



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Cockar & Muli JJ A)

CIVIL APPEAL NO 132 OF 1987

Between

JOGOO KIMAKIA BUS SERVICES LTD.....APPELLANT

AND

ELECTROCOM INTERNATIONAL LTD.....RESPONDENT

***(Appeal from a Judgment of the High Court of Kenya at Nairobi (Mr Justice D K S Anganyanya)
dated the 27th day of June, 1984***

in

Civil Case No 1430 of 1983)

JUDGMENT

This appeal is from the judgment and the decree of the superior court (Aganyanya J) dated 27th June, 1984 in High Court Civil Appeal No 1430 of 1983. The suit was peculiarly couched in both the breach of a contract as well as for the value of the goods delivered by the respondent company to the appellant company sometime in April, 1983.

The facts which gave rise to the suit were that by an oral agreement entered into between the appellant and the respondent companies, the latter was to supply and to instal telephone equipment in the appellant's hotel at Thika at the agreed contract price of Kshs 274,200/- inclusive of cost of the equipment (Kshs 248,200/-) and installation charges (Kshs 31,000/-). The agreement appears to have been based on the respondent's quotation dated 22nd December, 1980. According to the respondent 50% of the contract sum was to be paid on the delivery of the equipment and installation materials to the site and the balance was to be paid on completion of the installation of the equipment in the appellants' hotel premises. The respondent duly delivered some equipment and the installation materials worth Kshs 151,050/-. On delivery of the equipment and the installation materials the respondents were entitled to the payment of 50% of the contract sum (ie Kshs 137,000/-).

According to the unchallenged and the uncontroverted evidence of Mr Charles Waithaka Matu, for the respondent he had agreed with Mr Karanja, the appellant's General Manger that the former would deliver

the equipment whereupon it would be paid 50% of the contract price and thereafter the balance on completion of the work. Mr Waithaka delivered the equipment on 13th April, 1981 and Mr Karanja signed the delivery note on behalf of the appellant. Mr Waithaka raised the invoice for the 50% of the contract price but was never paid despite numerous calls and promises that he would be paid. Finally he was told to install the telephone equipment in rooms shown on the diagram. He did so with his workmen and completed the work in one week. He went on:-

“On 31.5.82 I was informed that a room had been constructed upstairs in which the equipment could suitably be installed. So I had to remove the framework from the wall I had previously fixed it to the new room. I was told that if I did this I would be paid the amount I was claiming. Karanja said this in presence of Jogoo Kimakia. I did exactly what I was told to do. I completed the installation on 14.6.1982. I brought in cables and joined them to the original room where all the conduits networks start. When I did that I told them to pay me for whatever I had done at that level – 50% plus cost of materials.”

Despite all this, the appellants never paid a penny to the respondents who, after many promises that they would be paid, then instructed their lawyers to demand payment and in default to file action. This was done and the action was filed on 6th April, 1983.

The appellant defended the suit and repudiated the agreement on the grounds that the equipment delivered was defective and denied breach of the agreement averring that the respondents did not comply with the lump sum contract. They also blamed the respondents for the breach of the contract.

After a prolonged trial the learned trial Judge found for the respondents in the claimed sum of Kshs 151,050/-. He went further and awarded Kshs 100,000/- as general damages for the breach of the contract. He went on:-

“The plaintiff claimed general damages as well in the plaint and though he did not pinpoint what he could have suffered during his evidence in Court yet he showed that from the time the telephone equipment was delivered at the site and some work done, Waithaka made several trips and calls to the defendant for the purpose of receiving payment which did not materialize. Waithaka also waited for a long time to receive instructions from the defendant to begin installing the telephone. And up to the time this case was filed, the work had not yet commenced. Considering long period of waiting, possibly undertaking no other contractual work in expectation of installing telephone exchange at Thika International Hotel and many visits and calls on the defendant, I am convinced the plaintiff would be entitled to some relief in form of general damages. Considering evidence and circumstances of the case, I would award him a modest Kshs 100,000/- as general damages.”

The appellant appealed to this Court and filed 5 grounds of appeal, but in our view, these grounds may be telescoped into two grounds, namely (1) whether the respondents had proved their claim for the equipment delivered at the appellant premises (ie Kshs 151,050/-) and (2) whether the respondents were entitled to general damages for the breach of the contract.

Mr Kamara for the appellants urged us to hold that the respondents were not entitled to the value of the goods delivered but for 50% of the contract price. We do not agree. The respondents elected to claim for the value of the goods delivered and for the breach of the contract. Having so elected the respondents were entitled to their specific claim. The learned trial Judge was fully justified on evidence to award Kshs 151,050/- as the value of the goods delivered. Mr Kamara conceded from the bar that the value of the equipment was in that sum. Mr Khaminwa for the respondents submitted that there was ample proof of the value of the goods delivered in the evidence of Mr Waithaka who delivered the goods on 13th April, 1981 against the delivery invoice which was signed by Mr Karanja, the General Manager of the appellants' company. We are satisfied that there was ample and unchallenged evidence of the value of the goods and the delivery thereof.

Grounds 1, 2 and 5 of the appeal fail.

With regard to grounds 3 and 4 of the appeal, Mr Kamara submitted that the learned trial Judge erred in awarding general damages in absence of any evidence to support the loss and in the alternative the general damages were manifestly excessive. Mr Khaminwa on the other hand supported the finding of the learned trial Judge in awarding general damages in the sum of Kshs 100,000/- which he submitted was not excessive.

There was ample evidence to prove that the respondents not only delivered the equipment but also installed some equipment in the appellants' premises. They made numerous visits to Thika and made numerous calls requesting for payments. They did not quantify the loss so occasioned presumably because they did not keep a record or that the loss was incapable of quantification. No claim for special damages was pleaded and naturally the question of special damages could not arise. After the delivery of the equipment and performance of the additional work at the appellants' request the performance of the contract ceased.

The respondents were ready and willing to complete the work. In fact in addition to the delivery of the equipment, Mr Waithaka had to install some equipment at the request of the appellants. He had to keep his workmen at the site to carry out further work in anticipation of the payment which had been promised all along. The respondents were not liable for any breach of the contract. On the contrary the appellants failed to honour their part of the contract and to that extent they were in breach of the contract. The respondents must have suffered loss for employing workmen to carry out some installation of the equipment as well as supervision of the work. This loss was not quantified. The many visits to the site as well as telephone calls requesting for payment must have put the respondent into additional loss which was not claimed as special damages.

That there was a breach of the contract by the appellants was obvious from the evidence. The appellants were unwilling to speak to the respondents (Mr Waithaka) even after the additional work they had requested had been completed. The respondents were innocent in the performance of their part of the contract but the appellants took them up the garden path and refused to pay for both the value of the goods delivered as well as for the additional installation works for which the respondents were unable to quantify its worth.

The law on damages stipulates various types of damages.

The distinction between general damages and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded. (See *Chitty on Contracts* 26 edition para 1772 at p117 *et seq.*)

Clearly the respondents in the instant case could not expect an award of special damages because they did not plead the same. We have found, on the respondent's evidence that the appellants were in breach of the contract and the next question is the loss the respondents suffered flowing from the breach. They were unable to quantify the loss except to say that they did additional work at the appellant's request. They had to engage workmen to install some equipment and this must have caused them additional expense. There was evidence that the respondents visited Thika on numerous occasions as well as making numerous telephone calls requesting for payment of both the value of the equipment and the cost of the additional works. There was inordinate delay in receiving the payment and they had to use the services of their lawyers to demand payment. We are satisfied that the respondents suffered unquantified loss flowing from the breach of the contract although they were unable to quantify the loss. They had a legal right to receive the payment and the appellants had a duty to make the payment.

The learned trial Judge awarded general damages in the sum of Kshs 100,000/-. With greatest respect the Judge misdirected himself when he speculated that the respondents were kept away from other contractual work. Although the respondent did not quantify the loss to be entitled to an award of special damages, they in fact proved the breach of the contract but failed to prove the actual amount of the loss or

any loss flowing from the breach of the contract. The award of general damages was not available to them. The loss suffered was therefore capable of compensation by an award of nominal damages.

In *'Medina' and the 'Mediana'* [1900] AC 113, 116 Earl of Halsbury LC as he then was defined nominal damages:-

“My Lords, here I wish, with reference to what has been suggested at the bar, to remark upon the difference between damages and nominal damages.

‘Nominal damages’ is a technical phrase which means that you have negated anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.”

Mr Kamara suggested the sum of Kshs 10,000/- as sufficient nominal damages. We consider this suggestion to be on the lower side. Having regard to the fact that the respondents will recover in full the value of the equipment they supplied and considering the additional work they undertook at the appellants request as well as the expenditure incurred by them on the visits and telephone calls, an award of Kshs 25,000/- nominal damages would be sufficient to compensate them for the unquantified loss flowing from the breach. Grounds 3 and 4 of the appeal succeed.

In the result we allow the appeal to the extent that award of general damages is set aside and substituted therefore an award of Kshs 25,000/- nominal damages. Subject thereto the appeal is dismissed with half costs to the respondents.

Dated and delivered at Nairobi this 15th day of December 1992.

J.E GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

M.G MULI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR