) were in conflict with clause (e) and (f). It is the Appellant's submissions that if but the court chose r on its breach. In clause (a) the agreement acknowledges the joint registration of the motor vehicle between the Appellant and Equity Bank and clause (c) brings in payment of the loan balance in instalments while clause (e) envisions completion immediately upon execution where the Appellant was expected to provide documents including the original Logbook. The Appellant argues that the trial court ought to have breathed life into the said clauses and determined that the logbook could only be availed at the end of sixteen months when the last instalment was paid and not on execution.
7. The Appellant argued that both parties were in violation of certain clauses of the contract and the court ought to have taken that into consideration as it made its decision. On the part of the Appellant, there was failure to meet the deadline on the completion while the respondent did not adhere to the timelines. The Appellant argued that the trial court had no basis to enter judgment in favour of the Respondent in the circumstances.
8. On the issue of the award of special damages, the Appellant argues that although the Respondent did not provide documentary evidence to substantiate its claim. The Appellant argued the Respondent did not produce receipts, invoices or bank records to prove that he was indeed making 80,000 per day in his business from the lorry and yet the court without proof, the court went ahead to award him special damages. The Appellant argued that special damages once pleaded cannot be awarded unless there is evidence to prove that indeed the claim is true. The Appellant argues that the court had no basis to make the said award.
9. On interest and costs awarded to the successful party by the court, the Appellant argues that there was no basis to award the same because, in his view, the respondent did not issue a demand notice as required by law and as such does not deserve the said award. The Appellant argues that had the Respondent issued a demand notice to the Appellant to produce the completion documents, maybe the current law suit would have been avoided and therefore he I underserving of the costs.

The Respondents Case:-

10. In his submissions the Respondent argues that what the Appellant is asking the court to do is to rewrite the contract between the parties and correct the errors or any mistakes made in the contract. The Respondent argues that there is no ambiguity in the contract and that the trial court was right in holding that the Appellant did not fulfil his obligations under the sale agreement and holding him



responsible for the breach. The Respondent argues that on his part he paid the full sale agreement for the lorry and cleared the Bank loan on the same only for him to realize that the Appellant had taken another loan and pledged the Lorry as security, hence frustrating the contract. The Appellant submitted that this act by the Appellant was a violation of the contract and that it was clear that the Appellant was not entering the contract in good faith.

11. On the issue of proof of special damages, the respondent argues that the court was right in finding that he was entitled to the award. The respondent argued that the Appellant knowing that he had pledged the vehicle for yet another loan other than what the respondent had been paid, he allowed the vehicle to be repossessed by the bank and hence occasioning him loss of business, since he had procured the lorry to use it for transport business. He therefore submitted that the court was right to award the claim for special damages and that there was no error at all, since he was able to establish that he was in informal employment, which did not demand record keeping or receipts or other documentation. He further argued that the Appellant was aware all along that he had acquired the vehicle for use in his logistics business which was greatly incapacitated when the lorry was taken away by the bank. In any event, the Respondent argues, that he did not anticipate to have to prove his income when entering into the purchase agreement for the lorry and to deny his claim for loss of income would be to punish him twice.
12. The Respondent's position on the award of costs and interest at court rates are that these are discretionary and are given by the court and that the same depends a lot on the circumstances surrounding the case. The court will withhold such awards if it is persuaded that the successful party contributed negatively to the case. In this case, the respondent argued that the court felt that he was deserving of the costs and interest at court rates and properly granted the same.

Analysis and Determination: -

13. The Court of Appeal outlined the duty of the first appellate court in the case of *Abok James Odera t/ a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR, when it stated as follows;-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
14. Guided by the above tenets I have carefully considered the entire record of appeal and the written submissions by both parties. The issues as set out above are three, as summarized from the six grounds of appeal contained in the memorandum of appeal, to wit;
 - i. Whether the trial court erred in its interpretation of the contract between the parties?
 - ii. Whether the trial court erred in awarding special damages without sufficient proof or evidence.
 - iii. Whether the trial court erred in awarding interest and costs to the successful party in the absence of a demand notice.
15. As to “whether the trial court erred in its interpretation of the contract between the parties,” the trial court found that the sale agreement was a binding contract and awarded the respondent the sum of Ksh.3,100,000/- being the monies paid towards the purchase of the Lorry. The court also found that while the Respondent had met his obligations under the contract, the Appellant had not in that he did not provide the completion documents as envisioned under clause D of the sale agreement.



16. The Court of Appeal has in the case of *Pius Kimaiyo Kiplangat v Co-operative Bank of Kenya Limited* (2017) eKLR reiterated

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

In my evaluation of the Judgment of the lower court I note that the court properly analyzed the contract as a document drawn by the parties with the intention to be bound therein by the terms of it, and the evidence availed to it by the parties during the trial. I have noted that the decision of the trial court on this issue was proper in that the court in its decision upheld the wishes of the parties without resorting to rewriting the contract for them. I am satisfied with the holding and find no good reason to disturb the same.

17. On the second issue as to “whether the trial court erred in awarding special damages without sufficient proof or evidence”. From the pleadings in the trial court, the respondent pleaded special damages arising from loss of business. He testified that he was a transporter and would transport goods from Nairobi to Kampala through Busia Border. He testified that he would make in a week between 80,000- to and 65,000. He testified that a journey to Uganda and back would take up to four days. On his return journey, he would carry pineapples and watermelon from Kampala and would roughly make Kshs.83,000/-. It is from this testimony that the court awarded the Respondent special damages for loss of business at the sum of Kshs.2,480,000/-. This was loss estimated to have occurred over a period of 31 weeks during when the Bank had impounded the Lorry.

- a. I note that courts, including the Court of Appeal, have granted prayers for special damages on evidence alone even when no documents to prove the claim have been tendered. The evidence on record is that the Respondent bought the vehicle for business and indeed used it as such before it was taken away from him. Like the trial court, I am convinced that indeed the Respondents was using the vehicle to transport goods across the border. To my mind, this business may be equated to the “jua kali sector” being one whose nature it is not unusual to find very scanty record keeping, if any, and I will not fault the court for the award of special damages to the Respondent. In my decision I am persuaded by the decision of Makau J in the case of *Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased))* [2018] eKLR where her held:-

“That while I am alive to the fact that watchman may be engaged by individuals or unregistered or registered security firms, most of them may not have letters of appointment nor are they issued with salary slips or sign payment vouchers as regards their earnings but it is not a requirement that proof of earnings be proved by daily earnings or on monthly basis by way of documentary evidence only such as payment voucher or payslip or books of accounts. The wrongdoer cannot be allowed to hide behind none production of documentary evidence or proof of earnings to deny his victim due compensation on the grounds of none production of documentary evidence on earnings as by allowing that, to be the only way to prove earnings, the majority of earners who are engaged in Jua Kali Sector, would be denied justice in matters in which strict proof of earnings will be insisted on.”



18. Similarly, the Court of Appeal in the case of *Jacob Ayiga Maraja and Francis Karani v. Simeon Obongo (Suing as the Administrator of the estate of Thomas Denga Obondo)* C.A. No. 167 of 2002 (Kisumu), stated thus: -

“In our view, there was more than sufficient material nor record from which the learned judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about KShs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things.”

19. For good reasons and on account of the fact the trial court had the opportunity to hear the evidence first hand, the trial court gauged the authenticity of the witness and decided that this case was a good one to award special damages on the evidence of the Respondent. I find that the decision of the trial court on special damages was arrived at by the trial court properly and I find no good reason to disturb it.
20. Finally, the third issue before me is “Whether the trial court erred in awarding interest and costs to the successful party in the absence of a demand notice.”

The Appellant has argued in his submissions that failure to issue a demand notice before filing suit disentitles the Respondent to an award of costs. He argued that costs are not an automatic right of a successful litigant despite the fact that courts have a wide latitude to award interest on damages and costs of the suit to the successful party in a suit. He asked to find that the fact that the trial court awarded costs and interest from the date of filing was erroneous and set it aside. On his part the respondent argued that the trial court exercised its discretion judiciously by awarding costs and interest at court rates and the court must have considered the unique circumstances and the nature of the case. He urged the court to uphold the award.

21. Section 27 (1) of the *Civil Procedure Act*, Cap 21, Laws of Kenya states; ”

“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.”

22. Since costs follow the event, in the case before me the trial court awarded costs and interest on damages upon awarding judgment to the successful litigant. As pointed out by both parties, costs are in realm of the discretion of the court and section 27(1) of the *Civil Procedure Act* above gives trial courts to award costs to successful litigants before them. Similarly, courts have wide latitude to award interest on costs and the period for when the same is to apply is left to the discretion of the individual courts. In the case before me, I note that the trial court judiciously used its discretion to award costs and interest on damages from the date of filing. No material has been placed before me to indicate that this was



an abuse of the court's discretion or outside the courts mandate and as such, I find no good reason to disturb the award.

Conclusion and Disposition:

23. The upshot of the above findings is that the Appeal before this court lacks merits and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF APRIL 2023.

J. W. W. MONGARE

JUDGE

In the presence of:

Mr. Gwaro for the Appellant

Mr. Munyoki for the Respondent

Sylvia- Court Assistant

