

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E423 OF 2020

GESEKA ENGINEERING & CONSTRUCTION LTD.....PLAINTIFF

-VERSUS-

THE COUNTY GOVERNMENT

NAIROBI CITY COUNTY.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 23rd October 2020 against the defendant, seeking judgment against it for an order of specific performance of the contract, special damages in the sum of Kshs.7,400,000/= together with interest thereon at commercial rates, and general damages for breach of contract in lieu thereof, or in the alternative payment of the contract sum of Kshs.11,481,081.00.
2. The plaintiff's case is that it entered into a written Agreement dated 16th January 2017 with the defendant, for the construction of a multipurpose social hall at Lucky Summer Ward, Nairobi, at a contract sum of Kshs.11,481,081.00. The plaintiff stated that it was subsequently granted possession of the site on 22nd January 2018 and it commenced construction in accordance with the approved architectural drawings, achieving approximately 30% completion, but the defendant breached the Agreement by permitting third parties to interfere with the works, resulting in theft of materials and equipment valued at over Kshs.1,050,000/=, which was reported to Ruaraka Police Station.
3. The plaintiff averred that it thereafter engaged a Quantity Surveyor who assessed termination costs at Kshs.2,825,329.20. The plaintiff stated that

despite repeated demands and assurances, the defendant refused to rectify the breaches or specifically perform the contract, leading to non-completion of the project and substantial loss to the plaintiff. The plaintiff averred that it has always been ready, able, and willing to perform its obligations under the contract but was frustrated by the defendant's conduct, resulting in loss of use of monies and incurrance of special damages amounting to Kshs.7,400,000/= in labour, equipment hire, and bank advances.

4. From the Court record and the Case Tracking System, save for entering appearance through a Memorandum of Appearance filed on 9th December 2020, the defendant failed to file a statement of defence to the plaintiff's suit. As a result, interlocutory judgment was entered against the defendant on 18th March 2025 and the matter was thereafter set down for formal proof hearing. The plaintiff called one witness to support its case.

PLAINTIFF'S CASE.

5. Mr. Ronard Omenya Moguche, the plaintiff's Executive Chairman, testified as PW1. He adopted his witness statement dated 23rd October 2020 as his evidence in chief. He produced the documents in the plaintiff's list and bundle of documents dated 23rd October 2020 as plaintiff's exhibit Nos. 1 to 12. Plaintiff exhibit No. 2 was amended to read Form of Contract Agreement dated 16th February 2017 from Sale Agreement dated 16th November 2017.
6. Mr. Moguche testified that the plaintiff company is a construction firm, which following a successful tender process in 2016, was awarded a contract by Nairobi City County for the construction of a proposed multipurpose social hall at Lucky Summer Ward, Nairobi, at a contract sum of Kshs.11,481,081.00, pursuant to a letter of award dated 25th November 2016 and a formal agreement was executed on 16th January 2017. He stated that the plaintiff was granted

possession of the site on 22nd January 2018 and commenced construction in accordance with the approved architectural drawings, under the supervision of the Project Architect appointed by the defendant, achieving approximately 30% completion. The plaintiff contended that thereafter, the defendant breached the contract by permitting third parties to interfere with the works, chase away workers, and remove construction materials and equipment valued at over Kshs.1,050,000/=, which theft was reported to Ruaraka Police Station.

7. He further testified that subsequently, the defendant initiated internal processes leading to termination of the contract and assessed termination costs at Kshs.2,825,329.20, a figure consistent with the plaintiff's own Quantity Surveyor's valuation excluding labour costs, which the plaintiff demanded through its Advocates. Mr. Moguche asserted that notwithstanding persistent follow-ups, escalating labour costs, and assurances of payment, the defendant sought to shift blame to the plaintiff and refused to remedy the breaches or specifically perform the contract, thereby being in fundamental breach of the contract. He maintained that the defendant should be compelled to specifically perform the contract, or in the alternative, compensate the plaintiff for losses arising from frustration of the contract.
8. At the close of the plaintiff's case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 25th November 2025 by the law firm of Zablon Mokuia & Company Advocates. The defendant neither filed written submissions nor made any oral submissions in opposition to the plaintiff's suit.
9. Mr. Ondieki, learned Counsel for the plaintiff submitted that the contract was lawfully awarded to the plaintiff pursuant to the Public Procurement and Asset Disposal Act and duly executed on 16th February 2017, thereby creating binding obligations on the parties. He argued that under the contract, the defendant was

obligated to hand over the site for uninterrupted performance, secure a safe working environment, and facilitate completion of the works within the agreed period. He further submitted that the plaintiff fully complied with its obligations by mobilizing to site, partially executing the works up to 30% completion and remained ready and willing to complete the remaining portion of the project. Counsel contended that the defendant fundamentally breached the contract by failing to secure the site and by permitting third-party and community interference, which included chasing away workers, physical attacks on site personnel, vandalism of machinery and tools, and theft of construction materials.

10. Mr. Ondieki asserted that the said conduct frustrated the contract, deprived the plaintiff of the benefit of performance, and rendered completion impossible. He stated that despite repeated reports and complaints by the plaintiff, the defendant failed to take remedial action, thereby confirming its liability for the breach, which was total and repudiatory in nature. It was submitted by Counsel that a party that prevents performance of a contract is liable for damages flowing from that breach. He testified that the plaintiff claims general damages for loss of the benefit of the contract, disruption of business, and loss of expected income from the uncompleted 70% of the works. Additionally, he stated that the plaintiff pleads for special damages of Kshs.7,400,000/=, being funds borrowed from financial lenders to finance procurement of materials, equipment hire, labour and mobilization. He maintained that due to the aforesaid breach, the plaintiff remains burdened with outstanding loan liabilities accruing interest at 6% per month, loss of invested capital, and continuing financial exposure.
11. Mr. Ondieki referred to the case of **Trishcon Construction Co Ltd v Landmark Holdings Limited** [2025] KEHC 7383 (KLR), and stated that

although the contract became unenforceable due to the defendant's repudiatory conduct, termination, and refusal to grant access to the site, the law permits recovery on the basis of restitution to prevent unjust enrichment and or *quantum meruit*. Counsel relied on the cases of **Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others** [2003] KEHC 991 (KLR) and **Matumbawe Investment Limited v Centofanti** [2024] KEHC 1646 (KLR), and further stated that where a contract cannot be enforced, a claimant is entitled to recover the reasonable value for work done and benefits conferred.

12. He submitted that applying these principles, the plaintiff claims compensation on a *quantum meruit* basis for the reasonable value of labour, materials, and equipment expended on site, assessed at Kshs.79,928,000/=, financing costs arising from the borrowed Kshs.7,400,000/=, which at an agreed interest rate of 6% per month over nine years amounts to Kshs.47,520,000/=. To buttress these submissions, Counsel relied on the case of **Samuel Mbuvi Mutemi t/a Samtech Building Contractors v County Government of Machakos** [2020] KEHC 6470 (KLR). In the end, Mr. Ondieki submitted that the plaintiff had proved its case on a balance of probabilities and urged this Court to find that the defendant was unjustly enriched by the plaintiff's labour and materials.

ANALYSIS AND DETERMINATION.

13. I have considered and analyzed the evidence adduced by the plaintiff in line with the pleadings filed, together with the written submissions by Counsel for the plaintiff. The issues that arise for determination are –
 - i) **Whether a valid and binding contract existed;**
 - ii) **Whether the defendant's conduct amounted to a fundamental or repudiatory breach;**

- iii) Whether the plaintiff was ready, able, and willing to perform its contractual obligations; and**
- iv) Whether the plaintiff is entitled to the remedies sought.**

Whether a valid and binding contract existed.

14. The evidence before Court demonstrates that the parties herein entered into a written Agreement dated 16th January 2017 for the construction of a multipurpose social hall at Lucky Summer Ward, Nairobi, at a contract sum of Kshs.11,481,081.00, following a notification to enter into a contract dated 25th November 2016 issued to the plaintiff company by the defendant.
15. The plaintiff produced the letter of award dated 25th November 2016, the executed contract Agreement, and related tender documents. It is evident that the defendant neither filed a defence to controvert the assertions nor did it rebut the evidence of the plaintiff's witness in cross-examination. In the absence of any rebuttal, and based on the documentary evidence produced by the plaintiff, this Court is satisfied that a valid and binding contract existed between the parties herein.

Whether the defendant's conduct amounted to a fundamental or repudiatory breach.

16. The plaintiff's evidence is that after being granted possession of the site on 22nd January 2018, it commenced construction and achieved approximately 30% completion. It asserted that the defendant failed to secure the site and permitted third parties to interfere with the works, resulting in theft of materials and equipment valued at over Kshs.1,050,000/=. According to the plaintiff, the said interference led to the chasing away of workers, vandalism of machinery, and eventual stoppage of works. The plaintiff testified that despite written complaints and reports, including a report made to Ruaraka Police Station, the

defendant failed to take remedial action, and instead initiated processes culminating in termination of the contract. This evidence was not rebutted by the defendant. To the contrary, it was corroborated by the production of photographs of the work done, a copy of a police abstract issued by Ruaraka Police Station on 1st July 2017 and copies of several memos dated 9th January 2018, 16th January 2019, 14th March 2019 and 25th March 2019.

17. The plaintiff vide a letter dated 5th June 2018 notified the County Secretary of the defendant that the environment at the site had gone from bad to worse, goons had attacked the site and stolen site project materials, and it was impossible for them to continue working due to the said hostilities. On perusal of the memo dated 25th March 2019, this Court is persuaded that indeed the plaintiff's completion of its contractual works was hindered by attacks at the site and theft of its project materials. This is because in the said memo, the acting Chief Executive Officer of the Ward Development Fund confirmed that the technical personnel under urban renewal did not confirm the availability of the public land where construction of the multi-purpose hall was supposed to take place.
18. A repudiatory breach by conduct means a situation where one party to a contract, through their actions, behaves in a way that clearly shows they no longer intend to be bound by the contract or will not perform their contractual obligations. The test is an objective one, whether a reasonable person, viewing the conduct in its proper context, would conclude that the party has renounced the contract. The Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga** [2015] KECA 394 (KLR), held that to prove repudiatory breach by conduct, the conduct has to be so grave that it fundamentally breaches the contract. The Court emphasized the objective

contractual test, the need for the conduct to strike at the heart of the contract, and the causal connection between that conduct and termination.

19. In the premise, this Court finds that the defendant's failure to secure the site and its allowance of third-party interference went to the root of the contract, rendered performance impossible, and deprived the plaintiff of the benefit of the bargain. Such conduct constituted a fundamental and repudiatory breach of the contract.
20. I am therefore satisfied that the defendant's conduct amounted to a fundamental repudiatory breach of the Agreement dated 16th January 2017.

Whether the plaintiff was ready, able, and willing to perform its contractual obligations.

21. The record shows that the plaintiff adduced evidence vide an internal memo dated 16th January 2019 and the attachments thereto, showing that it mobilized to site, commenced works in accordance with the approved architectural drawings, and executed approximately 30% of the project. The plaintiff further demonstrated by reporting the incidents preventing it from performing its contractual obligations to Ruaraka Police Station and notifying the defendant vide a letter dated 5th June 2018 of the situation at the site, that it remained ready and willing to complete the remaining works but was prevented from doing so by the defendant's conduct.
22. There was no evidence placed before Court to suggest any default on the part of the plaintiff. In the circumstances, this Court is satisfied that the plaintiff was at all material times ready, able, and willing to perform its contractual obligations, and that its failure to complete the project was solely attributable to the defendant's breach.

Whether the plaintiff is entitled to the remedies sought.

23. The plaintiff claims several reliefs in its plaint, including an order for specific performance of the contract, special damages in the sum of Kshs.7,400,000/= with interest accruing thereon at commercial rates and general damages for breach of contract or payment of the contract sum.
24. In light of the finding that the defendant fundamentally breached the contract between the parties herein and rendered performance impossible, this Court is of the considered view that an order for specific performance would not be appropriate. This Court is however satisfied that the plaintiff is entitled to compensation for losses suffered as a result of the defendant's breach.
25. On the claim for general damages for breach of contract, it is trite that general damages are not available for breach of contract. This principle was restated by the Court of Appeal in the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited** [2018] KECA 312 (KLR), in the following words -

... as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction.....

26. In the premise, the plaintiff's claim for general damages fails, leaving this Court to consider the claim for special damages and payment of the contract sum. In the case of **Hydro Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society)** (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR), the Court held as follows on special damages –

The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily

undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. This position was appreciated as early as in 1848 in Robinson v Harman¹¹ in which Parke B said “the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

27. Further, in the case of **Kenya Breweries Limited v Natex Distributors Limited** [2004] KEHC 2737 (KLR), the Court held that –

The general principle of compensation in both contract and tort is that subject to the doctrine of mitigation of loss, the claimant is to be put as far as possible in the same position as he would have been if the breach complained of had not occurred: restitutio in integrum. Accordingly, the claimant is entitled to gains prevented by the breach, expenses caused by the breach, and expenses rendered futile by the breach.

28. It is trite law that special damages must be specifically pleaded and strictly proved. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited** Civil Appeal No. 88 of 2002 [2004] 2 KLR 269, having found that the defendant breached the Agreement dated 16th January 2017, this Court must now determine the remedies the plaintiff is entitled to, in order to give effect to the obligations voluntarily undertaken by the parties.
29. Although the plaintiff claimed special damages in the sum of Kshs.7,400,000/=, comprising Kshs.3,600,000/= for expenses, Kshs.1,800,000/= for hired equipment, and Kshs.2,000,000/= for bank advances and interest, the plaintiff

made no effort to substantiate these claims. It failed to produce receipts for the hired equipment, letters of offer from banks, or evidence of credited financial facilities. Moreover, no proof was provided regarding the expenses incurred for employee wages, including a register and the amounts paid to individual employees and the cost of materials purchased and stolen from the site.

30. This Court however notes that by a memo dated 16th January 2019, by which time the defendant had vacated the site due to attacks on goods, theft of materials, and a generally hostile environment, the plaintiff submitted a breakdown of the termination costs to which it claimed entitlement. This breakdown was prepared by P.M. Muiyuro, the Project Quantity Surveyor, and was not challenged and/or contested at trial. According to the breakdown, the Quantity Surveyor valued the work completed at Kshs.1,021,282.35, materials on site at Kshs.115,800/=, anticipated loss of profits at Kshs.1,439,412.80, and VAT at Kshs.248,834.05, bringing the total termination costs to Kshs.2,825,329.20. The said figure was subsequently communicated to the defendant, who by a memo dated 14th March 2019, requested the Chief Officer of Urban Renewal Housing to confirm that its sector would bear the said termination costs.
31. In light of the foregoing, this Court is not persuaded that the plaintiff is either entitled to a claim for special damages in the sum of Kshs.7,400,000/= with interest accruing thereon at commercial rates or payment of the contract sum.
32. However, in line with established principles of *restitution and quantum meruit*, being compensation for the reasonable value of work done, the Court finds that the defendant would be unjustly enriched if allowed to retain the benefit of the plaintiff's labour and materials without compensation. The plaintiff is therefore entitled to recover the reasonable value of work done and costs incurred, together with appropriate interest.

33. This Court is therefore satisfied that the plaintiff is entitled to Kshs.2,825,329.20, being the termination costs, with interest at Court rates from 16th January 2019 when the Project Quantity Surveyor's tabulation of termination costs was forwarded to the defendant's Acting Director – Supply Chain Management.
34. In the premise, this Court finds that the plaintiff's suit against the defendant is successful, to the extent stated in the preceding paragraph. I therefore enter Judgment for the plaintiff as against the defendant in the sum of Kshs.2,825,329.20.
35. Section 27 of the Civil Procedure Act provides that costs follow the event. I therefore find that the costs of this suit shall be borne by the defendant.
36. As a result, I make the following orders –
- i) The defendant is hereby ordered to pay the plaintiff Kshs.2,825,329.20 being the termination costs with interest at Court rates from 16th January 2019 until payment in full;**
 - ii) Costs of the suit are hereby awarded to the plaintiff; and**
 - iii) Interest on (ii) above is awarded to the plaintiff at Court rates from the date of judgment until payment in full.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 27th day of February 2026. Judgment delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:-

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Mr. Ondieki for the plaintiff

No appearance for the defendant

Ms B. Wokabi – Court Assistant.

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