



**Ombaki t/a Carejo Construction and Development v Delta Construction Limited  
(Civil Suit E354 of 2021) [2023] KEMC 197 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEMC 197 (KLR)

**REPUBLIC OF KENYA  
IN THE MILIMANI COMMERCIAL CHIEF MAGISTRATE'S COURTS  
CIVIL SUIT E354 OF 2021  
JP ADUKE, SRM  
JULY 13, 2023**

**BETWEEN**

**CALEB ONYANGORE OMBAKI T/A CAREJO CONSTRUCTION AND  
DEVELOPMENT ..... PLAINTIFF**

**AND**

**DELTA CONSTRUCTION LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the defendant seeking recovery of damages for breach of contract and KES 3,109,895.00 plus interest thereon at current commercial bank rates. In the plaint dated 19<sup>th</sup> January 2021, the plaintiff avers he entered into a Construction Equipment Lease contract signed on 02.06.2020 in which the Plaintiff leased to the Defendant five units of Tippers.
2. Further, that following the said agreement, the defendant was to pay the Plaintiff upon completion of the works envisaged under the Lease Contract. The Plaintiff avers that he completed the works as agreed but is yet to be paid.
3. The Plaintiff blames the Defendant for breach of contract. The Plaintiff avers that the Defendant refuses to pay and has not offered any explanation for refusal to pay.
4. The particulars of breach of contract are captured in para 8 of the Plaint. The Plaintiff prays for general damages, special damages, costs of the suit and interest at commercial bank rates.
5. Return of Service on Record shows that the defendant was served with the suit papers. The Defendant entered appearance and filed a defence within the stipulated period. As a result, the suit proceeded to hearing. On the date of hearing, the defendant was absent. The Plaintiff called one witness who testified and adopted his witness statement and pleadings on file as his evidence in chief. Parties filed submissions.



6. The issues for determination before this court is one:

**1. Whether or not a contract existed and if the same was breached and therefore enforceable.**

Section 3 of the *Law of Contract Act*, Cap 23 Laws of Kenya provides that:

- (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.
- (2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.....

7. I have perused the documents annexed to the plaint on record, and note that there is no stamped (stamp duty) contract annexed as an exhibit. As at the date of writing this judgement, the same is still not available on the judiciary CTS portal. While I appreciate that the Judiciary CTS Portal has been experiencing system downtime in the last two weeks, it is crucial that court sees the stamped contract in question to arrive at a fair/ just determination at law. This being a claim in respect of breach of contract, it is apparent from section 3(1) and (2) cited above that such representations and contract ought to be in writing. In the circumstances, it is my considered view that a claim for breach of contract founded on an oral contract or a non-existent contract if any, fails in light of section 3(1) and (2) of the *Law of Contract Act*.

7. It is trite law that special damages must be pleaded, and proved. Whereas the KES 3,109,895.00/- is pleaded, I find that the same is not proved on a balance of probabilities in view of the absence of the stamped contract document on file, and make no awards on the same.

8. I have considered the Plaintiff's submissions in entirety, and all the pleadings on record. In view of the above reasons, I find the suit unmerited. Suit dismissed. No orders on costs. File closed.

**ADUKE JEAL PRAXADES ATIENO**

**SENIOR RESIDENT MAGISTRATE**

**JUDGEMENT SIGNED AND DATED THIS 13<sup>TH</sup> JULY 2023 AT 11.AM**

In the presence of :

1. Court Assistant: Benjamin Kombe.

2. Counsel for the Plaintiff- .....

(Name, Signature, Date)

3. For the Defence: .....

(Name, Signature, Date)

