



Global Scientific & Research Company Limited v National Veterinary Institute of Ethiopia (Civil Case 272 of 2018) [2021] KEHC 190 (KLR) (Commercial and Tax) (5 November 2021) (Judgment)

Neutral citation: [2021] KEHC 190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 272 OF 2018
MW MUIGAI, J
NOVEMBER 5, 2021**

**BETWEEN
GLOBAL SCIENTIFIC & RESEARCH COMPANY LIMITED PLAINTIFF
AND
NATIONAL VETENARY INSTITUTE OF ETHIOPIA DEFENDANT**

JUDGMENT

BACKGROUND

1. This Court conducted formal Proof proceedings on 21st September 2020 and delivered Judgment on 15th February 2021 and stated as follows:

The matter at this stage is stayed. The Proceedings conducted on 27th November 2020 are hereby expunged from the Court record and the Plaintiff to pursue entry of Interlocutory judgment before Formal Proof Proceedings commence. The pleadings filed remain and are valid on record.

2. Interlocutory judgment was entered on 21st April 2021 and Formal Proof proceedings conducted on 14th July 2021. The Plaintiff testified again and relied on the Plaintiff's Supplementary List of documents Produced as exhibit in Court.

PLEADINGS

3. The Plaintiff filed Plaintiff dated 5th July 2018. The Plaintiff averred that on or about December 2015, the Plaintiff applied for and was awarded a tender to supply various livestock vaccines to the Food & Agricultural Organization (FAO) of the United Nations in Juba, South Sudan.



4. Thereafter, the Plaintiff engaged the Defendant to manufacture and deliver the livestock vaccines as per the Food and Agricultural Organization's request. The Defendant accepted the offer and issued the Plaintiff with a pro forma invoice for the total order for USD 210,925.
5. There was an agreement between the Plaintiff and the Defendant, where the Plaintiff issued the Defendant with a letter of credit for USD 210,925 for the total value of the pro forma invoice.
6. The Defendant was to ship the vaccines directly to Juba South Sudan to FAO in two consignments. The Plaintiff further stated that the Defendant was negligent in supplying and delivering both the first and the second consignment of vaccines. Particulars of which are
 - i. Supplying the first consignment of vaccines without matching dosage of accompanying diluents hence making the vaccines unfit for purpose.
 - ii. Shipping the vaccines and diluents without advance notification to parties concerned, using a longer route instead of going directly to Juba from Addis Ababa causing ice-packs to thaw and the vaccines to expire due to heat exposure by the time they were received by FAO.
 - iii. Supplying vaccines without the required PANVAC Certification.
7. The Plaintiff averred that it is due to the Defendant's negligence, FAO rejected the first consignment of vaccines and the Plaintiff had to ship them back to the Defendant in Ethiopia at a cost of Kshs.720, 000.
8. Further, the Plaintiff alleged that the Defendant severally delayed in the production and delivery of the vaccines necessitating the Plaintiff to extend the letter of credit four times and each time at a cost of Kshs.890, 000.
9. Contrary to the agreement between the Plaintiff and the Defendant, the Defendant shipped the second consignment of vaccines without the relevant diluent causing the Food and Agricultural Organization to reject the vaccines and to terminate the Plaintiff's contract. Thereafter, the Defendant was requested to collect the rejected vaccines from FAO warehouse in Juba, South Sudan to defray storage and disposal charges of the rejected vaccines.
10. Subsequently, the Plaintiff lost the benefit of the contract with FAO and lost the business and profit it would otherwise have made suffered loss and damage for which it holds the defendant wholly liable. Reasons wherefore the plaintiff prayed for judgment against the Defendant for; -
 - a. Special damages of Kshs.22, 529, 000.
 - i. Kshs.669, 000 being the cost incurred in legal fees in charging collateral as security for credit line to purchase the vaccines.
 - ii. Kshs.3, 560, 000 being the cost incurred in extending the letter of credit to the defendant due to the Defendant's delay in production and supplying of the vaccines.
 - iii. Kshs.720, 000 being the cost incurred in shipping the rejected consignment of vaccines back to Addis Ababa from Juba.
 - iv. Kshs.17, 580, 000 being the profit that would have been made after the successful supply of all vaccines requested by FAO.
 - b. General damages



- c. An injunction restraining the Defendant from demanding the balance of the letter of credit issued to it by the Plaintiff's Bank.

LEAVE TO SERVE THE OUTSIDE JURISDICTION

11. On 9th December 2019, the Plaintiff was granted leave to file the Notice of Motion application dated 5th December 2019 seeking leave serve the Defendant outside jurisdiction. On 23rd January 2020, the application to serve services and other documents outside jurisdiction and the order to serve Court process outside jurisdiction was granted.

DEFENCE

12. The Defendant has neither entered appearance nor filed a defence against the Plaintiff. Despite service confirmed vide Affidavit of service filed on 17th October 2019 that the Defendant was served through International Courier Services.
13. The Plaintiff filed Affidavit of Service dated 10th June 2020, that they served outside jurisdiction Plaintiff, summons to Enter Appearance, Verifying Affidavit, Witness Statement and List of Witnesses, Plaintiff's List and bundle of Documents and Notice of Motion of 5th July 2018 through TNT Express World Wide whose offices are at Ground Floor International House. The Plaintiff's advocate was issued with Receipt No 47353 and manifest copies attached and marked IW-001 to the Affidavit of Service.
14. The Respondent According to the Court Record had been served 4 times earlier in the proceedings and failed to respond, enter appearance or file defence. Counsel for the Plaintiff also indicated that he served through email address nvi-rt@ethonet.et & marthayami@yahoo.com.

SUBMISSIONS (accessed on line)

15. The Plaintiff submitted on two issues for determination by the court. That is, whether the Plaintiff has specifically proved the special and general damages claimed and whether it is entitled to the prayers sought in the Plaintiff.
16. On whether the Plaintiff has specifically pleaded and proved the special and general damages claimed, it was the Plaintiff's submission that claim for special damages as particularized in the Plaintiff is for the total sum of Kshs.22, 529, 000, being the loss and damage the Plaintiff suffered as a result of the negligent actions of the Defendant. Further, that the Plaintiff has by the evidence given by the Plaintiff's Managing Director Frank Njoroge and the documents relied on, successfully proved the special damages claimed.
17. On the of claim of Ksh.669, 000 claimed as the cost which the Plaintiff incurred as legal fees for securing a credit line from its Bankers to enable it execute the tender, the Plaintiff produced in evidence a facility Letter from its Bankers, where the later offered the Plaintiff Banking facilities, including a Revolving Letter of Credit Facility of USD 505,000 to finance importation of pharmaceutical drugs and medical equipment.
18. On the other claim for Kshs.3, 560, 000 which is sought as the costs the Plaintiff incurred in extending the Letter of Credit to the Defendant, the Plaintiff submitted that this has been specially proved by production of the various letters of credit which were issued in favor of the Defendant.
19. On the final claim for Kshs. 17,580,000 sought as the profit that the Plaintiff would have made from the contract with Food and Agricultural Organization, it was its submission that, the Plaintiff lost the benefit of the contract as a direct consequence of the negligence by the Defendant in supplying the



vaccines, and as such, the Defendant is liable to compensate the Plaintiff for the said loss which arose out of their negligence.

20. The Plaintiff relied on the case of *Alinkumar M. Shah v Mumias Sugar Company Ltd [2010] eKLR* where the court stated; -

“In this case there is no dispute that the plaintiff under the two contracts made a huge purchase of sugar. Indeed, his customers on several occasions collected part of the sugar directly from the defendant. The defendant cannot, with seriousness claim that it did not know the plaintiff’s intended use of the sugar. DW 1 expressly admitted that the sugar was for re-sale. I find and hold that the defendant knew that the sugar which the plaintiff purchased from it was for resale at a profit.”

21. It was the Plaintiff’s submission that it has proved its claim on a balance of probabilities, as it specifically pleaded and proved the items of special damages claimed by production of various documents in support of its claim, which documents have not been disputed, and we urge the court to allow the Plaintiff’s claim against the Defendant for special damages of Ksh. 22,529,000 and Ksh. 1,000,000 as general damages, and grant the Plaintiff injunction sought, together with the costs of the suit and interest, on the decretal sum until payment in full.

DETERMINATION

22. After considering the pleadings and submissions filed by the Plaintiff the issue for determination is whether judgment should be entered against the Defendant as prayed.
23. The Defendant has neither entered appearance nor filed a defense against the Plaintiff. Despite service confirmed vide Affidavits of service filed on 9th October 2019, 17th October 2019, 10th June 2020, 16th June 2020, 25th November 2020 and 26th November 2020 that the Defendant was served through International Courier Services and email addresses nvi-rt@ethonet.et & marthayami@yahoo.com.
24. The Plaintiff made an Application for interlocutory judgment on 20th February 2020 and an interlocutory judgment was entered on 21st April 2021. The matter came up for Formal Proof hearing on 14th July 2021 when PW1 Frank Njoroge testified on behalf of the Plaintiff who adopted his witness statement.
25. Plaintiff has specifically pleaded and proved the special damages claimed, it was the Plaintiff’s submission that claim for special damages as particularized in the Plaintiff is for the total sum of Kshs.22, 529, 000, being the loss and damage the Plaintiff suffered as a result of the negligent actions of the Defendant. Further, that the Plaintiff has by the evidence given by the Plaintiff’s Managing Director Frank Njoroge and the documents relied on, successfully proved the special damages claimed.
26. The Plaintiff produced a bundle of documents dated 12th July 2018 and the Bundle of Supplementary Documents dated 24th July 2020. Marked FN002 and FN003 is a pro forma invoice from the Defendant to the Plaintiff for purchasing of vaccine. The list also included copies of Packing lists and the Bill of lading to confirm shipment. The Plaintiff’s evidence which was not controverted and the documents confirm the special damages claim.
27. The general principle in award of damages for breach of contract is, subject to mitigation of loss, the Plaintiff is to be put as far as possible in the same position it would have been if the breach complained of had not occurred. The Plaintiff stated that the first batch of vaccines that were supplied by the Defendant were rejected owing to the negligence of the Defendant where they supplied vaccines without the necessary diluents. It then followed that the Plaintiff lost the benefit of the contract as



a direct consequence of the negligence by the Defendant in supplying the vaccines, and as such, the Defendant is liable to compensate the Plaintiff for the said loss which arose out of their negligence. In the circumstances since the specific loss was quantified in form of special damages claim the Court would not grant general damages which would entail assessment of loss and in this instant has been specifically pleaded, claimed and proved. The general damages claim will not be granted.

28. There is proof of service by Plaintiff to the Defendant of Plaint and summons to enter Appearance. There is ample evidence to confirm that the Defendant did not enter appearance and neither did it file a Defense as required by Order 10 Rule 4(1) CPR 2010 while on the other hand the Plaintiff has provided proof for the claims enlisted through the List of documents produced as exhibits.

DISPOSITION

29. The upshot is that judgment is entered in favor of the Plaintiff as prayed and against the defendant as follows: -
- a. Special damages of Kshs.22, 529, 000 with interest and costs.
 - i. Kshs.669,000/- being the cost incurred in legal fees in charging collateral as security for credit line to purchase the vaccines.
 - ii. Kshs.3,560,000/- being the cost incurred in extending the letter of credit to the defendant due to the Defendant's delay in production and supplying of the vaccines.
 - iii. Kshs.720,000/- being the cost incurred in shipping the rejected consignment of vaccines back to Addis Ababa from Juba.
 - iv. Kshs.17,580,000/- being the profit that would have been made after the successful supply of all vaccines requested by FAO.
 - v. An injunction restraining the Defendant from demanding the balance of the letter of credit issued to it by the Plaintiff's Bank.

Orders accordingly.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH NOVEMBER 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

