



REPUBLIC OF KENYA



King Investment Management Ltd v Rivatex East Africa Limited (Civil Appeal 17 of 2020) [2023] KEHC 17701 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 17 OF 2020
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

KING INVESTMENT MANAGEMENT LTD PLAINTIFF

AND

RIVATEX EAST AFRICA LIMITED DEFENDANT

JUDGMENT

1. The brief facts of the case are that the Defendant advertised for an Open International Tender No, Real/38/2019-2020 for Supply and Delivery of Polyester and Viscose Staple fibres on 17/12/2019 whose closing date was 15/01/2020 and the Plaintiff upon submission of its documents was awarded the said tender vide a letter dated 20th January 2020. Through said letter of notification the defendant notified the plaintiff that it had been awarded the tender at a sum of USD 803,660.00 and the plaintiff acknowledged acceptance of the award vide a letter dated 23rd January 2020. The parties then entered into a contract dated 4th February 2020. However, as the plaintiff was close to completing the order as per the contract, the defendant wrote a letter cancelling the contract on 26th March 2020 leading to the present suit.
2. The plaintiff then instituted this suit vide a plaint dated 26th may 2020 seeking the following reliefs;
 - a. A declaration that the letter of cancellation dated 26/03/2020 cancelling the contract for supply and delivery of polyester and viscose fibres tender no, REAL/38/2019-2020 from the defendant to the plaintiff is unlawful, irregular, un procedural and therefore null and void *ab initio*.
 - b. That this honourable court be pleased to grant an order for specific performance compelling the defendant to prove an irrevocable letter of credit to the applicant's bank as provided in clause 6 of the contract.
 - c. General damages for breach of contract.



- d. Special damages.
- e. Costs of the suit be in the cause.
- f. Interests in (c), (d) and (e) above.

Plaintiff's evidence

3. The plaintiff had one witness in court, Lucy Zhang, who adopted her witness statement dated 26th may 2020 as evidence in chief. It was her testimony that the Defendant advertised for an Open International Tender No, Real/38/2019-2020 for Supply and Delivery of Polyester and Viscose Staple fibres on 17/12/2019 whose closing date was 15/01/2020 and the Plaintiff upon submission of its documents was awarded the said tender vide a letter dated 20th January 2020. The defendant then issued a letter of notification dated 20th January 2020 to the plaintiff stating that it had been awarded the tender at a sum of USD 803,660.00 and the plaintiff acknowledged acceptance of the award vide a letter dated 23rd January 2020. The letter of notification provided that the contract was to be signed within 30 days of the date of notification and not earlier than 14 days from the date of the letter of notification.
3. It was her testimony that the defendant drafted a contract dated 4th February 2020 which was duly signed by both parties. That they wrote a further letter dated 28th February 2020 issuing assurance that they would execute their part of the contract. She stated that on 5th March 2020 the plaintiff prepared a proforma invoice to enable the defendant apply for an import declaration form from the Kenya Revenue Authority and an irrevocable letter of credit. The proforma was sent to the defendant who applied and was issued with the IDF and then sent back to the plaintiff for the preparation of the pre export verification of conformity.
4. She testified that on 10th march 2020 the defendant sent a draft irrevocable letter of credit through its bank, Kenya Commercial Bank Ltd and on 12th March 2020 the plaintiff company proposed some amendments on the same which were communicated to the defendant. The defendant updated the draft as per the proposals and sent the amended draft to the plaintiff. She stated that they sent the final proposed amendments on 18th March 2020 and waited for the irrevocable letter of credit to be sent back to them.
5. The witness testified that on 20th march 2020 they informed the defendant that they had procured all the raw materials and on 25th March 2020 they wrote a production progress letter informing the defendant on the progress in the production of the fibres and enquired about the progress of the letter of credit. That while waiting for the letter of credit they received a letter of cancellation on 26th February 2020 without any reason. She testified that at the time they had procured the necessary raw materials and put in place the necessary logistics required for performance of the contract. That the defendant re-advertised for the tender after termination.
6. She stated that the action of terminating the contract unilaterally was illegal and the company seeks the requisite reliefs.

Defendants' evidence

7. The defendant filed a statement of defence and called one witness, Tecla Tum who adopted her witness statement filed on 9th July 2021 as evidence in chief. She testified that they entered into a contract dated 4th February 2020 which was executed by both parties but upon discovery that the plaintiff's prices were double the market prices the contract was terminated. It was on the basis of the advice from



- the procuring report dated 26th March 2020 approved by the defendant's managing director that the contract was terminated through a letter to the plaintiff dated 26th March 2020.
8. She stated that the reasons for terminating the contract were stated in the letter dated 26th March 2020 and included the fact that the defendant was not in a sound financial position to procure the fibres and the negative effect caused by the COVID 19 pandemic.
 9. It was her testimony that despite the plaintiff's assurances through its letter dated 28th February 2020 that it would deliver within the period of 45 days stipulated in clause 6 of the contract, the plaintiff's letter of 25th March 2020 confirms that it had not finalized production yet the 45 days from the time the contract had been executed and lapsed on 20th March 2020. Further, that the plaintiff had not furnished the performance security to the defendant within 30 days of receipt of the notification of award as per clause 3.7 of the tender document. She informed the court that the termination was justified as it was in line with clause 3.6 of the general conditions of the contract.
 10. The witness testified that the re-advertisement was after the contract had terminated and the plaintiff had filed review no. 46 of 2020 before the Procurement and Administrative Review Board on 6th April 2020 seeking orders similar to those in the suit herein and the same was dismissed on 27th April 2020. Further, that the plaintiff had no locus standi as the company was registered in the people's republic of china and it was wound up on 27th December 2019. The claim was filed on 10th February 2020 when the plaintiff company was non-existent.

Plaintiff's Case

11. The plaintiff filed submissions on 10th November 2022. The plaintiff's case is that there was a valid contract between the parties as it had been awarded the tender at a sum of USD 803,660.00 and that the plaintiff acknowledged acceptance of the award vide a letter dated 23rd January 2020. That the Letter of Notification provided that the contract was to be signed by the parties within (30) days of the date of notification and not earlier than fourteen (14) days from the date of the letter of notification. The contract dated 4th February 2020 was duly executed by both the Plaintiff and Defendant on the same date. That the exchange of documents from the Pro-forma Invoice, Import Declaration Form (IDF) and the draft irrevocable Letter of Credit through the Defendant's bank meaning the defendant issued instructions to its bank can only mean there existed a meeting of minds and therefore this series of actions created a legitimate expectation. The plaintiff urged that even the Letter of Cancellation confirms there was a valid and binding contract between parties. In the terms of the Cancellation Letter of the Contract dated 26/03/2020 both parties had the understanding of a mutually binding contract.
12. Learned counsel for the plaintiff submitted that it had capacity to contract as the company search conducted by the defendant is not the same as the plaintiff company. That it is clear that the search conducted by the Defendant was for a different Company King Investment Management Limited and not King Investment Management Co., Limited the Plaintiff Company. All the documents exchanged by the parties from the Notification of Award issued by the Defendant bear the name of the Plaintiff as King Investment Management Co., Limited. That , it is clear that the Defendant undertook the process of Tender Evaluation and Verification as provided for by the Procurement law in which it verified the existence of the Plaintiff Company. Counsel urged that the Defendant had already assured itself on the existence of the Plaintiff Company and further through the process ascertained that the Plaintiff Company had the legal capacity to enter in the contract.
13. The plaintiff submitted that having established that there was a valid contract between Plaintiff and Defendant as above. One would then expect each of the parties to perform its obligations as stipulated in the contract. Counsel stated that the letter of Cancellation of the contract dated 26/03/2020



contains two reasons for the cancellation of the contract. In the said letter the Defendant notes that the company made a decision to terminate the contract due to the high bided price compared to the prevailing market price and secondly that the outbreak of Covid-19 pandemic to have impacted negatively on its manufacturing operations. The Defendant termed the pandemic as a force majeure and states that the performance of the contract impossible due to the outbreak of Covid-19 which beyond its control. The plaintiff intimated that it submitted its documents having quoted the prices. That on the other hand, the Defendant: the procuring entity which must have beforehand conducted market survey and compared it with its budget, evaluated the bids to this particular tender and awarded the tender to the Applicant. For this reason, the Defendant cannot be heard to claim that it terminated the contract due to high bided price. In fact, the Defendant issued a Letter of Notification of the award quoting the prices bided by the Plaintiff. The Defendant went ahead to draft the Contract Agreement dated 04/02/2020 that was executed by both parties the same day. The Defendant after accepting the quoted price cannot be heard to contend that the price is high compared to the prevailing market price when it had the chance to evaluate and assess all considerations during the tendering process.

14. Counsel for the plaintiff cited the case of *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* [2017] eKLR and submitted that the type of circumstances envisaged by the parties to qualify as force majeure should be set out, so that those circumstances may apply to limit, extend the meaning of 'force majeure'. He urged that where the contract has a force majeure clause which identifies a certain act of God, only then can the specific force majeure lead to non-performance of contractual obligations, A force majeure clause can only be invoked if the situation in question is covered in the said clause and there is sufficient proof that indeed the situation is beyond the control of the parties and could not have been reasonably expected. The plaintiff in its Assurance Letter to the Defendant letter dated 28/02/2020 informed the Respondent of Covid -19 Pandemic that was very' pronounced in China at the time and assured that it will nonetheless deliver the goods within the time stipulated in the contract.
15. The plaintiff submitted that, on the reason for cancellation of the contract being non delivery, with the Defendant not clear when delivery' was supposed to be done, under the Statement of Defence they state that delivery was supposed to be within 45 days as provided in Clause 6 of the Contract while the defence witness testified that delivery was supposed to be 4 weeks as stipulated under Clause 3.10 of the Special Conditions of the contract. Further, that the defendant's witness was cross-examined about this and was shown Page 37 of the Contract on Schedule of requirements where in the Foot Note it is provided that "the procuring entity must specify here the date from which the delivery will start. That date should be either the date of contract award, or the date of contract signature, or the date of opening of the Letter of Credit, or the date of confirmation of the Letter of Credit as appropriate. The Tender Form should include only a cross reference to this Schedule." The plaintiff stated that it prepared the Pro-forma Invoice dated 05.03.2020 which it indicated "products ready within 45 days upon received of LC". The Defendant as issued with the Pro-forma on the same date and used it to obtain the Import Declaration Form (IDF) from the Kenya Revenue Authority. Further, that the draft Irrevocable Letter of Credit (L.C) that was drawn by the Defendant's Bank with instruction from the Defendant and had initially proposed under 31D that the Date of Expiry of the L.C shall be 90 days while under Clause 44C it provided that the Latest Date of Shipment was 21 Days before L.C Expiry Date upon which the Plaintiff proposed amendments that were adopted in the amended draft Irrevocable Letter of Credit Clause 31D Date of Expiry 120 Days from Issuance and Latest of Shipment 21 Days Before L.C Expiry Date. This meant that the Defendant through the Letter of Credit had allowed 99 days in which delivery would be done from the date of confirmation of Letter of Credit (L.C). Counsel stated that the draft Irrevocable Letter of Credit in Clause 45A under Description of Goods and/or services provided for Cost, Insurance, and Freight (C.I.F) mode of shipment. It was his case that under



CIF contracts, the seller assumes responsibility for costs and liabilities until the shipment arrives at the destination, at which time the risk is transferred to the buyer. He informed the court that the custom and practice under International Trade Law is that the Seller in C.I.F cannot undertake payments and shipping before the opening and confirmation of the Letter of Credit and therefore is delivery of goods too. Seeing that the parties are not clear on the time for delivery, it is therefore prudent to employ the custom and practice in the nature of these contracts. That the time of delivery is what had been provided under the Letter of Credit as to be 99 days after confirmation of the Letter of Credit (L.C) and or 45 days after opening of the Letter of Credit (L.C).

16. The plaintiff submitted on the second ground for termination as follows. That the same is the provision under Special Conditions of the Contract, for payment of performance security equivalent to 10% of the value of the Contract. The Plaintiff did not pay the same because the conditions for payment required issuance of the performance security through a Kenyan Commercial Bank while the Plaintiff did not have an account with a Kenyan bank. Also, the Defendant in compiling the Contract and extracting the tender documents that form part of the contract did not include Form 7.5 which was key in the payment of the performance security Therefore, the parties had impliedly mutually waived this condition at the initial stages of the Contract.
17. It is the plaintiff's case that the two grounds on time of delivery and payment of performance
18. security were not the grounds indicated in the Cancellation Letter dated" 26.03.2020 and it therefore means that they are an afterthought. Further, that the Defence witness was led to testify that the decision to terminate the Contract was reached when the Defendant realized the aforesaid high bid prices would negatively impact pricing of the finished products and it was on that basis of the advice from the Procuring Report dated 26.03.2020 which was approved by the Defendant's Managing that the Contract was terminated through a letter to the Plaintiff dated 26.03,2020. In support of this, the Defendant filed the Procuring Report in the list of documents which indicates the reasons for termination is as prescribed under section 63 (1) (a) to (i) of the Act (*Public Procurement and Disposal Act* of 2015). He submitted that section 63 of the *Act* is on Termination or Cancellation of procurement and asset disposal proceedings. Further, that the Defendant was guided by law that only applies to procurement proceedings and prior to notification of tender award. However, in the present case the Defendant has already issued a Notification of award to the Plaintiff and the parties had executed a Contract. The provision relied on by the Defendant cannot be used to cancel a Contract but only procurement proceeding before a Notification of award.
19. The plaintiff cited the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* (2015) eKLR and submitted that it was entitled to the award for damages for breach of contract, urging the court to find the same.

Defendant's Case

20. Learned counsel for the defendants submitted that the mere fact that there is a contract on record executed by both the Plaintiff and the Defendant does not point to it being a valid one. The subsequent events can invalidate a contract hence rendered null and void *ab initio*. That the contract was terminated through vitiating elements. He stated that a contract is valid when both parties have and/or had the capacity to contract at the time of entering into the contract. Capacity means that the person executing and or entering into the contract has the authority to do so. That the Plaintiff's Company as it pleads is named King Investment Management Company Limited. Upon search of the same, no record was found showing its existence. However, the Defendant through its agent found a company by the name King Investment Management Limited which was dissolved way back in the year



2019. That the Defendant adduced documentary evidence in court demonstrating the official search records whose particulars read:

CR No -2519013.

Company name - King Investment Management Limited.

Date of Incorporation -31/03/2017.

Active status - Dissolved.

Remarks - Dissolved by striking off. Date of Dissolution - 27/12/2019

21. That the Plaintiffs company is non-existent according to the official search records done by the Defendant's contact in China. The Plaintiff therefore lacked the capacity to contract at the time they executed the contract agreement.
22. It is the defendant's case it did not in any way breach the contract by issuing the cancellation letter dated 26/03/2020 as the same cancellation was properly anchored in law. That a tender may be terminated if there is inadequate budgetary provision, there is evidence that prices of the bids are above market prices and due to force majeure. This is envisaged in section 63 of the Public Procurement and Assets Disposal Act of 2015. Furthermore, what amounts to a valid termination is set out in section 153 of the Public Procurement and Assets Disposal Act of 2015. The defendant reiterated that the cancellation is based upon the grounds set out in section 63 of the Public Procurement and Assets Disposal Act of 2015 and thus stands in law and stated that in its defence it hereby invokes the doctrine of 'impracticability' which states that

“A Defendant need not show that performance is literally impossible but can also show that performance is impracticable.”

and cited the decision of the court in the case of *City of Littleton v Employers Fire Ins. Co.*, 453 P.2d 810, 812 (Colo. 1969) in support of the submission.

23. The defendant submitted that in the letter of cancellation of the contract, the Defendant clearly cited the reasons being the unprecedented Covid 19 pandemic and the high quoted prices that were at the time beyond the market value. This would significantly affect the pricing of the final product which would be unreasonable were the same tender to proceed to performance. The Defendant maintained that it legally terminated and/or cancelled the contract.
24. Learned counsel for the defendant submitted that it has shown this Honourable Court that the alleged performance of the Contract by the Plaintiff was not done. The Plaintiff is only on a chase to fraudulently acquire moneys from the Defendant. It is the Defendant's submission that the Court is not inclined to grant the orders sought by the Plaintiff as there was no performance of the contract which was terminated. The defendant maintained that the cancellation letter issued was valid and anchored in law. It invokes the doctrine of frustration as the same was cancelled before the performance of the contract hence declared null and void ab initio. Counsel urged the court to dismiss the suit with costs.

Analysis & Determination

25. Upon considering the pleadings, evidence adduced in court and the submissions tendered in court, the following issues arise for determination;
 - i. Whether the plaintiff had the legal capacity to contract



- ii. Whether there was a valid contract within the parties
- iii. Whether there was breach of contract by the defendant
- iv. Whether the plaintiff is entitled to the reliefs sought

(i) Whether the Plaintiff had the legal capacity to contract

26. The defendant led evidence that the plaintiff is a non-existent company. The defendant further produced documents for a company by the name King Investment management Limited. The defendant's witness testified that the defendant sent a representative to China to conduct search and the representative obtained record from the registrar of companies (Hon Kong) within the people's Republic of China.
27. It was the plaintiff's submission that the company herein is King Investment Management Co. Limited and not the imaginary company purportedly searched by the defendant. The Plaintiff further submitted that during the application for the tender, all documents were submitted including the certificate of Corporation. The plaintiff's witness gave evidence that the plaintiff company was registered in the year 2015 and has done business before with the defendant.
28. On this issue, I agree with the Plaintiff's submissions that the search conducted by the defendant was for a different company King Investment Management Limited and not King Investment Management Co. Limited the plaintiff company. Consequently, this issue is fully settled by the Plaintiff's evidence.

(ii) Whether there was a valid contract between the parties

29. The [*Black's Law Dictionary*](#) defines a contract as follows:

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.

30. The basis of any suit in contract performance or non-performance is as per requirements in subsection 3 of the [*Law of contract. Act*](#) (Cap 23 of the Laws of Kenya). The appellant was therefore expected to proof on a balance of probabilities. The legal burden of proof rests entirely with the plaintiff against the defendant as pleaded in the plaint. (See Section 107, 108, 109 of the [*Evidence Act*](#)) The concepts of the standard and the burden of proof on a balance of probabilities are clearly spelt out on the threshold of it in the Referenced authorities *Kingelen Lena Churu v Sifina Ltd*, Nairobi High Court Civil Case Number 3796 of 1994 (Anganyanya J on 24th August 1997), *Michael A Masheve v Samson Asatsa*, Civil Appeal No.76 of 1987 (Law, JA Kneller and Hancorx, AJJA on 23 February 1983) *Kenya Power and Lighting Co. Ltd and Another v Harmina Abakalwa Lusimba*, Civil Appeal Number 126 of 1993 (Gachuhi kwach and Tunoi JJA on 22 June 1994). The principle must be borne in mind by any court exercising jurisdiction in civil matters.
31. In reflecting the significance of the Standard and burden of proof in Civil Cases, the learned authors in [*Halsbury Laws of England*](#) 4th Edition Volume 17 laid emphasis as follows that:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the



party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

Let me say at the outset that in deciding this claim I adopt the taxonomy established by the above case law and extract in determining the question whether the Plaintiff case is such that it meets the threshold of proof on a balance of probabilities.

32. It is trite that the following essential elements constitutes a valid legal contract capable of being enforced by the court. Contract formation is therefore a very profound and foundational relationship on both local, national and International contracts. The key concepts adopted as guidelines to draft binding contracts are as enumerated below herein. The finer details on obligations, condition precedents, and warranties are contract specifics.

33.

- (a) An offer.
- (b) An acceptance.
- (c) Any consideration.
- (d) Any intention to create legal relations.

34. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* {2011} JMCA 16 ought to ordinarily reflect the following principles:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

35. The defendant challenged the validity of the contract from various angles. The defendant took the position that the plaintiff did not have the capacity to contract on the basis that there is no record showing the existence of King Investment Management Company Limited as upon conducting a search, it was established that the company was dissolved in 2019. So there it is again by the way of consonance with the case of *G.Percy Trentham Ltd v Archibal Luxfer Ltd* (1993) 1 Lloyds Re. 25 Lord Steyn stated as follows:

“it is important to consider briefly the approach to be adopted to the issue of contract formation..it seems to me that four matters are of importance. The first is that...law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties.



Instead the governing criterion is the reasonable expectations of honest men....that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance willing the vast majority of cases represent the mechanisms of contract formation. It is so in the case of a contract alleged to have been made by and exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden v Metropolitan Railway* (1977) 2 AC 666. *New Zealand Shipping Co. Ltd v AM Satterthwaite & Co Ltd* (1974) 1 Lloyd's Re.534 at Page539 co. 1(1975) AC 154AT p.167 *D-E Gibson V. Manchester City Council* (1979) 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is consideration of the first importance on a number of levels. See *British Bank for foreign Trade Ltd v. Novinex* (1949)1KB 628 ATP. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed make it easier to imply a term resolving any uncertainty, or alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only come into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd v. Atomic Power Constructions Ltd.* (1963)1 WLR33.”

36. What is in issue is the declaration made by the Defendant to the effect that the contract with the Plaintiff was not capable of being performed as provided for in the instruments endorsed by both parties due to the allegations of breach on the part of the Plaintiff. One problem I find about such cancellation of the contract is the acknowledgement that legal steps had been taken by the plaintiff to implement part of the bargain of sourcing for the materials referenced within the particular clauses in the agreement. The questions before this court involve the application of such principles in *Percy case (supra)* to the circumstances of this case and in particular the procedure applied by the Defendant to terminate the contract. Substantially relying on the principles in the following authorities the defendant evidence placed before this court fails the test of a rebuttal to the Plaintiff's case. The court of Appeal in *Hussamudin Gulambusseini Potbiwalla administrator, Trustee and Executor of the Estate of Gulambusseini Ebrahim Potbiwalla v Kidogo Basi Housing Cooperative Society Limited and 31 Others* in Civil Appeal No.330 of 2003. That

“A court of law cannot re-write a contract between the parties ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain it is ordinarily no part of equity's function to allow a party to escape from a bad bargain” (See also *National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd & Another* (2002) EA 503)

37. One of the key battle ground in this claim as between the Plaintiff and the Defendant was on the aspect of the legal identity of the company which tendered for the supply of fabric to the Defendant. It all revolved around the confusion of the company known as Kings Investment Management Company Limited and King Investment Management Limited. For clarity of disposition the corporation being able to fulfil its obligations towards the defendant was very specific in the tender documents. The argumentation about its identity is a strange addition by the defendant to run away from the terms of the contract. First of all I am quite surprised that the defendant will evaluate tender documents



proceed to award the same to a legal entity but in the cause of implementation they began a search and find of the profile entity contracted to deliver the fabric insulated in the contract. An assessment on the business organization being contracted can only be done at the due diligence stage. It is important to emphasize that the burden of proof in fraud on the part of the Defendant is a heavy one and in this case it failed to bring itself within the elements of the claim to repudiate the contract.

38. The upshot of this is that the two are different companies and therefore, the allegation that the plaintiff company did not exist is unfounded.
39. The defendant, in its statement of defence, admitted that there was a contract between the parties and confirmed that the plaintiff was the only bidder who submitted its bid following the advertisement of tender no. REAL/38/2019-2020. The defendant also admitted in its defence that it terminated the tender and gave the reasons in the statement of defence. It is therefore clear that there existed a valid contract between the Plaintiff and the Defendant

Whether there was breach of contract by the defendant

40. The plaintiff avers that a tender was advertised by the defendant and the same was awarded to them. On record we have a tender document no. REAL/51/2019-2020 for the supply and the delivery of polyester and viscose staple fibres. Clause 2.29 indicates that the plaintiff was to sign an acceptance within 30 days from being notified the award of the tender. Further Section IV indicates the delivery of all virgin polyester and viscose staple fibre was to be within a period of 4 weeks form the date of signing the contract or issuance of the local purchase order or indent. The contract was cancelled by the defendant and they went ahead to re-advertise the same
41. The defendant admitted to issuing the cancellation letter dated 26th March 2020 and therefore there is no dispute on the same. What is disputed is whether the cancellation was properly anchored in law. The contract, according to the defendant, was terminated due to two reasons; that prices of the bids were above market prices and due to force majeure. Reliance was placed on the provisions of sections 63 and 153 of the *Public Procurement and Assets Disposal Act* of 2013.
42. Section 63 of the *Public Procurement and Asset Disposal Act* states as follows;
 63. Termination or cancellation of procurement and asset disposal proceedings
 - (1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—
 - (a) the subject procurement have been overtaken by—
....
 - (d) there is evidence that prices of the bids are above market prices;
....
 - (g) force majeure;
.....
43. The wording of this section clearly states that the termination may be done prior to notification of the tender award. In the present case, the tender was awarded and a contract signed therefore this section cannot be applied to these circumstances. Further, when the matter came before the Public



Procurement and Assets Disposal Board it was determined that due to the valid contract, it had no authority to determine the dispute for this particular reason.

Section 153 of the [Public Procurement and Asset Disposal Act](#) states;

- (1) Upon the request of the procurement management unit, the accounting officer of a procuring entity may approve the request for termination of contract.
- (2) A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable on termination.

44. It follows that for this section to apply, there must be a request from the procurement management unit to the accounting officer for termination of the contract and that the contract document shall specify the grounds and procedures for the termination. The defendant has not provided any documentary evidence that there was a request from the accounting officer to terminate the contract or that the contract was terminated according to the terms set out in said contract.

45. The defendants' attempt to invoke the provisions of the [act](#) are a misapplication of the law as the statute that governs contracts is the [Contract Act](#). It is clear that the cancellation of the contract dated 4th February 2020 was after the tender had been approved and the same was cancelled vide the letter dated 26th May 2020. The plaintiff, up to that point, had informed the defendant regularly on the progress of processing the required goods and was evidently in the process of completing its end of the performance of the contract when the same was terminated.

46. I note that the defendants' reasons were for cancellation restricted to;having realised that the bidding price was higher compared to the prevailing market prices andthat there was a force majeure that rendered the contract impossible due to the outbreak of COVID-19.

47. The issue of the letter of credit was not among the reasons that occasioned the termination of the contract and therefore any allusion to the same was an afterthought. From clause 6 of the contract, it emerges that the letter of credit was to be obtained with the assistance of the defendant being a company in Kenya with a bank account whereas the plaintiff did not have the same. Evidence was provided that the irrevocable letter of credit was drafted, awaiting the actions of the defendant in the negotiations process for the same to issue.

48. The defendant, through its witness, also claimed that the plaintiff failed to deliver the goods within the required time but once again, this was not the reason for the termination of the contract. I have perused the documents on record and specifically page 37 of the schedule of requirements where the footnote states as follows;

'The procuring entity must specify here the date from which delivery will start. That date should be either the date of contract award, or the date of contract signature, or the date of opening the letter of credit, or the date of confirmation of the letter of credit as appropriate. The tender form should include only a cross reference to this schedule.'

49. I have also had the opportunity to peruse the pro forma invoice dated 5th March 2020 prepared by the plaintiff, issued to the defendant and that was used to obtain an import declaration form and it indicated that 'products ready within 45 days upon receipt of LC'. The draft irrevocable letter of credit proposed amendments by the plaintiff that were adopted set the date of expiry of the letter of credit as 120 days from issuance and latest date of shipment as 21 days before expiry of the letter of credit. This gave the defendants 99 days from the confirmation of the letter of credit confirmation to supply the goods. Despite all these requirements it is imperative to keep in mind that the letter of credit which



was to be obtained by the procuring entity was never procured and as such the plaintiff cannot be held liable for not fulfilling a term of the contract that was dependent on the defendants.

50. The defendant raised the defence of force majeure as one of the reasons that the contract was terminated. I note that the contract did not contain a force majeure clause to begin with. Further, in *Pankaj Transport PVT Limited v SDV Transami Kenya Limited* [2017] eKLR the court stated that
- as a general rule, a party pleading force majeure must prove that the failure was due to an impediment beyond his control; and that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform the contract into account at the time of the conclusion of the contract; and that he could not reasonably have avoided or overcome it or at least its effects.
51. The plaintiff clearly indicated through correspondences that it was in a position to fulfil the contract whereas the defendant did not establish why it was unable to perform its part of the contract.
52. The defendants' claim that the prices that the plaintiff was to supply the fibres were higher than market prices begs the question as to why there was a tender process. The tender process includes evaluation of bids against market prices during the initial stages before the tender is awarded. The main reason the process exists is to enable a procuring entity determine which prices would best suit their needs as compared with the market prices. In the instant case there is no doubt that factors which vitiate contracts or defeat contractual liability constitute appropriate defences to any claim for specific performance. They ought to be pleaded with specific particularity. Where they are not even generally pleaded a party should not be allowed to lead evidence on the same or even raise such factors after closure of trial. The essence of pleadings being to enable each party to be aware of the case he or she faces and to prepare an answer to the same.
53. I have considered the evidence tendered, the facts of the case and the testimony of the witnesses and I can only conclude that the defendant had no legal reasons to terminate the contract and therefore, the manner in which it was terminated was unlawful, irregular and in breach of the contract.

What reliefs is the plaintiff entitled to?

54. The appellant seeks the following reliefs;
- a. A declaration that the letter of cancellation dated 26/03/2020 cancelling the contract for supply and delivery of polyester and viscose fibres tender no, REAL/38/2019-2020 from the defendant to the plaintiff is unlawful, irregular, unprocedural and therefore null and void ab initio.
 - b. That this honourable court be pleased to grant an order for specific performance compelling the defendant to prove an irrevocable letter of credit to the applicant's bank as provided in clause 6 of the contract.
 - c. General damages for breach of contract.
 - d. Special damages.
 - e. Costs of the suit be in the cause.
 - f. Interests in (c), (d) and (e) above.
55. As it has already been determined that the cancellation was unlawful and irregular, I shall proceed to determine the other reliefs sought.



Whether the order for specific performance should issue

56. The issue of specific performance was discussed in *In Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998 where the Court held that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

57. In *Thrift Homes Ltd v Kenya Investment Ltd* 2015 eKLR, the court stated that:

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

58. The underlying principle in granting the equitable relief of specific performance is that,

“the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.” (see *Gurder Singh Birdi & Marinder Singh Ghatora v Abubakar Madhubuti*, Civil Appeal No. 165 of 1996)

59. I have considered the documentary evidence tendered in court alongside the witness statements and testimony and it is evident that the plaintiff had almost completed its part of the contract. What was pending was the issuance of the irrevocable letter of credit that the defendant was to facilitate through its bank. The correspondences between the parties including the drafted and amended letter of credit that was shared point to a lack of performance of contractual obligations on the part of the defendant. The issuance of this letter was to serve the purpose of ensuring that the plaintiff would be able to complete its part of the contract.

60. Therefore, having established that the plaintiff was ready and willing to complete the transaction, I find that the prayer for specific performance is merited.

Whether the order for general damages should issue

61. It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. This position was affirmed by the Court of Appeal in the case of *Joseph Urigadi Kedeva v Ebby Kangishal Kavai*, Kisumu Civil Appeal No. 239 of 1997 (UR) which was cited by the Court 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.....”



62. 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))”.

63. In the upshot of the foregoing, the prayer for general damages cannot be granted in the circumstances.

64. From the evidence on record and the testimonies in court, I find that the plaintiff has proved its case on a balance of probabilities that the defendant was in breach of the contract dated 4th February 2020.

65. The court hereby enters judgement for the plaintiff as against the defendant as follows;

- a. The letter of cancellation dated 26/03/2020 cancelling the contract for supply and delivery of polyester and viscose fibres tender no, REAL/38/2019-2020 from the defendant to the plaintiff is unlawful, irregular, unprocedural and therefore null and void *ab initio*.
- b. An order for specific performance compelling the defendant to prove an irrevocable letter of credit to the applicant’s bank as provided in clause 6 of the contract is hereby issued.
- c. A declaration that the contract agreement dated 04.02.2020 between the plaintiff and the Defendant, is valid and enforceable against the Defendant.
- d. The defendant shall bear the costs of this suit.
- e. 30 days interim stay granted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF MAY 2023

In the Presence of:

M/s Tum Advocate holding Brief for Omboto Adv. For the Defendant

Mr. Kiroga Advocate for the Plaintiff

.....

R. NYAKUNDI



JUDGE

