National Social Security Fund Board of Trustees v Micro City Computers Limited (Civil Application E045 of 2024) [2025] KECA 1313 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KECA 1313 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION E045 OF 2024

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ... APPLICANT

AND

MICRO CITY COMPUTERS LIMITED ..... RESPONDENT

(Being an application for certification that the applicant's intended appeal raises matters of public importance, and for leave to appeal to the Supreme Court from the Judgement of the Court of Appeal at Mombasa (Gatembu,Nyamweya & Odunga, JJ.A.) delivered on 12th April 2024 in Civil Appeal No. 49 of 2020 as consolidated withCivil Appeal No. 59 of 2020)

RULING

1. By way of a brief background, the dispute before the trial court in Mombasa High Court Civil Case No. 41 of 2017 was filed by Micro City Computers Limited [the respondent] against National Social Security Fund Board of Trustees [the applicant] in an Amended Plaint dated 30th November 2018.

2. At the heart of the dispute was an alleged breach of contract by the applicant. After the respondent successfully emerged the winner of a tender advertised through print media and its website by the applicant in September 2010, for the design, supply, installation and commissioning of an electric security surveillance system closed circuit television [CCTV] and restricted access control system for the applicant's complex in Nairobi, the parties herein entered into a written agreement dated 8th April 2011.

3. The respondent claimed general and exemplary damages for breach of the Contract dated 8th April 2011; special damages for loss of business and costs incurred of the sum of Kshs.214,544,220; loss of profit resulting from non- performance of the main contract and services contract of Kshs.103,447,136; tender preparation costs and consultancies of Kshs.9,930,000; payment of engineers contracted for performance of the contract of Kshs.8,794,336, interest on loss of profit of

Kshs. 75,166,276; interest on contractual amounts paid to engineers contracted for the project of Kshs.7,374,324; interest on all the heads of damages at prevailing commercial rates; and costs.

4. The applicant opposed the suit by a Notice of Preliminary Objection dated 28th June 2017, contending that the suit was not filed timeously contrary to Section 4[1] of the *Limitation of Actions Act*, Cap 22. Further, the applicant, in its Statement of Defence dated 11th July 2017, justified the cancellation of the contract as failure by the respondent to meet the stringent requirements for the tender; that the award was procured through misrepresentation and/or non- disclosure of material facts, and that it was thus void; that the contract was illegal and contravened procurement laws and public policy as it exceeded the amount budgeted for,and was therefore unenforceable; that the respondent was not entitled to the amounts claimed; and that it [the applicant] had the right to re-advertise the same tender for the purpose of securing their premises.

5. In reply to the defence, the respondent denied that there was anything illegal with the contract since contracts are awarded after budgetary allocations have been made and not vice versa; and that Ethics and Anti-Corruption Commission [EACC] carried investigations and absorbed it of any wrong-doing. It therefore prayed that the appellant's defence be dismissed and judgment be entered as prayed in the plaint.

6. In a Judgment dated 30th April 2020, the learned Judge [P.J. Otieno, J.] held that the termination of the contract was unlawful and not in accordance with Clause 6.2 of the Contract Agreement; that the reasons floated by the applicant that the tender was beyond its budget were not valid to terminate the contract; and that the respondent was entitled to the remedies sought since the applicant failed to plead and prove the alleged fraud and misrepresentation on the respondent's part.

7. In the end, the trial court awarded the respondent general damages for loss suffered for the breach of contract, which he assessed at Kshs.10,000,000, which included consideration for the prayer for loss of business profits. The respondent was also awarded the costs of performance bond at Kshs.246,128, tender security at Kshs.10,250; and accountant's professional fees for preparation of the audit report at Kshs.5,800,000, inclusive of VAT, being Kshs.6,056,378. The total award was Kshs.16,056,378. However, the trial court declined to award the claim under special damages and loss of profits resulting from non- performance of the main contract for want of proof.

8. On appeal to this Court, the respondent raised four [4] grounds of appeal, mainly challenging the failure of the trial court to award the loss of business profit for the reason that it considered it as special damages which is founded on the law of torts.

9. The applicant filed a separate appeal raising five [5] grounds of appeal. It was aggrieved that the trial court entered judgement in terms of the Further Amended Plaint dated 30th November 2018 when no evidence was led or tendered in support of the claim. The applicant further faulted the trial Judge for awarding damages of Kshs.10,000,000 as general damages for breach of contract and Kshs.6,056,378 as special damages, while they were neither pleaded nor proved.

10. This Court by a majority judgement [Nyamweya & Odunga, JJ.A.], Gatembu, JA. dissenting, partly allowed the respective appeals on the following terms:

    i. Award of general damages of Kshs.10,000,000 for breach of contract was set aside;

    ii. The respondent was awarded Kshs.103,447,136, being loss of anticipated profits;

    iii. Costs in respect of the tender preparation and consultancies comprising of: performance bond- Kshs.246,128; tender security- Kshs.10,250; tender preparation [architectural drawings]-

Kshs.3,000,000; and accountants' professional fees for preparation of audit report aggregating to Kshs.9,056,378.

iv The total sum of special damages was Kshs.112,503,514 which were to attract interest at court rates from the date of filing of suit in the trial court.

11. It is the majority Judgment of this Court that has precipitated the instant application vide the Notice of Motion dated 25th April 2024 brought under Article 163[4] of *the Constitution*, Section 3A and 3B of the *Appellate Jurisdiction Act* and rule 33[1] of the Supreme Court Rules, 2020. It seeks in the main that: this Court be pleased to certify that the applicant's intended appeal against the Judgement of the Court of Appeal sitting in Mombasa in Civil Appeal No. 49 of 2020 as Consolidated with Civil Appeal No. 59 of 2020 [Gatembu, Nyamweya & Odunga, JJ.A.] delivered on 12th April 2024 raises matters of general public importance and grant leave to appeal to the Supreme Court of Kenya against the whole judgement. The applicant also prays that the costs of the application be in the intended appeal.

12. The application is based on the grounds on its face, which are reiterated in the supporting affidavit of Kellen Njue, the applicant's Corporation Secretary of even date. He deposed that the applicant intends to raise three broad issues of public importance. Firstly, that the respondent commenced the suit in the trial court as a claim for special damages, which must be specifically pleaded and strictly proved; that, in the majority judgment of this Court, it was held that the respondent could not be penalised for not strictly proving special damages; and that, therefore, the holding creates a different standard of proof of special damages thereby departing from the 'strict proof' requirement.

13. Secondly, that it is trite law that a claim for special damages must be pleaded before the damages can be proved, which law is also anchored on the principle that a party is bound by its pleadings and the right to a fair hearing under Article 50 as read with Article 25 of *the Constitution*. Further, the Supreme Court will be required to settle the law as to whether a party can apply to amend pleadings after tendering evidence, which fact obtained in the majority Judgment.

14. Thirdly, is the issue of the place of cross-examination in the discovery of truth; that, in cross-examination, PW2, an expert witness as was noted in the dissenting judgement of Gatembu, JA., gave speculative evidence, and thus failed to meet the threshold of an expert opinion; and that, consequently, the decision of the majority which held that there was absence of contrary evidence, appeared to dismiss cross-examination as a tool for discrediting the witnesses' evidence.

15. The applicant urged that the issues raised are matters of general public importance that transcend the issues between the parties in the litigation, and which the Supreme Court should settle; and that, if the orders are not granted, it stands to suffer irreparable loss as the respondent will be enriched unjustly in the sum of Kshs.112,503,514, which was speculative.

16. Opposing the application, the respondent, through Paul Okolo Ananga, deposed in his replying affidavit dated 6th May 2024 that the applicant's issue is on the propriety of pleadings; that special damages were already pleaded in the original pleadings, and the amendment to the plaint after the respondent's testimony was meant to further breakdown the damages sought; that there was no appeal against the ruling allowing the amendment; and that, therefore, the applicant had foregone the option to recall the applicant's witnesses, hence the belated complaint.

17. On the issue of challenging the expert witness on the basis that the findings of this Court diminished the essence of cross-examination, the respondent contended that, where cross-examination discredits or undermines expert evidence, the defendant, and in this case the applicant, may have prevailed; and that, in any case, what the applicant sought to challenge was a matter of fact or opinion which would not be tenable in a second appeal.

18. The respondent stated that the issues raised do not meet the threshold for grant of leave to appeal to the Supreme Court; and that the application ought to be dismissed with costs.

19. We heard the application virtually on 19th February 2025. Learned counsel Mr. Wafula appeared for the applicant while learned counsel Mr. Mwakisha was present for the respondent.

20. Mr. Wafula highlighted the applicant's submissions dated 14th May 2024 by bringing to our attention Professor Ronald Dworkin address to the Law Library Congress on the interpretation of documents between an author and the reader; that the relationship between the reader and the author is likened to that of a customs inspector conducting a normal routine search at the airport, and that even when he finds illegal items in a traveller's bag in which the traveller did not place them, eventually, the traveller must accept the illegal items to be theirs. From that analogy, counsel submitted that the majority judgement of this Court may not have intended to produce the impugned outcome or findings for the reason that it wrote the law on special damages upside down.

21. Counsel submitted that the law is settled that, in a claim of special damages, a party must first plead them then strictly prove them as is settled in many decisions, among them the decisions of: the predecessor of this Court in Siree Limited v Lake Turkana El Molo Lodges [2008] 2 EA 521; this Court in National Social Security Fund v Sifa International Limited [2016] KECA 550 [KLR]; and the superior court in Coast Bus Services Limited v Murunga Danyi and 2 Others Civil Appeal No. 192 of 1992 [UR].

22. It was submitted that, in this case, the respondent sought a chain of special damages, but failed to particularise them; that, after close of its case, it made an application to amend the pleadings to introduce particulars of the special damages, which application was granted; that, the amendment notwithstanding, the respondent did not thereafter tender evidence by recalling its witness to corroborate the new evidence; and that, ultimately, the applicant was not initially aware of the specific claims that the respondent intended to plead so that it could controvert them in defence, or by cross-examining the respondent's witness, thereby breaching the principle of fair hearing as enshrined under Article 50 as read together with Article 25 of *the Constitution*. Reliance was placed on the decision of the Supreme Court in Shollei v Judicial Service Commission & Another [2022] KESC5 [KLR] where the Court emphasised that the right to a fair hearing under Articles 50[1] and [2] of *the Constitution* applied to both criminal and civil trials.

23. Counsel also submitted on the doctrine of 'relation back' which is not entrenched in *the Constitution* or our statutes; that the doctrine is essentially to the effect that amendments to pleadings relate back to the date of filing a suit; that once amendments are introduced to pleadings, it is presumed that they relate to the date when the suit was filed, and the presumption is that the party amending the pleadings is presumed to have predicted that those amendments would be made; that the nature/particulars of the special damages that were introduced by the amendment were speculative; and that by failing to recall the witness who had already testified to support the particulars meant that the respondent departed from the principle of strict proof of special damages.

24. Counsel submitted that the Supreme Court already handled the question of pleadings in the case of Raila Odinga & Another v IEBC & 2 Others [2017] eKLR where it was held that, if at the time of hearing, but in the absence of pleadings, the evidence adduced amounts to nothing and that the doctrine of 'relation back' cannot override *the Constitution* in so far as the right to a fair hearing is concerned. It was argued that the finding by this Court of upholding the doctrine of 'relation back' against a party's right to a fair hearing requires to be addressed and settled by the Supreme Court.

25. According to Mr. Wafula, the decision of this Court was to the effect that expert evidence can only be challenged by evidence of another expert and not by any other person, or even on cross-examination; and that this finding belittled the art of cross-examination as a tool of challenging the truth.

26. On the part of the respondent, while highlighting submissions dated 30th May 2024, learned counsel Mr. Kioko contended that leave was granted to amend the pleadings, but that the ruling granting the leave was not challenged by way of an appeal. Counsel referred to the decision of the Supreme Court in Mawathe Julius Musili v Irshad Ali Sumra & Others [2018] JELR 97372 [SC] for the proposition that, when no appeal is lodged against an interlocutory ruling by a trial court, the issue in dispute is settled by the judicial decision; that the purpose of the amendment was to further break down the liquidated claim, and that no prejudice was occasioned to the applicant by the amendment; and that, while the applicant had the option to apply to recall the witness who had already testified prior to the amendment, it chose not to.

27. On the issue of proof of special damages, it was submitted that an exception was created by this Court as to the requirement to strictly prove special damages; that this Court properly awarded the anticipatory profits which are treated differently as was held in the English decision of Parabola Investment Limited v Browallia Cal Limited [2011] QB, which justified the approach taken by this Court.

28. The respondent denied the assertion that the Court watered down the importance of cross-examination as a tool for testing evidence; that the Court did not hold that the applicant failed to succeed because it did not call an expert witness to contradict or rebut the respondent's expert evidence, but that, instead, the applicant's case failed because it did not sufficiently challenge the expert evidence in cross-examination.

29. On the whole, it was the respondent's submission that, on all the three points on which the applicant hinges its application, there is nothing of general public importance to warrant this Court to certify the matter for a further appeal to the Supreme Court; that the subject matter at hand does not transcend the parties herein, notwithstanding that the applicant is a public body; and that, therefore, the application should be dismissed.

30. In rejoinder, Mr. Wafula submitted that the issue of challenge on appeal against the ruling on the amendment of pleadings is not the subject matter in the instant application, but what a party is expected to do after amendment; that it is expected that what is pleaded thereof must be strictly proved; that a party cannot allege that the amendments relate back to the time of filing the suit and, therefore that there is no need to adduce evidence to support the pleaded facts in the amended pleadings; and that, furthermore, since the respondent anticipated the amendments, it should have supported them during the hearing by tendering evidence. Counsel emphasised that the scenario presented by this case leaves no doubt that special damages can be speculative, which is a principle that unsettles the well-known doctrine of strict proof of special damages; and that this is an issue of general public importance that requires to be addressed by the Supreme Court.

31. We have considered the application, the rival arguments by both counsel and the law. Our singular task is to determine whether the intended appeal passes the muster test for certification as one that raises a matter of general public importance and therefore grant leave to the applicant to appeal to the Supreme Court against the Judgement of this Court.

32. Our jurisdiction to certify a matter as one of general public importance requiring a further appeal to the Supreme Court is underpinned in Article 163[4] [b] of *the Constitution*, which provides:

> 4. Appeals shall lie from the Court of Appeal to the Supreme Court—

a. ...

b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause [5].

33. The Supreme Court affirmed this Court's role in such an instance in the case of Sum Model Industries Ltd v Industrial & Commercial Development Corporation [2011] KESC 5 [KLR] as follows:

> " This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 [5] of the Constitution. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to Abuse of the Process of Court."

34. The mandate of this Court with regard to certification is a filter process intended to ensure that the Supreme Court will only deal with matters of general public importance. This Court in Peter Kamau Ikigu v Barclays Bank of Kenya Limited & Peterson Ogino Ongaro [2015] KECA 149 [KLR], while referring to the decision of this Court in Joseph Amisi Omukanda v The Independent Electoral & Boundaries Commission & 2 Others – Civil Application No. Nai. 114 of 2014 [UR], held that:

> " The requirement for certification was intended to serve as a filtering process to ensure that only appeals with elements of general public importance should engage the Supreme Court, whose role may not be relegated to that of correcting errors in the application of settled law, even where they are shown to exist. The applicant is therefore obliged to satisfy us that the issue intended to be canvassed before the Supreme Court transcends the circumstances of the case and has a significant bearing on the public interest and that where the issue involved is a point of law, it is a substantial one, the determination of which will have a significant bearing on the public interest." [Emphasised supplied]

35. The Supreme Court further expounded on this point in the case of Ngoge v Kaparo & 5 others [2012] KESC 7 [KLR], observing that:

> " In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the constitutional set-up, running up to the Court of Appeal have the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court." [Emphasis supplied]

36. After considering and appreciating the phraseology of what is a matter of public importance, or matters of general importance, the Supreme Court in Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2012] KECA 259 [KLR] held that:

> " The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer that law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law. As Madan JA. [as he then was] said in Murai v Wainaina [1982] KLR 38 at page 49 para 1:
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> 'A question of general public importance is a question which takes into account the well being of a society in just proportions.'"

37. What constitutes points of general public importance was also addressed by this Court in Memphis Limited v Kenya Ports Authority [2022] KECA 105 [KLR] as follows:

> " 18. ... For leave to appeal to be granted, the applicant needs to demonstrate that the points of law are 'of general importance the determination of which will substantially affect the rights of one or more of the parties.'
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> 19. The Act does not however provide direction on what may be considered to be 'of general importance'. We think what the Supreme Court of Kenya stated in Hermanus Phillipus Steyn v Giovanni Gnecchi- Ruscone [2013] eKLR though in the context of certification under Article 163[4] [b] of *the Constitution*, does provide guidance in interpreting the words 'of general importance' under Section 39[3] [b] of the Act. In that case, the Supreme Court stated thus:
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> 'Before this Court, 'a matter of general public importance' warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad- based, transcending the litigation- interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

38. It thus goes without saying that, for a matter to be certified for consideration by the Supreme Court, it must arise from the determination of this Court, but that it should not be faulting the determination made by the trial court.

39. From the facts before us, the applicant argues that this Court departed from the well settled principle of law that 'special damages must be specifically pleaded and strictly proved'. It is conceded that the plaint was amended after the close of the respondent's case to include particulars of special damages. It is factual that the respondent did not recall its witness to adduce further evidence to support the new set of facts, being the particulars of special damages as pleaded in the amended plaint. The trial court dismissed the claim of special damages under the amended plaint on the ground that no evidence was adduced in support thereof, but this Court, by a majority decision, differed and allowed the claim of special damages.

40. The scenario presented by the decision of this Court ultimately goes against the well settled procedure and law; one of placing the horse before the cart. In other words that a party can first adduce evidence, and upon realising that the evidence does not support its case, apply to amend the pleadings so as to support the evidence that is already adduced.

41. Inter-twinned with the above and as has been argued by the applicant, the fundamental issue of adhering to the principle of a fair hearing also comes into play. This assertion is hinged on the fact that, when the amendment was effected, which was after evidence had been tendered, the aggrieved party [in this case the applicant] was not given an opportunity to interrogate the new facts introduced by the amendment. We think that this is a fundamental question worthy of the Supreme Court's consideration for the reason that this Court has now brought the well-settled law that special damages must be specifically pleaded and strictly proved, into upheaval. A party seeking redress in court on a claim of special damages is now at crossroads in the face of the decision hinged on this Court's impugned judgment and the age-old decisions in the avalanche of case law on the hitherto settled principle on proof of special damages. This conflicting decision should be addressed by the Supreme Court so that the law is settled once and for all.

42. Another issue which to our mind transcends the parties to the dispute in issue relates to the award of damages for breach of contract. No doubt the subject dispute being one premised on a breach of contract, it is trite law that what is recoverable is mainly compensation for the work already done and nominal damages for the breach. In this instance, the respondent was awarded what was clearly speculative or anticipated profits. We think that this is also an issue on which the Supreme Court should pronounce itself.

43. Our findings are that the proposed points of law proposed for determination by the Supreme Court transcend the parties' private interest and are of considerable importance to the broader public. Therefore, we find that the applicant has established a proper case for certification as a matter of general public importance. We accordingly grant leave to the applicant to appeal to the Supreme Court against the Judgement of the Court of Appeal sitting in Mombasa in Civil Appeal No. 49 of 2020 as Consolidated with Civil Appeal No. 59 of 2020 [Gatembu, Nyamweya & Odunga, JJ.A.] [Gatembu, JA. dissenting]] delivered on 12th April 2024. Costs shall abide the decision of the Supreme Court.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR