



**Fairdeal UPVC Aluminium & Glass Limited v ASE Europe N.V (Civil Cause 85 of 2016) [2023] KEHC 19904 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19904 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CAUSE 85 OF 2016  
DKN MAGARE, J  
JULY 4, 2023**

**BETWEEN**

**FAIRDEAL UPVC ALUMINIUM & GLASS LIMITED ..... PLAINTIFF**

**AND**

**ASE EUROPE N.V ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed suit on August 17, 2016 against the defendant Ase Europe N.V. claiming: -
  - a. General damages for breach for breach of contract.
  - b. Special damages for Kshs 27,936,00.00 for loss of two projects as particularized under paragraph 12 above.
  - c. Damages of Kshs 20,000,000.00 for loss of goodwill.
  - d. Compensation for loss arising from the defects of the goods as provided under the Constitution.
  - e. Interest on (a) (b) and (c) above at court rates from the date of filing suit until payment in full.
  - f. Cost of and incidental to his suit; and
  - g. Any other or further relief this honourable court may wish to award.
2. Before the matter could go on for hearing the defendants raised a preliminary objection and filed an application dated October 4, 2016. The main reason for both the pro and application is that there was no reasonable cause of action and that the court had no jurisdiction.
3. They alleged that exclusive jurisdiction of the court in Aantwerp, and under Belgian law was anticipated under the contract. My predecessors Justice P J.O Otieno dismissed the preliminary objection and application in limine with costs.



4. Among the grounds of application that was dismissed was that the plaintiff had accepted USD 8,000/= in full and final settlement of the claim.
5. A defence was not filed in this matter. After a lot of back and forth, a request for judgment was made and entered on February 9, 2021. The matter proceeded for formal proof on October 17, 2022.
6. The plaintiff adopted the witness statement and identified the bundle of documents from pages 18 – 35. The plaintiff produced the documents as exhibits 1 - 8. The goods which were supplied were facility.
7. The goods were not upto the specific mark of merchantable quality. The issue was raised and a sum of USD 8,000/= was reimbursed. The defendants is based in Belgium.
8. PW2 testified that he signed a witness statement dated July 8, 2016 and filed on August 17, 2016 which he adopted by evidence in chief.
9. He produced and identified documents. The plaintiffs stated they suffered further costs due to the poor quality of goods. This resulted in loss of two projects namely landmark holding Ltd and Forescape Holdings ltd.
10. The materials were refused by the clients. The works were given to a different contractor. They produced a letter from Forestscape Holdings Ltd. that withdrew the contract in Forestscape they lost business worth 14 million direct loss. In Landmark they were sure of USD 13,000 but were not given work. A contract for USD 1.2 million was rejected.

#### **Issues**

11. From the evidence and pleading 4 issues arise that: -
  - a. Whether there was breach of contract on part of the defendant.
  - b. Special damages payable.
  - c. Whether general damages were payable and to what extent.
  - d. Remoteness of damages
  - e. Costs.

#### **Breach Of Contract**

12. The plaintiff bought good worth 18,110 USD as per the proforma invoice. The goods were to be Standards Gypsum board as to my understanding. However, the same were said to be substantial. The defendants representative Yvan Castlelein, authorized the claim. They reimbursed USD 8,000/= performa invoice for No VAL/B210/REV for 4x20 ft Dry Box containers Gypsum Board dated December 5, 2014 was given an invoice CFR Mombasa from Qingdao, china was given.
13. The claim being contractual, the same should be pleaded specifically. The damages are not large. The damages must be strictly pleaded and proved.
14. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal had this to say: -

“We are only concerned with the awards of damages. The superior court (Etyang’ J) awarded special damages in the sum of Kshs 227,750/= as cost of repairs to the respondent’s vehicle and sum of Kshs 540,000/= as damages for loss of user. It has been held time and again by this court that special damages must be pleaded and strictly proved. We refer to the remarks



by this court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store*, Civil Appeal No 5 of 1990 (unreported) and *Idi Ayub Sabbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it" We also refer to the cases of *Ouma v Nairobi City Council* [1976] KLR 297 at page 304 and *Kenya Bus Services v Mayende* (1991) 2 KAR 232 at page 235. The evidence before the learned judge on the question of loss of user was just "thrown at him". The respondent had stated that his profit margin was Kshs 5,000/= to Kshs 9,000/= per day from the sale of potatoes. Although the learned judge said that there was not a single receipt to show or prove those figures, the learned judge nevertheless proceeded to the damages under the heading of "loss of user" as general damages.

15. I note that the refund for the entire purchase price of USD 8,000/= was made. They excluded other claims. They are all agreed that the goods were not fit for the purpose. The defendant was under duty to sell merchantable quality goods.
16. I have seen the plaintiff incurred other expenses to transport worthless goods to the site and back. They suffered loss for contract for which the material were to be used.
17. I find and hold that the defendant were in breach of contract by supplying un merchantable good contrary to the [Consumer Protection Act](#) and [Sale of Goods Act](#).
18. However, the same was not said to be fraudulently done. The reading for innocent representation is rescission and refund. They also suffered cost of disposing the unmerchantable goods over and above paying requisite clearance chances and taxes.
19. Out of possible 18,110, only 8,000/= being freight charges were refunded. USD 10,10 was not refunded. USD 146,717 was paid to the forwarding agents. Duty of Kshs 893,244 was paid There were other taxes and expenses paid. Unfortunately, they are not broken down and in a manner of speaking were thrown at the court.
20. Under the consumer protection act I am required to require payments for damages and punitive damages. These are damages that are foreseeable and arise out of breach of the Act.
21. Damages should be such that they are not punitive. I posit that award of damages is not to punish the wrong doers but to right a wrong and get direct damages. In [John Kamore & another v Simon Irungu Ngugi](#) [2014] eKLR Justice Ngah Jairus stated as doth: -

"It is clear from the record that after due regard to the decisions cited by the parties, the learned magistrate was alive to all these factors in determination of the respondent's compensation. This is what he said in concluding his judgment;

"Having observed this, this court is alive to the relevant factors considered in making awards. Normally courts consider the nature of injuries, the period of healing and whether the healing is full or partial, the residual incapacity if any, the inconvenience or deprivation encountered by the plaintiff, inflationary trends, cost of living and lapse of time from the time of any availed decided authorities.



The plaintiff is only entitled to what is fair, just and reasonable. Money cannot renew a physical frame that has been shattered and battered. Assessment must be done with moderation. The aim is not to enrich the plaintiff. It is not also the aim to punish the defendant.”

22. The court shall hand the same as pleaded. The particulars pleaded are as set out below: -

Under Forestscape Holdings.

- i. Project value 14,250,000
- ii. Man hours replacement 336,000
- iii. Loss in transportation 100,000/=
- iv. Loss in storage 250,000/=
- v. Project land Mark Holdings 13,000,000

Total 27,936,000

- a. The plaintiff seeks Kshs 27,936,000
- b. Kshs 20,000,000/= as good will loss.
- c. Compensation.
- d. Costs

### **Good Will and General Damages**

23. Good will is in the general damages. This was a contract for specified goods. Consequently, where the goods are lost, the party is entitled to special damages.
24. There can be no special damages for general damages. In the case of *Peter Umbuku Muyaka v Henry Sitati Mmbasu* [2018] eKLR the court confirmed that there can be no general damages for breach of contract.
25. As a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in *Kenya Tourism Development Corporation v Sundowner Lodge Ltd* 2018 eKLR. The reason for such was explained by the court in the case of *Consolata Anyango Ouma v South Nyanza Sugar Co Ltd* (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. This is 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))”.

### **The Amounts For Special Of Kshs. 27,936,000/=**

26. Special damages must be particularized and proved. The loss of the contract for 13,000,000/= is not payable. There was no contract with Landmark Holding. The claim is speculative. In other words, the loss of a contract that had not been awarded is not foreseeable.
27. This is also further buttressed by the fact that, the claim for loss of tender being foreseeable, there must be cogent evidence of the loss occurred due to the import.
28. I therefore dismiss the claim for 13,000,000.

### **Damages**

29. The damages that are awardable under such a contract are those damages that are foreseeable. There is no evidence that there is a nexus between not being given the project at land mark Holdings the claim is speculative at best.
30. The goodwill is not aforeseable loss under the *Consumer Protection Act*. That there was direct loss for the project Forest Scape Holdings. However, the loss of project value was not property proved. Especially for a sum of 14,250,000. I will award punitive compensation under the *Consumer Protection Act* for a sum of Kshs 6,000,000 given the damage the defendant caused the consumer.
31. I will also award special damages proved under the Forestscape contract made up as hereunder for actual loss proven as project loss:  
Loss and damages Kshs 6,000,000  
Loss in man hours Kshs 336,000  
Loss in transportation Kshs 100,000  
Loss in storage Kshs 250,000/=  
Total Kshs 6,686,000
32. The compensation for the goods has already been made good off and awarding the same will amount to double payment. In the end, therefore I enter judgment for the plaintiff against the defendant for a sum of 6,686,000. The rest of the claim is dismissed. The plaintiff will have costs of the suit of USD 3000. Stay 30 days.

### **Determination**

33. In the end I make the following orders: -
  - a. I find the plaintiff to have proved its case against the defendant in the following terms.
  - b. The defendants were in breach of the contract between them and the plaintiff.
  - c. The defendants supplied unmerchantable goods contrary to the European Union standard, the *Consume Protection Act* and *Sale of Goods Act* and as such are liable to pay damages.
  - d. Costs of USD 3000



- e. Stay for 30 days
- f. File is closed.
- g. I award the plaintiff damages of 6,686,000.
- h. Punitive damages of Kshs 6,000,000
- i. Interest at 14% from the date of filing.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4<sup>TH</sup> DAY OF JULY, 2023.** Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant - Brian

