REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA A NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO. 443 OF 2015

PRIME TELECOMS LTD.....PLAINTIFF

VERSUS

ERICSON KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 16th September 2015, and subsequently amended and filed in Court on 17th November 2015.

2. The plaintiff seeks that judgment be entered against the Defendant as here below stated;

a) Loss of income of Kshs 6,000,000 per month from 29th April 2015, until the date of delivery of judgment;

b) Costs of equipment Kshs 9,459,240;

c) Loss of business Kshs 36,765,700;

d) Damages for loss of business opportunity;

e) Costs of the suit;

f) Interest at Court rates on items (a), (b), (c) & (d) from date of judgment until payment in full; and

g) Any other relief this Honourable Court deems fit to grant.

3. The Plaintiff's case is that, on 30th January 2013, it entered into an agreement with the Defendant described as; Frame Agreement for provision of Optic Fibre Civils and Cable Works, READ-2012:367534, (herein "the Agreement"). That the parties enjoyed a good working relationship, until 29th April 2015, when the Defendant issued the Plaintiff with a notice purporting to terminate the Agreement. The reason given for the termination was that; one of the Plaintiff's casual workers was involved in a fatal road accident, at the Defendant's project site along the Jogoo-Nile Road Junction, Nairobi. The Defendant attributed the accident to the Plaintiff's breach of the requirements of the relevant occupational Health and Safety Policies.(herein "the OHS policies").

4. The Plaintiff contents that the purported termination of the Agreement is diametrical to the terms thereof. That, in addition, the Defendant maliciously communicated the accident incident to other entities that it has business relationship with it, thereby occasioning it damage, loss and causing it to be issued with a Red card.

5. The Plaintiff therefore claims the loss of income at an average of; Kshs. 6,000,0000, per month from the date of termination of the contract, Kshs 9,459, 240., being the cost of purchase of the machinery, as tabulated under paragraph 7 of the plaint, loss of business opportunities in particular a Tender from Safaricom Limited worth Kshs. 36, 765,700.

6. However the Defendant denied the Plaintiff's claim vide its statement of Defense. It is averred that, the Plaintiff failed to adhere to the specific supplier occupational health and safety requirements under Appendix 16.1 of the Agreement and the Occupational Safety and Health Act, Cap 514 of the Laws of Kenya, whose observance was expressly required under the Agreement. Similarly, that the Plaintiff failed to

meet its obligation to ensure that its personnel acted as per the relevant occupational health and safety policies and procedures required under the Agreement, as a result one its casual workers was involved in a fatal road accident as aforesaid.

7. The Defendant denied the particulars of damage and loss as pleaded and argued that, the scope of the Agreement, provided under clause 3.2, that the Agreement did not bind the Defendant beyond the scope provided in each purchase order. That clause 13 thereof provides that the Plaintiff was to furnish and equip its personnel with the necessary materials required for the execution, testing and completion of a project at its own cost and risk and that the title and ownership to the materials had not passed to the Defendant at the time of the termination of the Agreement on 29th April 2015 and as such the claim for the cost of purchasing equipment is unfounded and the claim for loss of business opportunities is denied and is speculative.

8. The Defendant denied that it communicated the accident incident to any entities in a negative manner and averred that, even then, under the terms of clause 2 of Appendix 16.1b of the Agreement, the Plaintiff acknowledged that the Defendant could share details related to major incidents and incident investigations with third parties including the Defendant's customers. Finally, the site of the incident was commissioned by Safaricom Limited, who also conducted their investigations internally and independent of the Defendant.

9. In reply to the Defence, the Plaintiff averred that it adhered to the Specific Supplier Occupational Health and Safety requirements under Appendix 16.1 of the Agreement and the OHS Policies and denied breach of Clause 23 of the Agreement and/or Appendixes 16.1 and 16.1b of the Agreement. It was averred that, under clause 13.2 of the Agreement, the title and ownership of all materials necessary to perform the works passed to the Defendant at the point they were incorporated into the works. It refuted the argument, that the claim for loss of business is speculative. It was reiterated that, the accident which happened on 20th March 2015 was not caused by non-observance of its part of OHS Policies.

10. At the hearing of the case, the Plaintiff's evidence was led by Mr. Martin Wainaina the director of the Plaintiff's Company. He relied on the statement and the documents filed in court by the Plaintiff. He reiterated the averments in the Plaint and the amended Plaint and maintained that, the termination of the Agreement was contrary to the terms thereof. That the reasons advanced of the accident that involved its casual worker was out of malice and illegal as the Plaintiff did not contribute in any way to the occurrence of the accident.

11. Further that the Defendant, did not follow the laid down procedure in terminating the Agreement as the Plaintiff was not given thirty (30) days prior written notice of the intention to terminate the Agreement, and that the notice was to state clearly the nature of the act, or omission that constituted the breach thereof, so that the Plaintiff could remedy the same within a period of thirty days. It was maintained that, the unlawful termination of the Agreement caused the Plaintiff to suffer loss as stated, and that the effect of the red card issued to it, was to exclude it from future Safaricom Limited bids and tender opportunities for a period of one year. That Safaricom Limited being the largest provider of mobile and data network infrastructure in the country was its prime source of business as it is engaged in the business of laying infrastructure.

12. In cross examination, Mr. Wainaina denied that, the Defendant had warned the Plaintiff on several occasions for not complying with OHS Policies. He denied having attended a meeting and/or signed minutes where the issue of violation of these policies was discussed. On further cross examination, he informed the court that the equipment that had been bought, is with the Plaintiff and not the Defendant, and that if the Defendant pays for the same, he shall hand it over to them. However, he conceded that the agreement states that they would buy equipments at their own costs and risk.

13. The Defendant's evidence was led by Mr. Mamati Hendulas the Manager for OHS of the Defendant's company. He also relied on the statement and documents the Defendant filed in court. He testified that he visited the site at Ruai, and noted several safety violations including lack of safety basic personal protective equipment (helmets, overalls, goggles and reflectors, gloves, gumboots), absence of barricades, and neither the risk assessment nor the safety talks had been conducted. On 31st May 2013, during his follow up inspection, he noted that little change had been made.

14. On 6th June 2013 he visited again and observed continuous violation of OHS requirements and on 26th February 2014, the Defendant issued the Plaintiff with a stop order, to cease all the works on the basis of the said violations. However, the Plaintiff disregarded this stop order and continued with works. On 23rd February 2014, the parties held a meeting after conducting investigations on the works being undertaken by the Plaintiff. The meeting resulted in the stop order. It was agreed that the Plaintiff will not commence works without reinstating barricades, it was to conduct risk assessment, on a link by link basis prior to commencement of works and the Plaintiff was to ensure strict use of PPEs on site by imposing strict enforcement rules.

15. That the Plaintiff was notified of these recommendations of 27th February 2014, through the work stop order Incident Report, and the works stop order that had been issued was cancelled. On 20th March 2015, the incident of the fatal road accident stated herein took place. That the Plaintiff failed to report the incident within 24 hours and reported it more than 28 hours in breach of the Agreement. However once the Defendant was informed, it informed Safaricom Limited as the project's instructing entity. Subsequently the representatives of the Defendant visited the site, which revealed lack of traffic management plan, failure to display speed limit signage and mismanagement of the victims' emergency care.

16. During the cross examination, the witness admitted that he had not produced the site visit reports nor the works stop order referred to. Although he produced a final report of the incident that he had prepared, it was noted that it had not been signed anywhere. However, in re-examination, he told the court that the documents were communicated to the Plaintiff through email and the Plaintiff admitted receipt thereof and neither are they in dispute. That the Defendant could not terminate the Agreement earlier because one of its core values is "perseverance".

17. The Defendant also called Rostand Njomjang the head of Build Harm East Africa in the Defendant's Building Department. He relied on the statement he filed in court as his evidence, and testified that after the accident was reported to the Defendant and Safaricom Limited, they visited the site and carried out separate investigations. Following the investigations, Safaricom Limited resolved to find the Defendant

responsible as the instructed entity and issued it with a Red card vide their letter dated 27th April 2015. The Red card greatly affected the Defendant's business and it appealed against it whereby the period of suspension from engaging in business with Safaricom Kenya Limited was reduced from 12 months to three months vide a letter dated 19th May 2015. On 29th April 2015, the Defendant terminated the agreement with the Plaintiff and any pending purchase orders in line with clause 27.1 and offered to compensate the Plaintiff for the services rendered which was accepted and signed off by the Defendant's applicable representatives.

18. That in the given circumstance, the Defendant had a proper legal basis for terminating the Agreement and used proper procedure provided in the Agreement. In cross examination, he informed the court that he could not tell how long after the incident the investigations were done. That clause 5.1 stipulates penalty for violation of OHS.

19. At the close of the entire case, the parties tendered their final submissions, which I shall consider alongside the evidence adduced herein. However, before I do that, I note that the Plaintiff filed a list of issues for determination and referred to the same in their submissions which in a nutshell state as follows:-

(a) whether the Defendant acted in breach of the contract when it terminated the contract between the parties;

(b) whether the accident that occurred on 20th March 2015, was caused by the Plaintiff;

(c) whether the Plaintiff breached the Defendant's OHS policies;

(d) whether the Plaintiff is entitled to the reliefs sought in the Plaint;

(e) who should pay the costs of the suit

20. These issues were basically addressed and adopted by the Defendants in their submissions accordingly. The court shall be guided by the same. I shall now examine the first issue as whether the agreement was properly, legally and/or lawfully terminated. The first stop point in relation to the same is the notice of termination dated 29th April 2015, addressed to the Plaintiff by the Defendant. The notice makes reference to the Provisions of Article 23 (compliance with the laws and regulations) and Article 27 (termination of the agreement). The Plaintiff relies on Article 27 to argue that, the termination was not procedural. Whereas the Defendant relies on Article 23 to argue that the termination was lawful, due to non compliance of its provision.

21. For ease of understanding the provisions of Article 23 of the Agreement, it states as follows:-

"Article 23.1 The contractor shall ensure that its personnel abide by all relevant policies and procedures necessary for the performance of the Works and made available to it by Ericson, as well as related instructions issued by Ericsson's Representatives."

"23.2 The Contractor shall comply with the provisions of all applicable laws and regulations (including procurement, at the Contractor's expense, of all licenses, permits, certificates or other approvals) and the requirements of different industry standards applicable to the performance of the Works."

22. The Defendant further argues that, the relevant policies and procedures are found under the Defendant's General Suppliers Occupational Health and Safety requirements annexed to the Agreement as appendix 16.1. They state as follows;

"16.1: The contractor shall establish and maintain quality and environmental systems in conformance with the requirements set out in ISO 9000 and ISO 14001, or such other quality and environmental system standards agreed between the parties. Such systems shall be documented by the Contractor and submitted to Ericsson no later than ten (10) days from the Agreement Effective date."

23. That the Plaintiff's breach of these policies and procedures was independently evidenced by the issuance of a red card by Safaricom Limited to the Defendant on account of the Plaintiff's non-compliance, that had led to the death of one of its employees. Therefore the Defendant argues that, the Plaintiff's breach is fundamental and entitles it to rescind and/or repudiate the whole contract. They relied on the case of; *African Cotton Industries Limited –vs- Rural Development Services Limited [2014] eKLR* where it was held;

"When an innocent party finds itself in a position where the other has breached the contract, it has a right to elect to treat the breach as repudiated and move on, or to enforce it through the assistance of the Court."

24. The Defendants refuted the arguments by the Plaintiff that the breach is of the nature contemplated under clause 10.5 of the Frame Agreement, and argued there is no provision in the matrix provided for the penalty to be imposed for a permanent fatality.

25. To revert back to the issue under consideration as already stated, the Plaintiff relied on clause 27.6 which states that either party shall be entitled to terminate this agreement in whole or in part immediately if:

(a) "27.6.1 material changes take place in the conditions concerning the ownership or control with respect to the other party, or that the whole or part of that party's business engaged under this agreement is sold or transferred to a person or entity; or

(b) 27.6.2 the other party should pass a resolution, or any court should make an order, that it shall be wound up, or if a trustee in bankruptcy or insolvency, liquidator, receiver, or manager on behalf of a creditor should be appointed or if circumstances shall

arise which would entitle the court or a creditor to make a winding up order, or if it is otherwise likely that the other party is insolvent."

26. The Plaintiff further argues that the letter dated 29th April 2015 which terminated the agreement was with immediate effect, yet parties are bound by the terms of the agreement as held in the case of; *National Bank of Kenya Ltd -vs- Samkolit (K) Ltd & Another [2001] eKL* unless coercion, fraud or undue influence are pleaded and proved, therefore thirty (30) days prior written notice should have been given.

27. That similarly in the case of; *Elson Plastics of (K) Limited –vs- National Water Conservation and pipeline Corporation [2014] eKLR,* the Court held that a Court cannot re-write the contract for the parties and the parties are bound by and should be committed to the terms of their contract.

28. That, the termination of the agreement with immediate effect was against the provisions of clause 27 of the Agreement and the Defendant realized it had terminated the Agreement perverse the terms and authored a letter dated 6th May 2015, maintaining its decision to terminate the Agreement and clarified that the termination shall be effective on 26th June 2015.

29. That, at page 2 of the said letter, the Defendant stated prior to the settlement of any outstanding payments or performance Bond due to the Plaintiff, the Defendant, will apply the penalties stipulated in Article 10.5 (delays and Penalties for non-conformance).

30. That the letter dated 6th May 2015, only serves to compound the Defendant's breach of the terms of the Agreement, in addition to terminating it without due regard to its terms. Further it imposes penalties in terms of the SHEQ penalties matrix under clause 10.5 of the Agreement which is counterintuitive and unjust.

31. In my considered opinion, parties herein having conceded that they voluntarily entered into the subject Agreement, they are bound by the terms and conditions thereof. Reference has been made to several Articles thereof. Of great significance is Clause 10.5 which clearly provides that, if the Plaintiff fails to comply with the Defendant's safety checks and procedures, the Plaintiff will be liable for penalties provided as per the penalty matrix. Those penalties deals with elements inter alia: Safety and Health, Environment and Quality. They also classify the severalty, impact and the penalty applicable. It is noteworthy that, the impact provided for under Safety and Healthy is potential fatality and not "permanent fatality". The penalty applicable for the said potential fatality is 0.5% of work order.

32. On the other hand, Clause 23 simply requires the Plaintiff to comply with laws and regulations. It does not provide the penalties for non compliance. However, the Defendants concede that, there is no provision in the matrix for the penalty to be imposed for a permanent fatality, but I find that the occurrence thereof could not result in termination of the Agreement. This is supported by the provisions of Article 27 which clearly provides the circumstances under which the contract could be terminated, which include but are not limited to;

(a) Under Article 27.1 cancellation of the purchase orders without costs;

(b) Under Article 27.4 in the event the Defendant rejects the works as set out in Article 9.1.6 (following the contractor's remedial work); and or where the Defendant is able to claim maximum damages as set out in sub-article 10.2 (in the event of delay);

(c) under Article 27.6 which entitles either party to terminate the contract in whole or in part as already stated herein;

(d) Under Article 27.7 where the Defendant is entitled to terminate the Agreement after giving the Plaintiff Thirty (30) days prior written notice;

(e) Under Article 27.10 in case of material breach of the agreement or parts thereof by either party not remedied within thirty days from the date of receipt of the other party's written notice of such breach;

33. It is therefore clear that under Article 27, there is no provision for the Defendant to terminate the contract on the ground of permanent fatality and the same could only be guided by Article 10.5 which deals with the violation of OHS, although it did not deal with the same. Therefore Article 23, which the Defendants have relied on must be read jointly with Article 10.5.

34. Even if the court were to find that, the Defendants were entitled to terminate the agreement as they did. The provisions of Article 27.7 required them to give a thirty (30) days prior written notice. The letter dated 29th April 2015, which terminated the agreement with immediate effect was therefore contrary to these provisions. The Defendants however seem to have noticed the same, and remedied it by issuance of a subsequent letter dated 26th May 2015. Unfortunately, this letter was not produced by either party and the Court is not able to appreciate the reasons advanced therein for terminating the Agreement.

35. Be that as it may, I find that there was no basis for the Defendant to terminate the Agreement on the ground that the Plaintiff had breached the provisions of Article 23 of the Agreement, relying on the fatality suffered by the casual labourer and on the basis of non-compliance with the OHS policies and procedures.

36. That leads me to the second issue as to whether the accident can be blamed purely on the Plaintiff's negligence and/or violation of the OHS. In this regard, the Plaintiff submitted that, Section 107 (1) of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That, although the Defendant has listed particulars of the Plaintiff's breach of contract, in its defence, it did not bother to lead any evidence to prove the particulars.

37. That Mamati Heldlus, DW1, admitted on cross examination that he never documented the site visits he made to the Plaintiff's site on 2 7th

May 2013, 3[1st] May 2013 and 6[th] June 2013 yet he was required to do so by his employer. He also admitted that, the alleged work stop order, which was issued against the Plaintiff, is a written document, yet the same was not produced in court as evidence.

38. That the victim was not knocked down by the Plaintiff's motor vehicle but was a victim of an accident which happened outside its site and caused by third parties, a fact uncontroverted. Therefore, the Plaintiff cannot be blamed for the accident. Further, although the Defendant also alleges that it conducted an investigation after the incident which occurred on 20[th] March 2015, the report of the incident is not signed, and does not indicate whether it was checked or whether it was approved. It therefore lacks authenticity and does not have an iota of probative value. The investigation was shoddy and partial.

39. Reference was made to the case of; *Kituo Cha Sheria & another –vs- Central Bank of Kenya & 8 others [2014]eKLR* where the court that;

> *"32. As correctly pointed out by the Attorney General and the 1st respondent, the petition has its basis in a newspaper article and documents which have not been executed. Clearly, therefore, the primary documents that the petitioners rely on are of doubtful probative value, as submitted by the respondents in reliance on the case of Wamwere vs The A.G and Randu Nzau Ruwa and 2 Others –vs- Internal Security Minister and Another (2012) eKLR. If I may borrow the words of the court in the Ruwa case, with tremendous respect to the petitioners, these media articles, taken alone, are of no probative value and do not demonstrate any effort on the part of the petitioners to demonstrate violation of the Constitution by the respondents.*
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> *33. The first is a newspaper article from the Daily Nation of October 19 2011. The second is an unsigned, undated agreement referred to as a "Share Sale and Purchase Agreement". The third is the lease between Central Bank and Thomas De La Rue Kenya Limited entered into in 1992, while the fourth document is titled "De La Rue Currency and Security Print Limited Statement of Financial Position as at March 2009".*

40. That, when the investigations into the incident were being conducted no work was going on at the site and the Plaintiff had removed some of the safety equipment used at an active site when employees are working due to vandalism by members of the public.

41. However, the Defendant maintained that, the Plaintiff violated section 6 of the Occupational Safety and Health Act, 2007, that obligates employers to ensure the safety of their workers, despite the repeatedly warnings on its failure to observe safety standards at its various work sites. The Defendant argued that, the Plaintiff should not be allowed to benefit from its own breach and relied on the case of; the case of; *Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR* which affirmed the holding in *Alghussein Establishment V Eton College [1991] 1 All ER 267* where the Court held as follows:

> *"The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach…..'*

42. The Defendants produced a report dated 30[th] March 2015, under the heading "Fatality Incident Kenya". A quick perusal thereof reveals the sequence on 20[th] March 2015 at 9.30am, two vehicles collided along Nile-Jogoo road as the pick driver was trying to avoid the man travelling on the same road towards Donholm on realising he would hit the man drove into the junction prematurely as a result of the impact the van veered off the road, knocked the deceased Mr. Oketch in the chest, he was thrown off onto the 2[nd] carriage way and landed on his back. It is alleged that at that time, the deceased had changed in his PPE and was trenching on the central kerb. The report identifies the direct cause of the accident as being the speed coupled with the incautious manner of driving of the two vehicles involved in the collision and that the work area was not barricaded prior to commencing works as only one warning/hazard signage, namely "Men at work" was on site, the signage was not on road to control traffic but on the kerb area, no speed limiting signage and no flagman to help control traffic on meeting roads.

43. The root causes were stated as; risk assessment (RA) aimed at identifying hazards, risks and management measures not conducted prior to commencing work; traffic management plan not fully implemented by the ASP.

44. It suffices to note that this report was prepared by the Defendants and although it's alleged the Safaricom Limited carried out their own independent investigations; their report was not formally produced in court. The Plaintiff on the other hand did not produce any report on the surrounding circumstances of the incident but denied bearing any blame for the incident in whatever way. Even then, being a road traffic accident, cause of the accident would have been more certain, if the police investigation report was availed.

45. But as already stated, even if the Plaintiff was to blame for non compliance with the OHS policies and procedures, the cause of action and remedy would be founded under Article 10.5 and not Article 27. In conclusion on the first and second issues, I find that the termination notice was not issued in accordance with the provisions of the Agreement.

46. The Plaintiffs have invited the court to hold that, termination of the agreement amount to a breach of the contract. However, I note that, among the prayers sought for in the Amended Plaint, there is no prayer in relation with the said breach. There is no prayer for general damages for breach of contract. I shall therefore leave the issue to rest at that. Even then, the provision of Article 27.12, clearly stipulates that, termination of the Agreement for any cause shall not release either party from any liability which has accrued to the party or that may accrue in respect of any act or omission prior to termination. In this regard, the Defendants submitted that the Plaintiff has been paid its dues which fact has not been denied.

47. The final issue is whether the court should grant the orders sought. The first claim is for loss of income. The Plaintiff submitting on these issues stated that, it has produced spreadsheet statements showing the purchase orders it received from the Defendant for the period between

21st May 2014 and 24th March 2015 to prove that it earned an average of Kshs. 6,000,000 per month. Its engagement with the Defendant would have gone on until the project was completed. The breach by the Defendant of terminating the Agreement unlawful entitles it to the sum from the date of termination to the date of Judgment. The Defendants on the other hand submitted that, the test for recoverable damages is that of remoteness and/or that the damages must flow naturally from the breach of contract or the damages as laid down in the decision of; *Hadley v. Baxendale (1854) 9 Exch. 341* and adopted in Kenya by the case of*; Pankaj Transport PVT Limited v SDV Transami Kenya Limited [2017] eKLR*.

48. It was further submitted that, as the Frame Agreement did not bind the Defendant beyond the scope provided in each Purchase Order, there was no obligation upon the Defendant to issue the Plaintiff with subsequent Purchase Orders. Each Purchase Order was a separate contract subject to negotiation and acceptance prior to its signing. That even then, that the Plaintiff did not lead any evidence at the trial to show the pending number of purchase orders that cumulatively amounted to Kshs. 6,000,000 as was averred in the Amended Plaint, nor gave the particulars of how this figure is made up or calculated.

49. The Defendant further argued that, in any case, the claim for the sum of Kshs. 6,000,000 is in the nature of special damages which must not only be pleaded but also proved in evidence. Reliance was placed on the case of; *Fredrick Mulumba T/A Freba Investments v National Cereals & Produce Board [2009] eKLR* which adopted the decision in *Strows Broks Aktie Bolog v Hutchison [1905] AC 515* that distinguished special and general damages as follows:

> "*General damages are such as the law will presume to be direct, natural or probable consequences of the action complained of. Special damages on the other hand are such as the law will infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character; they must be claimed specially and proved strictly."*

50. Further reliance was placed on the case of; *Habib Zurich Finance (K) Ltd v Muthoga and another [2002] 1 EA 81 (CAK)* to argue that general damages cannot be awarded for a breach of contract because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general and become special damages thus there must be proof of actual loss as a result of the breach.

51. Finally the Defendant relied on the decision in *Kenya Power & Lighting vs. Fridah Kageni Julius [2014] eKLR* where the court cited with approval the decision in *Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177* which held as follows:

> "*It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage, it is not enough to note down the particulars and 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."*

52. I have considered the arguments in relation to this issue and find that, Article 3.2 relied on by the Defendant states that, "this agreement does not bind Ericson beyond the scope of each purchase order issued in accordance with its terms." The scope of the contract is provided for under Article 3. Article 4 deals with purchase orders, stipulates under sub article 2 that specific requirement for any works shall be subject to a separate purchase order, and sub Article 6 provides that the contract between the parties shall be concluded when the contractor has received a purchase order which is in accordance with the terms and conditions of the Agreement. Sub Article 9, states that when a contract has been concluded, the Agreement shall then be deemed to be integral part of such contract.

53. These provisions supports the Defendant's submissions that: the provision of works and/or the installation of specified material to be carried out by the Plaintiff was to be in accordance with the terms of the agreement as described in the Purchase Order, the project detail and Agreement appendixes. Therefore the Defendant was not bound beyond the scope of each Purchase Order.

54. I have looked at the amended Plaint filed by the Plaintiff, and the claim of Kshs. 6,000,000 is dealt with in two lines under paragraph 7(a) the Plaintiff which states as follows; "loss of income at an average of Kshs. 6,000,000 per month from the date of termination of the agreement."

55. In the statement filed by the Plaintiff's witness Mr. Wainaina, it is averred under paragraph 6 that the Plaintiff used to earn an average of Kshs. 6,000,000 per month after paying tax and has lost this amount as a result of breach of contract by the Defendant. The Plaintiff has annexed documents in support of this claim. The said documents includes copies of cheques, two invoices and delivery notes.

56. At the trial, the Plaintiff's witness testified in cross examination that he lost business to a tune of Kshs. 6,000,000 and referred the court to page 63 of its bundle of documents which contain a bundle of purchase orders they used to get from the Defendants. I have looked at the document at page 63, and I find it is a one page document which is totally illegible and completely un-understandable without further explanation, even the subsequent substituted copies are not explained in evidence or otherwise.

57. In conclusion, I concur with the Defendant's submissions that the claim is not proved. Even then, when it is pleaded as special damages, it required proper proof thereof, and that evidence is lacking. I disallow it.

58. As regards the claim of the costs of equipment of the sum of Kshs 9,459,240; Plaintiff submitted that the equipments were purchased for the project and referred the court to a bundle of documents produced at page 52-62 of the Plaintiff's documents, it was argued that these documents have not been challenged by Defendant in any way.

59. The Defendant to the contrary, argued that under clause 13 of the Frame Agreement, it is explicitly provided that the Plaintiff would, at its own risk and costs, furnish and equip its personnel with the necessary machinery, apparatus and physical hardware required for the execution, testing and completion of the works under it.

60. That no evidence was led at trial to show the correlation between the equipment purportedly purchased by the Plaintiff and the specific Purchase orders that were issued to it, or to show when the title to this equipment would have passed to the Defendant and that as a matter of fact, it was admitted at trial and in the Plaintiff's written submissions, that the equipment are currently in the Plaintiff's possession.

61. In my considered opinion on the issue and taking into account the provisions of Article 13, of the subject agreement herein, as stated by the Defendants, it was the responsibility of the Plaintiff to purchase the equipments and all material necessary to perform the work, furnish and equip its personnel with the same. The title and ownership of such material was to pass to the Defendants at the point they were incorporated into the works. It therefore follows that, the Plaintiff has to establish that the subject equipments herein, were incorporated into the works. From the pleadings, the Plaintiff tabulates the cost of various equipments in respect of the project. The Plaintiff's witness in his statement, stated that, the Plaintiff invested the equipments specifically in the project for the Defendant, and that it became useless after the unlawful termination of the agreement.

62. The Plaintiff then referred the court to documents at pages 52-62. I have gone through the same, and with utmost respect, some of them are completely illegible, in particular pages 52, 54, 60 and 62. Secondly, I note that, four of the documents are invoices for different amounts which are not fully supported by the four cheques produced at pages 58-60. I therefore find insufficient evidence to support the claim as pleaded that;

i. all equipments listed at paragraph 7(b) of the Plaint were purchased; and/or

ii. they were incorporated in the Defendant's works

In the circumstances, I disallow the claim.

63. The next two claims are for loss of business and business opportunity. The Plaintiff submitted that, it was excluded from bidding and tendering for a Tender floated by Safaricom Limited in the sum of Kshs. 36,765,700 due to the Red card issued to it by Safaricom Limited. The Plaintiff blames his woes on the Defendant. On the other hand the Defendant submitted that, the document referred to as a "Tender" from Safaricom Limited does not show that the Tender is for the sum of Kshs. 36,765,700 or that the non-award of the same was due to the Defendant.

64. That it was established during cross examination of PW1 that the tender issued by Safaricom Limited merely requested bidders to submit bids, and the document produced by the Plaintiff is own bid containing the sums it would have proposed to tender to Safaricom Limited. It was not a sum guaranteed to be awarded as tenders are competitive in nature and only the winning bidder would be awarded the project.

65. I have looked at the alleged tender documents from Safaricom Limited, and as submitted by the Defendants they do not constitute an Award of a Tender. The same is a bid for a Tender. It was subject to competitive bidding which could have gone either way and therefore it's not certain that the Plaintiff would have won the Tender and/lost the same.

66. It is a general law that a tender is a submission made by a prospective supplier in response to an invitation to tender. It makes an offer for supply of goods or services. Tender documents are prepared to seek tenders (offer). I therefore find the claim not supported and disallow it. I also find that, the Plaintiff has not proved that they lost business opportunities as a result of the red card. It suffices to note that, Safaricom Limited served both parties with the Red card. The Defendant opted to mitigate its position by lodging an Appeal and as a result, the period of ban was reduced from 12 months to three months. The Plaintiff did not act in a similar manner. The law of contract is clear, that a party must mitigate its own loss that may result from a breach and/or continuous breach of contract. Even then as already stated, the lost opportunity is not well brought out in the evidence. Further, although the Plaintiff blames the Defendant for reporting the incident to Safaricom Limited, the Defendant justified the action on the ground that Safaricom Limited commissioned the site where the accident took place. That explains why Safaricom Limited also carried out an independent investigation of the incident. It is further stated that clause 2 of appendix 16(1)(b) authorized the Defendant to share the information relating to the Plaintiff with the Third party. This has not been rebutted. I therefore find the Plaintiff has not proved its case for award of damages for loss of business opportunities.

67. The last issue is on interest and costs. The Plaintiff submitted that, the terms of the contract bound the Defendant to pay against any invoice issued by the Plaintiff within 45 days. That the Defendant has without any just cause, terminated the Agreement. Consequently the Plaintiff has been kept out of its funds unfairly; therefore, the Plaintiff is entitled to interest on the sum claimed from the Defendant at court rates. Further that Section 27 of the Civil Procedure Act provides that, subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers, provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. The interest on costs awarded at any rate may not exceed fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

68. However, the Defendant relied on the general rule that costs follow the event meaning that it is the losing party who pays the legal costs of the successful party. It was submitted that the Plaintiff has shown lack of industry in even trying to establish the claims it made in the Plaint and has put the Defendant to the time and expense of defending itself against an unmeritorious claim. In the circumstances, this is a proper case for the award of costs as against the Plaintiff in any event.

69. I have considered the issue of interest and costs, and I find that from the analysis of the Plaintiff's claim and the findings of the Court being that none of the claim for special damages have been proved, no interest can be awarded as prayed for under paragraph 11(f) of the Plaint.

70. Finally, the court having found that, the basis upon which the Defendant terminated the Agreement were not in accordance with the provisions of the Agreement, which would have probably entitled the Plaintiff to an award of general damages for breach of contract had

there been a prayer for the same in the Plaint, it is only fair that, each party bears its own costs, and it is so ordered.

71. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 19th day of November 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mr.Njenga for the Plaintiff

Mr. Kuyo for the Defendant

Dennis .....Court Assistant