



REPUBLIC OF KENYA



**Kamau t/a Superior C Services v China Road & Bridge Cooperation (Civil Case E33 of 2022) [2023] KEHC 20474 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20474 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E33 OF 2022**

**OA SEWE, J  
JULY 10, 2023**

**BETWEEN**

**MARGARET CHELAGAT KAMAU T/A SUPERIOR C SERVICES ... PLAINTIFF**

**AND**

**CHINA ROAD & BRIDGE COOPERATION ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this suit, Margaret Chelagat Kamau, entered into an agreement dated April 11, 2016 with China Road & Bridge Corporation (Kenya), sued as China Road & Bridge Cooperation, whereby the defendant leased from the plaintiff motor vehicles for the purposes of transportation of various construction materials to and from the defendant's sites. The plaintiff contended that it was a term of their agreement that her motor vehicles would attract payment at the rate of Kshs 9/= per kilometre as well as Kshs 20,700,000 for every 100,000 tons.
2. At paragraph 6 of her Complaint the plaintiff stated that she delivered her part of the bargain; and that it was her legitimate expectation that the contract would run to its logical conclusion to enable her earn the proceeds thereof and improve her life, but this was not to be. On the 11<sup>th</sup> June 2016, the defendant terminated the agreement on allegations of theft of diesel attributed to Motor Vehicle Registration No. KAX 143W. The plaintiff pointed out that the motor vehicle did not belong to her; and that defendant's independent investigations exonerated her from the allegations of theft of diesel and/or any outward occasion that would frustrate the performance of the subject contract.
3. Hence, the plaintiff asserted that the termination of their contract by the defendant was malicious in that it was done in contravention of Clause 2.2 of the Contract. In particular, the plaintiff alleged, *inter alia*, that the termination was without reasons, was done within 20 days, exposed the plaintiff to unsolicited charges and that it was done after the plaintiff was exonerated from any wrongdoing in an investigation commissioned by the defendant. Accordingly, the plaintiff prayed for:



- (a) A declaration that the acts of the defendant amounted to breach of the contract dated April 11, 2016;
  - (b) Special damages for breach of contract in the sum of Kshs 85,765,696/= as pleaded in paragraph 11 of the Plaint;
  - (c) Exemplary damages;
  - (d) Costs of the suit;
  - (e) Interest thereon from the date of filing suit till payment in full.
4. A perusal of the court record shows that the Plaint was duly served on the defendant along with Summons to Enter Appearance in compliance with Order 5 Rule 1(3) of the Civil Procedure Rules; and that the defendant opted to not defend the suit. Accordingly, upon request by the plaintiff in the prescribed form, interlocutory judgment was entered herein in favour of the plaintiff on 8<sup>th</sup> July 2022, pursuant to Order 10 Rule 4(2) of the Civil Procedure Rules. The matter was thereafter fixed for formal proof.
  5. At the hearing, the plaintiff testified as PW1 and adopted her witness statement dated May 19, 2022. She in effect reiterated the contents of her Plaint to the effect that she executed an equipment lease agreement with the defendant in respect of her Motor Vehicle Registration No. KAX 143W (FAW) for the purpose of providing transport services for the defendant's construction materials. She further explained that the agreement was to last for 60 days with effect from 3<sup>rd</sup> May 2016; and that after providing services for only one week, she was summoned to the defendant's head office in Mariakani on allegations that her tanker had been involved in theft of diesel to the tune of Kshs 19,000,000/=.
  6. PW1 further testified that the defendant proceeded to stop the use of her trucks with immediate effect; and later served her with a contract termination letter dated June 11, 2016. She added that, although an independent investigation was undertaken by the defendant which exonerated her, the defendant declined to let her resume the contractual services. She pointed out that she had 20 trucks at the defendant's quarry to carry boulders as well as one fuel tanker; and was therefore fully prepared and equipped to perform the contract to completion.
  7. The plaintiff explained that, on account of the defendant's breach of their contract, she suffered immensely, because she had hired some of the trucks from third parties. In particular, the plaintiff testified that some of the owners demanded immediate payment from her and she had to sell some of her property to pay off her obligations to the owners of the hired lorries; and that in some instances, she was arrested and taken to court on allegations of obtaining by false pretences. She produced her List and Bundle of Documents before the Court as Exhibits 1-9 and the documents include the Agreement dated 11<sup>th</sup> April 2016 and the Report on theft of diesel dated 16<sup>th</sup> November 2016 as well as the letter dated 11<sup>th</sup> June 2016 by which the defendant terminated its contract with the plaintiff.
  8. In proof of her claim, the plaintiff commissioned an auditor, Mr. Malcolm Ochieng Odhiambo (PW2) to quantify her loss. Mr. Odhiambo also testified herein and produced his forensic report as the Plaintiff's Exhibit 10 in which he quantified the plaintiff's total loss at Kshs 85,765,696/=.
  9. Accordingly, in his written submissions filed on November 17, 2022, Mr. Siminyu, Advocate, proposed two issues for determination, namely, who between the parties is in breach of the agreement and whether the plaintiff is entitled to the orders sought. He urged the Court to note that the defendant instituted a private investigation into the alleged theft; and that the investigation exonerated the plaintiff from the theft. He added that, in spite of this crucial finding, the defendant did not reinstate



the plaintiff's contract, yet the plaintiff had legitimate expectation to gain income therefrom. Thus, Mr. Siminyu urged the Court to find that the defendant terminated the agreement unfairly, arbitrarily and maliciously.

10. On whether the plaintiff is entitled to the orders sought, Mr. Siminyu made reference to Anson's Law of Contract 28<sup>th</sup> Edition at pages 589-590 for the proposition that every breach of contract entitles the injured party to damages for the loss suffered through that breach. He also relied on *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd*, Civil Appeal No. 53 of 2015, to support his submission that the damages payable are such as may, to the extent possible, put the plaintiff in the position she was in before the breach. Counsel further argued that the plaintiff is entitled to exemplary damages granted the arbitrary manner in which the defendant terminated the contract, notwithstanding that its own report exonerated the plaintiff from blame. He therefore proposed an award of Kshs 5,000,000/=.
11. As pointed out herein above, although the plaintiff prayed for pecuniary damages in the sum of Kshs 85,765,696/=, her claim also comprised of prayers for a declaration as well as exemplary damages. Accordingly, Order 10 Rule 6 of the *Civil Procedure Rules*, provides:

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

12. Thus, in *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -

...I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meaning - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

13. Similarly, in *Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia* [2021] eKLR it was held: -

...When there is some other aspect of the claim besides the claim for pecuniary damages, such as a claim for negligence, the Court will have to consider such a claim on the merit and satisfy itself that the same has been proven through 'formal proof' proceedings before proceeding to assess damages. This is the course adopted in *Mwatsahu vs Maro*, Civil Case No. 74 of 1996 (1967) EA 42, a case of pecuniary damages for breach of warranty of title which the Court (Harris J) found the registrar could not enter judgment in default of the defence.

20. The Court does not therefore find that the entry of interlocutory judgement absolved the Appellants from proving liability by way of hearing in Court. This Court thus finds that despite omission by the Respondent to file a defence in the matter, the Court was still



required to have the matter heard with respect to liability, in addition to the question of assessment of damages...”

14. The Court of Appeal took the same posturing in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR thus:

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

15. In the premises, I have given careful consideration to the evidence presented herein by the plaintiff and her witness. The key issues arising therefrom are:
- (a) Whether the plaintiff has proved on a balance of probabilities that the defendant committed a breach of the contract dated April 11, 2016 by terminating it without justifiable cause.
  - (b) Whether the plaintiff is entitled to the reliefs sought.

#### **A. On Termination of the Contract:**

16. It is now trite that the Court’s role in such circumstances is to interpret the contract as written with a view of giving effect to the expressed objective of the parties when they made the contract. This principle was discussed by the Court of Appeal in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR thus:

...where the intention of the parties has in fact been reduced to writing, under the so called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it...”

17. The agreement between the parties were exhibited herein as the Plaintiff’s Exhibit No. 1. It was duly signed by China Road & Bridge Corporation (Kenya) and the appellant. There is no dispute that it was anticipated that the agreement would last for 60 days initially, but was automatically renewable at the instance of either party. The plaintiff was to avail 20 tippers in good condition and the rental rate was Kshs 9/= per km for boulders and Kshs 7/= for sand and gravel. These terms were clearly set out at Clauses 2, 3 and 6 of the agreement. It is also noteworthy that, at clause 4.1, the parties agreed that the total working quantity of big stones was 100,000 tons; and that the total value for the big stones would be Kshs 20,700,000/=.
18. Further to the foregoing, Clause 3.3. of the subject agreement shows that the plaintiff was to use the fuel supplied by the defendant; the value of which would be deducted from the payment due to the plaintiff. The plaintiff testified that she availed 20 tippers with effect from May 3, 2016 and that her fuel



tanker, Motor Vehicle Registration No. KAX 143W, FAW, was also duly registered with the defendant. The plaintiff's letter requesting for the registration of the tanker with the defendant was exhibited at page 21 of the plaintiff's Bundle of Documents. It is dated 9<sup>th</sup> May 2016.

19. The plaintiff did advert to the fact that in the course of May 2016, the defendant unearthed some theft in connection with its diesel consumption arrangement for which the defendant blamed her and attributed the theft to her tanker, Registration No. KAX 143W, FAW. She however denied the allegations and required that an in-depth investigation be undertaken by the defendant; which was done. She produced the report of the investigations at pages 10-12 of her Bundle of Documents (the Plaintiff's Exhibit No. 2). The report reads:

...On May 25, 2016, we checked that the fuel charge demanded by the oil tank truck (licence plate No. KAX 143W) is huge, far more than the diesel oil consumption necessary for normal stone transportation. Therefore we suspect that the driver of the said vehicle stole and sold the diesel oil without permission. Upon investigation, it was found that the said vehicle was authorized by Superior C. Services Company...Responsible person of Superior C. Services found that the said oil tank truck was no the vehicle rent by it through investigation and that there were two oil tank trucks with the same licence plate number..."

20. The report also has a depiction of the two trucks bearing the same registration number, one being the plaintiff's, and the other being a Mitsubishi FUSO truck alleged to belong to Safarimaster (K) Ltd. In its report the defendant concluded that:

...It is hereby required that Safarimaster (K) Ltd and the oil tank truck (licence plate No. KAX 143W) (FUSO) return the extra diesel oil received, which is 254,408L. In case that the company or the oil tank truck in question is found to be in violations against the law, the severe punishment shall be meted out..."

21. It is noteworthy however that this report was not released until 16<sup>th</sup> November 2016; and therefore had nothing to do with the decision by the defendant to terminate the contract. Accordingly, the termination must strictly be looked at from the prism of Clause 2.2 of the agreement, which states in part:

...if any party intends to terminate this agreement, he should provide minimum written notice of 7 days to the other party."

22. And, it is manifest that in the termination letter dated 11<sup>th</sup> June 2016, the defendant took care to comply thus:

Due to the theft of diesel by the above mentioned transporter, we do hereby terminate the contract of Superior C. Services Company, the amount of the stolen diesel was 276,408 litres, which amounts to \$194,500 in dollars, according to the management regulations hereby, China Road and Bridges Corp (K) decides to issue a formal notification 7 days in advance to the above transporter, that we are intending to terminate the contract with Superior C. Services..."

23. In my careful consideration, the defendant was within its right to terminate the contract and did terminate the contract in accordance with Clause 2.2 of their agreement with the plaintiff, bearing in mind that the duplication of the number plate was only discovered much later in November 2016. Needless to underscore the principle that, barring fraud, mistake and undue influence, parties are bound by the terms of their agreements, even where it ultimately turns out to be a bad bargain. In



*National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] KLR 112, the point was made by the Court of Appeal thus:

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

It is clear beyond peradventure that save for those special cases where equity might 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."

### **B. On Whether The Plaintiff Is Entitled To The Reliefs Sought:**

24. In the circumstances, the plaintiff is not entitled to a declaration that the defendant acted in breach of the agreement dated 11<sup>th</sup> April 2016. In the same vein, I find no basis for holding the defendant liable in special or exemplary damages as prayed for by the plaintiff, having found that the termination occurred before the report on theft of diesel.
25. Had I found in favour of the plaintiff, I would have considered the applicable principles, such as the principle discussed in *Gedion Mutiso Mutua v Mega Wealth International Limited* [2012] eKLR, thus:

The principal guiding the award of general damages for breach of contract was restated in *Provincial Insurance Company of East Africa Ltd vs. Mordekai Mwangi Nandwa*[1995-1988] 2 EA 289 ...that it is quite clear that no general damages may be granted for breach of contract...That notwithstanding, the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. The plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property, or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract..." (see also *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd, supra*)

26. Another pertinent principle was explicated in *British Westing House Electric and Manufacturing Co. v Underground Electricity Rys Co. of London* [1912] A.C. 673 it was recognized that:

The law imposes a duty on the Plaintiff to take reasonable steps to mitigate the loss caused by the breach of contract, and debars him from claiming compensation for any part of the damage which is due to her neglect to do so."

27. There was therefore no justification as to why PW2's forensic report covered the period from January 2016 to May 2022 when the contract was only for 60 days with effect from May 3, 2016. Indeed, one of the documents relied on by the plaintiff was a letter dated May 25, 2016 by which she withdrew the



services of the tanker with effect from May 25, 2016 due to what she referred to as “incompetence in offering the services we required of it.” It beats logic that the plaintiff would, in the same vein, keep trucks on site to no avail, especially the ones on hire, for a longer period.

28. In the result, I find no merit in the plaintiff’s claim. The same is hereby dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10<sup>TH</sup> DAY OF JULY 2023**

**OLGA SEWE**

**JUDGE**

