



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 668 OF 2001

LATIMER RUGUARU GACANJA (Trading as ZOEА TRANSPORTERS LIMITED).....PLAINTIFF

-VERSUS-

THE TRUSTEES OF THE LUTHERAN WORLD FEDERATION.....DEFENDANT

JUDGMENT

1. The plaintiff herein lodged a suit against the defendant vide the plaint dated 25th April, 2001 and further amended on 11th June, 2011 and sought for the following reliefs arising out of a claim for breach of contract:

- a) **An outstanding balance of Kshs.6,134,305/.**
- b) **Special damages of Kshs.89,800/.**
- c) **General liquidated damages for breach of contract in the sum of Kshs.4,983,823/.**
- d) **Interest due on (a), (b) and (c) above at commercial rates prevailing at the material time of between 21% to 36% p.a annually from 30th September, 2016 until payment in full.**
- e) **Such other reliefs that this Honourable Court deems fit to grant.**
- f) **Costs of the suit.**

2. While noting that the plaintiff later filed a further further re-amended plaint dated 18th March, 2015 this court did not come across anything from the record to indicate that leave was granted to the plaintiff to amend and to file the same. In the circumstances, this court will place reliance on the further amended plaint.

3. The plaintiff pleaded in his further amended plaint that he was at all material times engaged in the transport business whereas the defendant was running a refugee camp in Kakuma.

4. The plaintiff pleaded in his further amended plaint that sometime on or about the 8th day of March, 1996 the defendant contracted him to transport poles/firewood from Eldoret to Kakuma.

5. The plaintiff further pleaded that between 6th March, 1996 and 20th August, 1996 the defendant had also contracted him to transport poles and firewood from Eldoret to Kitale to Kakuma and that agreements were drawn and executed to that effect totaling a contractual sum of Kshs.9,385,000/, particulars of which are provided under paragraph 7 of the further amended plaint.

6. It is pleaded that out of the abovementioned sum, the defendant only paid an amount of Kshs.3,395,057/= leaving an outstanding balance of Kshs.6,134,305/= which remains unpaid to date.

7. It is also pleaded that though the plaintiff continued to perform his contractual obligations, the defendant later purported to terminate the contract without prior notice, thereby resulting in loss/damage to the plaintiff totaling the sum of Kshs.89,800/= and further incurring additional losses totaling the sum of Kshs.4,983,823/= which he now claims as liquidated damages.
8. Upon service of summons, the defendant entered appearance and put in its statement of defence dated 28th October, 2008 and amended on 8th May, 2009 to deny the allegations made by the plaintiff.
9. More specifically, the defendant denied the existence of any transport contract between the parties, contrary to the allegations being made by the plaintiff.
10. The defendant pleaded that instead, the plaintiff was engaged in fraudulent collusions with one Zaka Kuawogai in his personal capacity and hence any breach or loss resulting therefrom cannot be attributed to the defendant.
11. At the hearing, the plaintiff testified and summoned one (1) additional witness. On its part, the defendant closed its case without relying on any witness testimony.
12. The plaintiff who testified as PW1 stated that he is a director of the plaintiff and that he transported goods for the defendant at all material times at various prices which are indicated in the contract entered into between the parties herein.
13. PW1 stated that out of a total sum of Kshs.9,385,000/= payable pursuant to the contract, he only received the sum of Kshs.3,395,057/= leaving an outstanding balance of Kshs.6,134,308/= by which time he had completed delivery.
14. It is the testimony of PW1 that at times, he would go to collect the poles as per the request of the defendant, only to find no poles or related goods, while simultaneously incurring costs of travel and hire of vehicles which were intended to transport the said goods.
15. It is the testimony of the plaintiff that owing to the above, he has incurred a loss of Kshs.89,800/= which he later corrected to constitute the sum of Kshs.89,500/=.
16. The plaintiff gave evidence that at one point, he had requested the defendant to make an advance payment which it did in the sum of Kshs.625,000/= prior to the breach of contract.
17. The plaintiff also gave evidence that at no point was the issue of collusion with one of the officers of the defendant ever brought to his attention and that he was the sole person appointed by the defendant to supply the goods from various places to Kakuma.
18. In cross-examination, PW1 testified that he and his wife sit at the Board of Directors of the plaintiff and that they used to operate from Nairobi to Kakuma for the defendant.
19. PW1 also testified that both he and the Project Manager signed the contracts in question, the latter having prepared them.
20. It is the evidence of the plaintiff that not all the contracts were standard.
21. It is also the evidence of the plaintiff that he was paid for all goods delivered and that his claim against the defendant is for breach of contract on the part of the defendant, on the failed journeys which caused him to suffer loss in the manner particularized in the pleadings.
22. The plaintiff stated that the breach resulted where an employee/agent of the defendant would alert him on the availability of the goods in question for delivery but that upon arrival, the witness would discover that either another supplier had been engaged or that the goods were not available after all for purposes of transportation.

23. The plaintiff further stated that initially, he had been transporting goods for the defendant from Nairobi to Kakuma for payment, and that through its Project Manager, the defendant asked him to ferry firewood on its behalf and that they met in Kitale and executed contracts to that effect.

24. It is the testimony of PW1 that while in Kitale, his drivers notified him that other persons were doing a similar job as that assigned to the plaintiff.

25. The plaintiff stated that his work entailed transporting the goods in question and that he was never a supplier for the defendant. However, the witness stated that what he was claiming from the defendant was for the losses incurred when he would be asked to collect firewood only to find that other persons had already undertaken that task.

26. The plaintiff also stated that some of the contracts had the period of delivery of the goods and completion of delivery, whereas others simply provided that delivery would be completed within the contract period.

27. It is the evidence of PW1 that going to the forest to collect supplies for transportation was not part of the contract but that it was the responsibility of the suppliers to ensure the goods were placed in their proper designated places for collection, which was sometimes not the case. He stated that the contract provided for designated collection points of the goods for transportation.

28. It is also the evidence of PW1 that the defendant would instruct him and/or his drivers to collect the material goods from the suppliers upon confirming availability and location of the goods; and hence he depended on the instructions of the defendant on where to locate the suppliers.

29. Peter Mungai who was PW2 adopted his signed witness statement as his evidence and stated that he worked for the defendant at its Kakuma Refugee Camp as an assistant storekeeper and food monitor from the year 1997.

30. The witness stated that bundles of firewood were delivered to Kakuma.

31. In cross-examination, the witness however stated that it is the plaintiff's employees who transported the goods in question particularly firewood; long and short poles, which transportation differs from the supply of such goods.

32. It is the testimony of PW2 that on various occasions, he was assigned duties outside his office and hence other persons were placed in charge of receiving the goods delivered.

33. The witness stated that he knew PW1 whom he had met on few occasions in Kitale in the year 1996 and that he knew the plaintiff as being the transporter of various goods on behalf of the defendant to Kakuma.

34. The witness also stated that at one point during his encounter with PW1 in Kitale, he noticed that the vehicles belonging to the plaintiff would sit idle with no work to do and that the suppliers on the ground would often give conflicting information on the actual status on the ground, in the sense that they would contact him on the collection of goods but on taking the transporters to the ground, they would discover that what was on the ground differed from what had been communicated to him.

35. PW2 further stated that it is often the supplier of the goods who would give conflicting information to the transporters including the plaintiff, but that the defendant was not the supplier.

36. It is the evidence of PW2 that most of the documentation tendered by the plaintiff was not signed by him.

37. In re-examination, the witness testified that the supplier would make the respective goods available at a specific venue and thereafter notify the transporter of their availability for the purpose of delivery.

38. Upon close of the hearing, parties were directed to put in written submissions which were followed by brief oral highlights by the parties' respective advocates.

39. In his submissions, the plaintiff argues that he has tendered sufficient evidence to prove the elements of breach of contract on the part of the defendant by allocating delivery of the goods in question to third parties despite contracting with the plaintiff for such delivery.

40. The plaintiff also argues that despite pleading the particulars of fraud against him, the defendant did not tender any evidence to support any such claims.

41. The plaintiff is therefore of the view that he is entitled to the reliefs sought in his pleadings, as well as costs of the suit to be paid by the defendant. The plaintiff has cited a few authorities including the case of **Sempre Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34** where the court held that it had jurisdiction to award compound and simple interest on damages for breach of contract.

42. In his oral highlights, **Mr. Kihara** counsel for the plaintiff echoed the written submissions save to add that the contracts entered into between the parties herein were both oral and written, and that the burden of proof has been discharged in this instance.

43. In reply, the defendant by way of its submissions dated 20th January, 2017 contends that though it did not call any evidence, the evidence tendered by the plaintiff cannot support his claim.

44. The defendant also contends that it ought not to be held liable for the losses suffered by the plaintiff since the latter should have taken active steps in mitigating his losses but did not, citing the case of **African Highland Produce Limited v John Kisorio [2001] eKLR** in which the court rendered the following:

“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him to minimise the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant.”

45. The defendant submits that there is no correlation between the alleged breach of contract on its part and the borrowing of a bank loan by the plaintiff, which the plaintiff was eventually unable to repay.

46. The defendant is of the view that the plaintiff is therefore not entitled to the reliefs sought, further submitting that any claim for special damages must be specifically pleaded and strictly proved.

47. For the foregoing reasons, the defendant argues that the plaintiff's claim cannot hold and that in any event, the contracts referenced at the trial are tainted with fraud and forgery.

48. In his oral highlights, Mr. Nderitu advocate for the defendant argues that the originals of the documents were never produced and also reiterates the written submissions that the existence of a contract between the parties has not been proved by the plaintiff; and that any contracts tendered are clearly tainted with fraud.

49. The advocate therefore urges this court to dismiss the plaintiff's claim with costs.

50. In rejoinder, the plaintiff through his further submissions argues *inter alia*, that the claims of fraud and forgery pleaded by the defendant have not been proved against it.

51. The plaintiff also maintains that it is the suppliers of the defendant who caused him grave inconvenience and loss, and hence the present claim.

52. Overall, it is the submission of the plaintiff that his claim remains uncontroverted and hence it ought to be allowed. These sentiments were reaffirmed in the rejoinder arguments by Mr. Kihara.

53. The record shows that subsequently, two (2) applicants namely Paul Kang'ori and Ben Ngumba Gacanja brought the application dated 1st October, 2018 and sought to substitute the plaintiff with their names, indicating that

the plaintiff died on 21st September, 2017.

54. Upon hearing the parties, this court by way of the ruling delivered on 13th May, 2021 substituted the name of Latimer Ruguaru Gacanja with that of the abovementioned applicants as plaintiffs in the matter.

55. I have considered the evidence tendered in court and the submissions filed plus the authorities cited, and I have identified the following as the key issues for determination:

i. Whether the plaintiff and the defendant enjoyed a contractual relationship at all material times;

ii. Whether there was a breach of the contract by the defendant; and

iii. Whether the plaintiff is entitled to the reliefs sought.

56. To address the **first** issue, upon my examination of the pleadings and evidence collectively, I am satisfied that the plaintiff brought credible evidence to show that the defendant had at all material times contracted his services for purposes of transporting its goods, namely poles and firewood, from Eldoret/Kitale areas to Kakuma.

57. The evidence tendered also shows that such transportation services were engaged at cost and that the plaintiff was required to issue invoices with copies of delivery notes to the defendant's camp at Kakuma for payment.

58. Upon my further examination of the pleadings and evidence, I note that whereas the defendant denied the existence of any such contracts and further alluded to the presence of fraud and forgery on the contracts tendered in evidence, it did not bring any credible evidence to support those allegations.

59. For the foregoing reasons and in the absence of any contrary evidence, I am satisfied that the plaintiff has proved the existence of a contractual relationship between him and the defendant at all material times.

60. Concerning the **second** issue for determination, upon my study of the pleadings and material placed before me, I observed that the plaintiff brought credible evidence by way of delivery notes to show that he had delivered the various material goods to the defendant on various dates.

61. The plaintiff also tendered credible evidence to indicate receipt of the goods on behalf of the defendant on various dates. It is therefore apparent that the plaintiff performed its contractual duties at all material times.

62. Upon considering the evidence of the plaintiff that on occasion he would be contacted to transport poles or firewood and related items, only to discover that the said items were not at the site, I also observed that this evidence was echoed by PW2 in his oral testimony.

63. It is noteworthy that PW2 was at all material times an employee of the defendant and working closely with the persons in charge of supplies and transportation, which would include the plaintiff and his drivers/agents.

64. I also note from the contract documents adduced as evidence that communication on availability of the goods to be delivered by the plaintiff was to come from either the contractors or the defendant's agents/staff. This supports the evidence of both the plaintiff and PW2 that whether or not the suppliers of the goods were the ones who altered the venue of collection of the goods, it is apparent that the defendant was at all material times aware of this fact and it is more plausible than not that its employees or officers gave instructions to the plaintiff to collect the goods, only to find that they were missing or had been collected by other parties.

65. In this sense and in the absence of any contrary evidence by the defendant, I am satisfied that the plaintiff has reasonably demonstrated that by not ensuring that the material goods were always at the site of collection at the time of giving instructions for collection and delivery, the defendant had acted in breach of the agreement entered into between the parties.

66. This brings me to the **third** and final issue touching on the reliefs sought by the plaintiff. I will first address the sum

..... for the Plaintiff

..... for the Defendant