



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL CASE NO. 01 OF 2016

SPEED WALL BUILDING TECHNOLOGIES LTD APPELLANT

VERSUS

THE COUNTY GOVERNMENT OF MIGORI DEFENDANT

JUDGMENT

1. **SPEED WALL BUILDING TECHNOLOGIES LIMITED** (the plaintiff) has sued **THE COUNTY GOVERNMENT OF MIGORI** (defendant) seeking (a) general damages for breach of contract (b) general damages for loss of legitimate (c) special damages incurred as a result of pursuing and after signing the contract which continue accruing.

2. The background to the claim is that by a letter of offer dated 22/05/2014, the defendant informed the plaintiff that its application for the proposed construction of an operating theatre for **Isebania Level IV Hospital in KURIA WEST, Migori County** at a total cost of Kshs.13,692,402/20 cents (Thirteen Million Six Hundred and Ninety Two Thousand, Four Hundred and Two Shillings and Twenty cents only) was successful.

3. The plaintiff accepted the offer, and on 14/06/2014, both parties signed the agreement for the project. On the strength of the arrangements between the parties, on 24/06/2014, the plaintiff signed and executed a performance bond, and further secured financial facilities in the sum of Kshs.2,816,962/= to facilitate the execution of the project – a loan the plaintiff is still servicing.

4. Meanwhile the plaintiff waited for a handing over of the site by the defendant and visited the defendant's offices at Migori County Government on several occasions so as to be taken to the site for the execution of the project, but the defendant refused and/or neglected to honour their undertaking.

5. Subsequently the plaintiff wrote to the defendant a letter over the same matter, and to its surprise, read in the newspaper of 04/03/2015 an advertisement by the Defendant for tender for completion of the stalled theatre in **ISEBANIA MC/201/2014-2015 MIGORI COUNTY** – the same tender which had been awarded to the plaintiff and for which he was only awaiting handing over of the site.

6. The plaintiff wrote a letter of complaint to the defendant and demanded cancellation of the advertisement and on 16/03/2015, the defendants placed an advertisement in the newspapers cancelling the same – but to date, there has been no handing over. The plaintiff contends that from the conduct of the defendant, it is in breach of the contract resulting in the plaintiff suffering loss and damages particulars thereof are pleaded.

7. The defendant failed to enter appearance or file defence and an interlocutory judgment was entered on 15/06/2016. The matter thereafter proceeded on formal proof where **SAMUEL TANIBO OTIENO**

(PW1) plaintiff's managing director, explained to the court that the defendant had placed a closed tender to which he made an application. On 22/05/2014, the defendant wrote to inform the plaintiff (**Exhibit 3**) that its application was successful from the **PROPOSED CONSTRUCTION OF AN OPERATING THEATRE FOR ISEBANIA LEVEL IV HOSPITAL IN KURIA WEST, MIGORI COUNTY** at a total cost of Kshs.13, 692,462/20 cents and requiring an acceptance from the said within a period of seven (7) days. By a letter dated 26/05/2014 (**Exhibit 4**) the plaintiff accepted the offer and a formal agreement was entered into by the parties on 14/06/2014 and the same was duly signed.

8. It was PW1's evidence that his company was thereafter required to furnish the County Government with a performance bond for 4.5% of the contract sum – which amounted to Kshs.616,159/19 cents (**Exhibit 5**). This performance bond was an insurance guarantee provided by the plaintiff as security for compliance to perform the obligations under the contract, and such bond was executed with Africa Merchant Assurance Company (**AMACO**) on 24/06/2014.

9. After submitting the performance bond and signing the aforementioned agreement of 14/08/2014, the plaintiff mobilized funds for purposes of executing the contract. To this end the plaintiff applied for a loan from K-Rep Bank Limited and on 29th September 2014, was granted a loan as per **Exhibit 7**. According to PW1 the loan granted was Kshs.2,816,962/= and credited to the plaintiff's account on 29/09/2014, and the repayment being made to the bank is at the rate of 23.5% p.a.

10. Since the plaintiff was ready with the funding, and the 14 days period allowed by the contract for handing over of the site having lapsed, PW1 visited the defendant's offices on several occasions through the Department of Public Works for handing over of the site but achieved nought.

11. On 27/10/2014, the plaintiff wrote a letter (**Exhibit 8**) to the Migori County Chief Officer of Health imploring for a handover of the site, as the overdraft facility was running but this elicited no response.

12. Eventually the defendant placed an advertisement in the Daily Nation Newspaper of 04th March 2015 (**Exhibit 9**) advertising the very tender which had been awarded to the plaintiff – only that it suggested that the project had stalled.

13. The plaintiff sought audience with the Minister for Health, Migori County Government, demanding to know what was going on and a demand letter dated 10/03/2015 was also sent to the defendant urging for cancellation of the advertisement and for the defendant to take the plaintiff to the site without further delay. That advertisement was subsequently cancelled by another newspaper advertisement placed in the Daily Nation of 16/03/2015.

14. Having explained all the avenues available and failed, the plaintiff filed suit.

15. This court was shown the Bill of Quantities (**Exhibit 12**) the plaintiff prepared detailing the work to be executed in the contract – showing quantity and costs of every activity that was to be undertaken in the contract. PW1 stated that the last page of that document has the Grand Summary and the document also carries liquidated damages i.e. costs incurred in the event of breach or delay in delivery of works – being Kshs.20,000/= per week.

16. PW1 explained that there was an amount the company had expected to get from the contract as it was a full contract where the plaintiff was expected to procure materials, engage professional workers, and pay labour. He stated that the plaintiff usually charges 20% of the capital it employs on purchase of materials and 30% of the contract sum goes to labour, so the interest expected was 20% of the contract sum being Kshs.1916936/03.

17. He also stated that the plaintiff pays 15% to professional engagement being Kshs.2053860 and 15% goes to pay casual labourers and other workers.

18. As regards special damages (which have not been pleaded), PW1 stated that the plaintiff has incurred costs of repaying the loan, which is Kshs.55165/50 cents as interest, and so far it has repaid

Kshs.1,434,303/20 cents.

19. In some occasions the plaintiff has not been able to repay the loan in time, and this has resulted in bank penalties totalling to Kshs.305,179/=.

20. PW1 explained that for the plaintiff to get a loan the bank charged an appraisal fee of 1.5% which translated to Kshs.42,524/40 cents and a further 42,524/40 cents as disbursed fees. The plaintiff also executed a standing order of Kshs.200/= per month, which totals to Kshs.5200/=.

21. It is the plaintiff's case that it is entitled to liquidated damages being money which should be paid by the defendant for breach of contract for 26 months – the figure is worked out as $26 \times 4 \times 20,000 = 2,080,000$ /. The total sum claimed by the plaintiff is Kshs.8, 496,138/1 cents.

22. I have no doubt that the defendant is in breach of contract by failing to hand over the site to the plaintiff so as to begin work. This is demonstrated by the various correspondences sent by the plaintiff appealing for a handover and confirmed by the defendant's sudden advertisement for the very project the plaintiff was to embark on, then quickly withdrew that advance the moment the plaintiff raised a red flag.

23. The general principle in award of damages for breach of contract is, **subject to mitigation** of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see **Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR**, **Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR**). The case of **Hadley v Baxendale (1854) 9. Exch. 341** that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see **Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] e KLR**).

24. The above cited case has factors I will bear in mind even as I consider the damages to be awarded for breach of the contract

25. Having found that the plaintiff was in breach of contract then the next issue to determine is whether the contract provided specific terms in the event of the plaintiff being in breach of contract?

26. As pointed out paragraph 27 of the Bills of Quantities (**Exhibit 12**) refers to liquidated damages where the plaintiff contractor is in breach of the contract. It does not state what happens where the client (defendant) is in breach. The reference to Appendix to conditions of contract has particulars of insertions to be made in application to contract and refers to liquidated and ascertained rate of Kshs.20,000/= per week. I am afraid I do not comprehend what this is all about as it makes no specific reference to the defendant. If it relates to paragraph 27 of the Bills of Quantities, then it has failed to state that the provision applies to the defendant *mutatis mutandis*.

27. I would under the circumstances hold that the plaintiff is entitled to damages for breach of contract.

28. I also have no doubt that the plaintiff incurred expenses in preparing for the execution of the contract in securing a performance bond for Kshs.616,159/19 cents. He certainly did apply for a loan from K-Rep Bank – but he was not given Kshs.2,816,692/= as funds towards performing the secured tender. A letter approving the plaintiff's request for a loan is dated 19th September 2014 and refers to an additional overdraft facility which was being consolidated with an already existing principal balance of Kshs.1,316,962/= - additional loan given was Kshs.1,500,000/=. There is nothing to show when the earlier loan was taken or that the funds approved for prior to this letter were also for purposes of obtaining funds towards performance of the contract. In the circumstances I hold that the only loan the plaintiff obtained towards fulfilling his contractual obligations was the sum of Kshs.1,500,000/=. The approval for and disbursement fee were 1.5% of the loan each translating to Ksh 42,524/40cents.

29. Since the money borrowed herein never got to meet its intended use why didn't the plaintiff immediately plough it back to the bank to mitigate his losses upon realizing that the handing over was never to be? The plaintiff is not completely without blame on this and it would be unreasonable to expect the defendant to repay the entire sum borrowed. I am of the view that the defendant should bear the monies expended towards securing the loan and the repayment made from 29th September 2014 when the bank started debiting the plaintiff's account with the charge repayment until April 2015 which is slightly over one month after the date the second advertisement for the tender was withdrawn by a newspaper advertisement. This criteria is applied because once the demand was made and it elicited no response, then the writing was on the wall for the plaintiff that the defendant was never going to honour the contract and he should have begun mitigating his losses.

30. As for the contention that he is entitled to general damages for breach of legitimate expectation – I think that is what is taken care of under the damages for breach of contract. In any event the plaintiff had not yet purchased construction materials, engaged labour – whether casual or professional.

31. Is the plaintiff entitled to damages for the figures he has alluded to in his evidence although they were not specifically pleaded? The plaintiff has provided this court with all the material information regarding the expenditures and losses he has incurred being the execution of the performance bond for Ksh 616,159/-, the loan applied @ Ksh 1.5 million, the attendant bank processes totaling Ksh 85,048/- and the drawing up of the Bills of Quantities. To the extent that it is possible to apply the principle of averages because there are necessary figures with which to work upon almost with near precision! (see **Vaughan Williams, LJ in Chaplit versus Hicks [1911] 1KB 786**).

32. All the other figures which have so meticulously been marked out are in my view a special damages claim which should have been pleaded and proved (see **Order 4 Rule 2 and 6 Civil Procedure Rules** - this was never done. I refer to the case of **Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR)** and **Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)**).

33. The expected engagement of professional workers, labourers and casuals are events which were anticipated if the construction had taken place – it never did, and so no expenditure was incurred and the plaintiff cannot claim what has not been spent. [See **Bowen L.J in Radcliffe versus Evans [1892] QB** an English leading case in pleading and proof of damage where he stated that:

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty with which the damage done ought to be stated and proved...as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry”

34. Consequently, the plaintiff has only formally proved his claim for damages for breach of contract which in awarding I take into consideration the input by plaintiff of drawing up the bills of quantities, executing the performance bond in preparation for the work contemplated plus the bank charges and remittances accruing thereto until April 2015 and I award a total sum of Kshs. 2,280,003 (Two million Two hundred and Eighty Thousands only) as general damages for breach of contract

35. I also award the plaintiff interest on the sum at court rates from the date of filing suit until payment in full- Costs of this suit shall be borne by the defendant.

Written and dated this 16th day of February, 2017 at Homa Bay

H.A. OMONDI

JUDGE

Delivered and dated this 16th day of February, 2017 at Migori

A.C. MRIMA

JUDGE