



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 61 OF 1996

KIBUGI FARMERS CO-OP SOCIETY.....PLAINTIFF

VERSUS

PHILIP MUNGAI T/A

MUNGAI ELECTRICAL VENTURES.....DEFENDANT

J U D G M E N T

A. Introduction

1. The plaintiff filed this suit against the defendant vide an amended plaint dated 29th February 2006 in which he sought for orders that he be paid the sum of Kshs. 659,668.00 in respect of damages incurred by him due to the defendant's breach of contract. He also prayed for costs of the suit for exemplary damages and interests.
2. The defendant filed an amended defence and counter-claim dated the 11th April 2008 in which he prayed for dismissal of the plaintiff's suit with costs. He sought for general damages of Kshs. 9,920,919/= for breach of contract; special damages of Kshs. 189,875/=; interest on amounts claimed at court rate from 7/01/1994 and costs of the suit.

B. Plaintiff's Case

3. The plaintiff called one witness who testified that he was the chairman of the plaintiff at the time and further that he knew the defendant who was successfully awarded a tender for works to be done at the plaintiff society. The tender value was Kshs. 594,100/=.
4. The plaintiff witness further testified that the works were to be carried out in 3 phases, 2 of which the defendant successfully completed and was paid a total of Kshs. 364,460. The witness further testified that trouble ensued when upon inspection of the 3rd phase there were complaints of completion not having been complied with after which payment was denied.
5. The witness further testified that the defendant subsequently stopped work, and later attempted to remove some installations from the factory, an attempt that was stopped by members of staff.
6. The defendant sought police intervention with whom he returned to the factory sparking a confrontation after which the plaintiff realised that some of their equipment was missing. Subsequently, the defendant was arrested.
7. The plaintiff's witness testified that because of the hostility between them and the defendant, the commercial relationship was tarnished and the plaintiff granted the contract to someone else. The plaintiff subsequently filed this suit against the defendant.

C. Defendant's Case

8. The defendant testified that he was awarded the tender and he did carry out the works and was paid for phase one and two. He further testified that prior to start of phase 3, there was some work to be done which he was awarded and paid Kshs. 80,000/=.
9. He further testified that he carried out the works of phase 3 and completed. Upon inspection on the 6.1.1994, there were some recommendations made by the inspecting engineer. The defendant further testified that it is in the course of attempting to redo the work that a melee occurred forcing him to involve the police after which he was arrested and charged in a criminal case that resulted in an acquittal.
10. It was his further testimony that upon his acquittal he requested the plaintiff to provide him with security so that he proceeds with the work but the Plaintiff declined. He further testified that at that time the plaintiff owed him a total of Kshs. 189,992/= being the balance to be

paid in phase 3.

11. The defendant further testified that because of the issues with the plaintiff, the defendant was restrained from carrying out any work because of a letter written by the District Agricultural Officer leading to him losing work worth Kshs. 9,483,459/=.

D. Plaintiff's Submissions

12. The plaintiff submitted that the relationship between the society and the defendant had irretrievably broken and as such despite the acquittal of the defendant. The relationship between the society and the defendant had deteriorated. However, the defendant was in breach of the contract.

E. Defendant's Submission

13. The defendant submitted that the plaintiff had wrongfully terminated the contract between him and the society and subsequently the defendant was entitled to damages for breach of contract and for the loss of work worth millions.

F. The Determination

14. The issue for determination herein is to decide on who among the parties was in breach and what the remedy for the breach to compensate the affected party would be.

15. The relevant clause on breach of the contract between the parties herein is clause 4 of the contract which provides,

“If the contractor is guilty of any neglect or delay in the building or completing the said works within the time prescribed in clause 1 and 2 hereto the principal may be notice in writing sent by post to the contractor at his usual place of business immediately determine this agreement and the principal may then enter upon the said works without committing themselves to any liability for compensation as to the contracted price of shillings 594,100 under this agreement or the balance of that sum if advanced have been made to the contractor and if the cost of completing the worked be more than the said contract price or the balance thereof aforesaid, then the difference between it and the said contract to the principal.”

16. It is not in doubt from the pleadings by both parties that phase 3 was not completed to a satisfactory level. Further, it is not in dispute that subsequently the defendant was granted authority to carry out the repairs to ensure he is paid for phase 3.

17. It is admitted by the plaintiffs that following the scuffle on the factory, the relationship between the plaintiff and the defendant had irretrievably broken down. Despite the acquittal of the defendant, he could not be allowed to go on with the repairs at the factory although the works had been approved by the management. In my view, there was no breach of contract on part of the defendant.

18. It is worth noting that on the day of the scuffle, the defendant was recovering goods, which were his, as the same had not been paid for by the Plaintiff. This is admitted in the testimony of plaintiff's witness.

19. In my view, breach of the contract was occasioned once the plaintiffs refused to allow the defendant proceed with the repairs he was doing before his arrest. The act of the plaintiff amounted to breach in my view because there was no delay or neglect by the defendant in carrying out of their works in phase III. The works in phase I and II were completed on time. The inspection of the repairs to remedy the defects were approved as is evident from the testimony of the parties.

20. In the case of **Gatobu M'ibuutu Karatho V Christopher Muriithi Kubai [2014] eKLR** where it cited the High Court in Kampala case **Nakana Trading Co. Ltd V Coffee Marketing Board 1990 – 1994 EA 448**, which dealt with the issue of breach of contract as follows:-

“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts.

21. The parties in any contract are obligated to fulfil their contractual duties and obligations. The plaintiff committed a fundamental breach by failing to allow the defendant to continue his work after acquittal and this entitles the defendant to compensation for loss. It is worth noting that when the defendant asked for security, his request was denied on grounds that it was not a term of the contract and further that the plaintiff had earlier terminated the contract as shown in the Plaintiff's letter to the defendant dated 10/2/1994.

22. It is evident that parties are bound by terms of the contract. It was held in the case terms of the **Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999**, where the Court held that:-

“Parties to a contract that they have entered into voluntarily are bound by its terms and conditions.....”

23. Thus the plaintiff waived the right to “determine” the contract between themselves and the defendant by allowing him to carry out further repairs in remedy of the shortcomings exposed by the inspection upon completion of phase 3.

24. The Plaintiff could therefore allege breach by the defendant on mere grounds that there were irretrievable differences between them as alleged. Parties are bound by the terms therein especially on termination of the said agreement and in this case there were was one condition

precedent for termination. This was the clause on existence of that there was *any delay or neglect in the building or in its completion*. In the case of **National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, the Court held that:-

“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”.

25. By permitting, the defendant to carry out repair works, the plaintiff in my view shifted the burden of breach from the defendant to the society. Consequently, the plaintiff was not justified to unilaterally cancel the agreement. The blame on breach points the blame to the plaintiff as analysed in the foregoing paragraphs.

26. The defendant on his part alleges that as a result of his arrest and the letter by the District Agricultural Officer, he could not get work and thus claims Kshs. 9,483,459 from the plaintiff for loss and damage suffered. In my considered view, the defendant has failed to produce evidence linking the plaintiff to the loss of potential work. The defendant admits that he lost work as a result of the letter written by the District Agricultural Officer. The defendant has failed to prove his claim of loss of business or to attribute the blame to the plaintiff.

27. In regard to the issue of costs, Section 27 of the Civil Procedure Act provides that costs are granted at the discretion of the Court and the said discretion must be exercised judiciously. However, it is also trite law that costs follow the event. See the case of **R...Vs...Rosemary Wairimu Munene, Exparte Applicant...Vs...Ihururu Dairy Farmers Cooperative Society Ltd**, where the Court held that:-

“The issue of costs is the discretion of the court as provided by the law. The basic rule on attribution of costs is that costs follow the event.... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”.

28. Bearing in mind the above provisions of law and relying on decided cases on the issue of costs, it is trite law that costs follow the event. The defendant herein is the successful litigant and should ordinarily be accorded costs.

29. Consequently, I find that the plaintiff claim has not been proved to the standards required and it is hereby dismissed.

30. I find the 1st defendant's counterclaim partly succeeds and I hereby award him damages for breach of contract to the tune of Kshs. 189,992/= being the balance of the contract fee with interest at court rates from the date of filing the counterclaim.

31. The plaintiff will meet the costs of the suit.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF DECEMBER 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr Muriithi for Okwaro for defendant.