Micro-City Computers Limited & another v National Social Security Fund Board of Trustees & another (Civil Appeal 49 & 59 of 2020 (Consolidated)) [2024] KECA 444 (KLR) (12 April 2024) (Judgment) (with dissent)

Neutral citation: [2024] KECA 444 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 49 & 59 OF 2020 (CONSOLIDATED)

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

MICRO-CITY COMPUTERS LIMITED ..... APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ..... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 59 OF 2020

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEE .... APPELLANT

AND

MICRO-CITY COMPUTERS LIMITED ..... RESPONDENT

(An appeal against the judgment of the High Court at Mombasa (P.J. Otieno J.) delivered on 30th April, 2020 in HC Civil Case No. 41 of 2017)

JUDGMENT

1. On 30th April, 2020, the High Court at Mombasa (P. J. Otieno J.) delivered a judgement in Mombasa High Court Civil Case No. 41 of 2017 arising from a contract entered into between Micro-City Computers Limited (hereinafter referred to as "Micro-city") and National Social Security Fund Board of Trustees (hereinafter NSSF) for the design, supply, and installation and commissioning of an electric security surveillance system-closed circuit television (CCTV) and restricted access control systems at

NSSF's premises. The learned Judge entered judgement for Micro-City for the total sum of Kshs. 16,056,378/=, being general damages for breach of contract assessed at Kshs. 10,000,000/=, and expenses of Kshs. 6,056,378/= made up of a performance bond of Kshs. 24,128/=, the tender security of Kshs. 10,250/= and accountants' professional fees for the preparation of the audit report at Kshs. 5,800,000/=. In entering the said judgement, the learned Judge declined to award Micro-City the sum claimed in respect of loss of anticipated profit resulting from non-performance of the contract on the basis that the figures claimed were speculative and that the payments made to engineers contracted for the performance of the contract on tender preparation and cost and consultancies were not proved.

2. Aggrieved, both parties in the suit in the High Court lodged separate appeals in this Court. Micro-City, which was the Plaintiff before the High Court lodged Civil Appeal No. 49 of 2020 while NSSF, the Defendant therein, lodged Civil Appeal No. 59 of 2020. By consent of the parties, it was agreed that both appeals be disposed of together.

3. I shall briefly highlight the facts giving rise to the appeals as set out in the pleadings and proceedings in the High Court. Micro-City's claim was that in September 2010, NSSF advertised via print media and its official website a tender for the design, supply, installation and commissioning of an electric security surveillance system-closed circuit television (CCTV) and restricted access control system, which was to be installed at the NSSF's Social Security House Complex in Nairobi; that Micro-City participated in and bid for the said tender, emerging the winner thereof; that on the 8th April, 2011 it entered into a written agreement with NSSF regarding the said tender; and that the said contract was breached by the NSSF vide a written letter which did not comply with the terms on termination.

4. In addition to general and exemplary damages for breach of the contract agreement dated 8th April 2011, Micro-City claimed special damages being loss of business and costs incurred of the sum of Kshs. 214,544,220/= in its Further Amended Plaint dated 30th November 2018 filed in the High Court as follows: -

    a. Loss of profit resulting from non-performance of the main contract and services contract of Kshs. 103,447,136/=.

    b. Tender preparation costs and consultancies of Kshs. 9,930,000/=.

    c. Payment of engineers contracted for performance of the contract of Kshs. 8,794,336/=.

    d. Interest on loss of profit of Kshs. 75,166,276/=.

    e. Interest on contractual amounts paid to engineers contracted for the project of Kshs. 7,374,324/=.

    Also claimed was interest on all the heads of damages at prevailing commercial rates and costs.

5. In response to the said claim, NSSF filed a Notice of Preliminary objection dated 28th June 2017 challenging the jurisdiction of the High Court for the reason that the suit was time barred pursuant to section 4(1) of the *Limitation of Actions Act*. In its statement of defence dated 11th July 2017, NSSF also stated that Micro-City did not meet the stringent requirements for the tender, thus the award was procured through misrepresentation and/or non-disclosure of material facts and was void; that the contract was illegal and in contravention of the procurement laws and public policy in so far as the contract amount exceeded the amount budgeted for and provided for in the annual procurement plans, and was therefore unenforceable. NSSF asserted that in addition to the contract being in total breach or contravention of procurement laws, they cancelled the contract due to budgetary constraints and communicated the same to Micro-City. Therefore, it was pleaded that Micro-City was not entitled to the amounts claimed. It was NSSF's case that having cancelled the award; they were entitled to re-

advertise the same for the purpose of ensuring that its premises were secured, which was a matter of great public interest.

6. In reply to the defence, Micro-City averred that there was nothing illegal in the contract in question since under the relevant procurement laws and rules contracts were awarded after budgetary allocations had been made and not vice versa. Further that the Ethics and Anti-Corruption Commission carried out its investigations and exonerated Micro-City from any wrong doing. It was therefore sought to have the defence filed dismissed and judgment entered in its favour as prayed.

7. During the trial, Micro-City called two witnesses in support of its claim. Paul Okolo Ananga, Micro-City's Managing Director, who testified as PW1, relied on his statements filed on the 7th April, 2017 and 21st November, 2017, together with a bundle of document accompanying the said statements to reiterate that Micro- City emerged the winner of the tender floated by the NSSF leading to the execution of a formal contract on the 8th April, 2011. Further, that in the said contract, it was agreed that NSSF was to pay Micro-City a sum of Kshs. 244,825,708/= as the cost of the contract; that after expiry of the warranty period of two years from the time of installation of the security equipment, Micro-City was to remain on site and carry out maintenance of the installed security system at a cost of Kshs. 15,000,000/= per year with effect from 2013; that in breach of the said contract NSSF failed to facilitate Micro-City in taking up the site by giving a lame excuse that performance of the contract was not possible because of budgetary constraints; and that as a result, Micro-City suffered loss of business.

8. PW1 further averred that investigations were carried out by the Director of Public Prosecutions (D.P.P) and the Ethics and Anti-Corruption Commission (E.A.C.C) both of whom absolved Micro-City from any wrongdoing with regard to the contract as there had to be a budgetary allocation before the tender was awarded to it. According to the witness, Micro-City is a company of repute having undertaken similar projects before and NSSF carried out due diligence and chose it because of its expertise after site visits were conducted on its previous projects. PW1 clarified that Micro-City was not claiming the contractual sum but a sum of Kshs. 214,544,220/=, being its expenses and projected profits. In support of the claim for loss of business, PW1 stated that Micro-City entered into a service contract with Atelier 2030; it employed several engineers as its employees for a period of 6 years and there was a 10% interest on the monies paid to the engineers. PW1 explained that the figures claimed by Micro-City were arrived at upon calculations by its accountants and that the subject contract was procedurally signed and a copy handed to him.

9. George Mokua, a certified accountant from Mokua Onwonga & Co. Certified Public Accountants testifying as PW2, produced his report dated 14th March, 2017. His testimony was that their brief was to examine the fair financial loss resulting from the cancellation of the subject contract, and that they relied on documents availed to them by Micro-City. He explained that their computation was based on the contractual sum; the duration taken into consideration was between the year 2012-2018; the fact that the installation of the equipment was to be for 16 weeks and would have netted a profit of 62,285,117/=; that the cost of maintenance and overhead costs up to 2018 came to a sum of 42,162,019/= to give a combined loss of profits of Kshs. 103,447,136/-; the costs of preparation of the tender and consultation at Kshs. 9,930,000/=; payments to engineers in the sum of Kshs. 8, 794,336/= and interest at 14% at the prevailing rates on the three heads of losses which came to about Kshs. 92,372,747/=. It was his evidence that based on the generally accepted accounting principles, a financial projection of Kshs. 214,544,220/= was reasonable. He stated that he relied on agreements entered into between Micro-City and various consultants, the loss of profits over the contract period, based on projections on the revenue which would have accrued less the expenses incurred in a real trading situation.

10. Ms. Caroline Rakama Odera, the acting Corporation Secretary for NSSF testified as DW1 on its behalf, and adopted her witness statement filed in Court on the 20th October, 2018 together with a bundle of documents filed on the 13th December, 2017. In her evidence she disclosed that the subject tender was initiated by NSSF at the allocated budget of 125,000,000/= according to Board Paper No. BFIC/55/2011 dated 22nd February, 2011; that NSSF was not permitted to enter into any contract in excess of what was budgeted for; that in disregard of procurement laws, a contract was awarded to Micro-City for the sum of Kshs. 244,825,708/= which exceeded the budgeted and allocated funds. Subsequently the board generated another board paper requesting for allocation of a sum of Kshs. 245,000,000/= for ICT out of the ICT budget of 1.7 billion but this was rejected and no money was allocated; and that Micro-City was also awarded an unfounded annual maintenance cost of Kshs. 15,000,000/= which was not provided for in the tender document. It was her evidence that the subject contract was therefore awarded illegally, and was also not properly executed as it did not bear the seal of NSSF, and was therefore cancelled by way of letter dated 21st May, 2012. In addition, that Micro-City could not incur any loss as the contract was never entered into, and that the letter of award provided for negotiation and a site visit before executing the contract.

11. In his judgement, the learned trial Judge identified the issues for determination as whether the parties entered into a contract and whether it was binding; whether there was breach of contract on the part of the NSSF; whether Micro- City was entitled to any of the reliefs sought; and what orders should be made as to costs. On the first issue, the learned Judge found that there was in existence of a valid contract between the parties and that there was no valid reason for terminating the same on the ground that the tender was floated by NSSF beyond its allowed budget allocation. He proceeded to hold that since the letter of termination was not in accordance with clause 6.2 of the contract which stipulated one month written notice of intention to terminate the contract, the contract was never validly and lawfully terminated, and that the NSSF breached the terms of the subject contract. On the third issue, the learned Judge found that in the absence of the particulars of fraud and misrepresentation, coupled with the failure by NSSF to prove that Micro-City participated in any illegalities, meant that Micro-City was entitled to remedies as a result of breach of contract in the circumstances.

12. In arriving at the nature of remedies that Micro-City was entitled to, the learned Judge appreciated the authority of Strows Broks Aktie Bolog vs. Hutchison [1905] AC 515, Consolata Anyango Ouma vs South Nyanza Sugar Company Ltd [2015] eKLR and Anson's Law of Contract, 28th Edition at pages 589 and 590, to the effect that the general damages that are available to the innocent party to the breach are limited to such as the law will presume to be direct, natural or probable consequences of the action complained of; that the purpose of damages for breach of contract is, subject to mitigation of loss, to put the claimant as far as possible in the same position he would have been had the breach not occurred; and that a claimant, who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal.

13. The learned Judge found as a fact that the parties indeed negotiated by a tender process and executed an agreement; that in the entire tender process there were costs and professional exertion by Micro-City with a legitimate expectation that a financial benefit would accrue once the contract was executed; and that was the loss that needed to be compensated. He held that in those circumstances, Micro- City was entitled to general damages for the loss suffered when the contract was breached and that this loss was independent of any special damages that might have been incurred by Micro-City provided it was not capable of being viewed as duplication. He assessed that loss in the sum of Kshs. 10,000,000.00 taking into account the fact that there was a prayer for loss of business profits.

14. As regards the claim for exemplary damages, the court found that there was no evidence led to warrant the award of exemplary damages since there was no allegation or proof that NSSF was propelled by bad faith or design to gain a financial benefit. He held that no exemplary damages were awardable to Micro-City in the circumstances of the case. On special damages, the learned Judge found, based on the decision in Kenya Breweries Limited Kiambu vs General Transport Agency Limited [2000] eKLR, that Micro-City did not produce evidence in support of the particulars of loss of business profits and costs; that in cross-examination, PW2 stated that the expenses appearing in his report were not supported by any payment document but were just reasonable expenses incurred in a real trading situation; that such evidence did not meet the threshold for proof of special damages; that even the usual basic business operation documents like of bank statements to prove payment of the preliminary expenses that it incurred in the preparation of the tender document and the cost of all the consultancies which it is entitled to by dint of clause 16.3 of the subject contract, were never produced in evidence; that the specific claim of 103,447,136/=, called for specific proof by way of some documents; that the evidence of loss of profits resulting from non-performance of the main contract by PW1 and PW2 remained largely speculative without credible probative value thus falling short of the plaintiff's onus of proof.

15. The learned Judge therefore disallowed the claim for loss of profit resulting from non-performance, as well as the payment to engineers contracted for performance of the contract on tender preparation cost and consultancies. He however found that the claim for a performance bond of Kshs. 246,128/=, the tender security of Kshs. 10,250/= together with the accountant's professional fees for the preparation of the audit report at Kshs. 5,800,000/=VAT inclusive proved.

    The aggregate of that proved sum was Kshs. 6,056,378/=. It was on that basis that judgement was entered for Micro-City against NSSF in the sum of Kshs. 16,056,378/= plus interest at court rates from the date of the suit until payment in full with costs of this suit.

16. This was the decision that aggrieved both Micro-City and NSSF. Micro-City's appeal is based on the following four grounds:

    1. The Learned Judge erred in law and in fact in failing to uphold Micro-City's claim for loss of profits as prayed or at all on the basis that the same had not been proved.

    2. The Learned Trial Judge erred in law and in fact in his treatment of the evidence relative to Micro-City's claim for loss of profit and especially erred in treating the claim for loss of business/ profit which was effectively one in the nature of special damages as though it were on founded in tort.

    3. That the Learned Trial Judge erred in treating Micro-City's claim for loss of profit as if it were a claim in restitution and failed to appreciate that once the breach of contract had been proven all Micro-City was required to do was to establish the residual value that would have been due to it upon performing the Contract, evidence in respect of which was adequately presented before the Court.

    4. The Learned Judge acted erroneously in assessing and determining Micro-City's claim for loss of profit on the wrong principles and further erred in his appreciation of the evidence put forth in support thereof.

17. Micro-City accordingly sought orders that its appeal be allowed to the extent that the portion of the Judgment of the trial court dismissing its claim for loss of profits be set aside and in lieu thereof judgment be entered therefor in the sum of Kshs. 103,447,136/= plus interest and costs.

18. NSSF's appeal, on the other hand is based on the following grounds:

1. The Learned Judge erred in law and in fact entering judgment for Micro-City based on pleadings contained in the Further Amended Plaint dated 30th November 2018 when no evidence was led and or tendered in support of the allegations contained in the said further amended Plaint.

2. The Learned Trial Judge erred in law and in fact in entering judgment for Micro-City based on speculation rather than evidence on record.

3. That the Learned Trial Judge erred in law and fact in awarding Micro-City Kshs. 10,000,000/- as general damages for breach of contract contrary to established principles of law that general damages are not recoverable in breach of contract.

4. The Learned Judge erred in law and in fact in awarding Micro-City special damages in the sum of Kshs. 6,056,378/- when the same were neither specifically pleaded nor strictly proved as required in law.

5. The Learned Trial Judge erred in law and in fact by failing to consider all the material facts placed before Court and thereby failed to take into account relevant matter that he ought to have considered and as a result arrived at a completely erroneous decision.

19. NSSF therefore sought that the judgment of the High Court delivered on 30th April 2020 awarding Micro-City Kshs. 10,000,000/- general damages and Kshs. 6,056,378/- special damages be varied and or set aside and substituted with the order dismissing its suit; and that the costs in the High Court and of the Appeal be awarded to NSSF.

20. The two appeals were heard on this Court's virtual platform on 24th May 2023, when learned counsel Mr. Mwakisha appeared for Micro-City, while learned counsel Mr. Wafula appeared for NSSF. Both learned counsel opted to rely entirely on their submissions already filed, and in this respect each filed two sets of submissions. Those for Micro-City were both dated 10th May 2023, while those for NSSF were both dated 5th July 2021. I have considered the pleadings and submissions filed by the parties in line with the role and mandate of this Court as set out in Selle vs. Associated Motor Boat Company Ltd [1968] EA 123 and Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates [2013] eKLR, which is to review and analyse the evidence on record and determine whether the conclusions reached by the learned trial Judge on the facts and law should stand or not. In doing so, as cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd (1958) E.A 424, I will be slow to differ from the findings on questions of fact, since the judge who tried the case had the advantage of seeing and hearing the witnesses.

21. My first observation from the memoranda of appeal and submissions filed by the counsel for both parties is that they do not dispute the findings by the trial Court that there was a valid contract entered into between Micro-City and NSSF, and which was breached by NSSF. Their points of divergence appear to be the basis for the findings and awards made with regards to general damages and special damages by the trial Judge, which are the two main issues arising in this appeal.

    At this stage it is necessary to provide brief details of the subject contract to contextualise the disputed awards made by the learned trial Judge.

22. By a letter dated 2nd March, 2011, referenced "Tender No. 04/2010-2011: For Design, Installation and Commissioning of an Appropriate Electronic Surveillance & Restricted Access Control Systems at Social Security House Complex – Nairobi", NSSF informed Micro-City that:

> "Further to your response to the above referenced tender dated 16th September, 2010 the National Social Security Fund Wishes to inform you that you were successful.
>
> This letter therefore serves to notify you that you have been awarded the tender for Design, Installation and Commissioning of an Appropriate Electronic Surveillance & Restricted Access Control Systems at Social Security House Complex – Nairobi at your quoted tender sum of Kshs 244,825,708.00 (Two Hundred and Forty Four Million Eight Hundred and Twenty Thousand Seven Hundred and Eight Shillings Only) and an annual maintenance cost of Kshs 15,000,000.00 (Fifteen Million Shillings only) after expiry of the warranty period all-inclusive of taxes and subject to successful negotiations as provided for in the Request for Proposal (RFP) Document.
>
> The letter of offer does not in any way constitute a contract and you
>
> will be expected to signify your acceptance within 14 days
>
> After expiry of the 14 days' notice and upon receipt of a letter of acceptance a contract will be signed between the National Social Security Fund and yourselves."

23. Subsequently, an agreement was entered into on behalf of the parties, which was produced in evidence. However, by a letter dated 21st May, 2012, NSSF, while refereeing to the said tender addressed Micro-City as follows:

> "Further to our letter of award dated 2nd March, 2011 in which you were awarded the above tender, we regret to inform you that the Fund is unable to proceed with the project due to budgetary constraints.
>
> Any inconvenience is highly regretted."

24. From that letter, the reason NSSF gave for retracting its earlier position was that it was facing some budgetary constraints. In brief, these were the circumstances that the learned trial Judge considered in finding that there was a valid contract entered into between Micro-City and NSSF, and that there was breach of the contract by NSSF. I shall accordingly proceed with the consideration of the pleadings and arguments made by the parties on the award of damages made by the learned trial Judge.

25. On the award of general damages, NSSF contends that the trial Court erred in finding that Micro-City was entitled to Kshs.10,000,000/= as general damages for breach of contract, and while citing the decisions by this Court in Kenya Tourist Development Corporation vs Sundowner Lodge Limited, Civil Appeal No. 120 of 2017 (2018) eKLR; Consolata Anyango Duma vs. South Nyanza Sugar Co. Ltd [2015] eKLR; and Peter Umbuku Muyaka vs. Henry Sitati Mmbasu [2018] eKLR; submitted that that the court has no discretion to award general damages as the award is not available for breach of contract, the proper remedy being an award of special damages. Therefore, that in awarding Micro-City Kshs.10,000,000/= as general damages for breach of contract, the court was engaging in "sympathetic sentimentalism" and speculation as opposed to proof- based judicial determination.

26. Micro-City on the other hand stated that it was a well settled principle that in redressing breach of contract, the essential consideration was that the aggrieved party ought as much as possible to be placed in the position it would have been if the contract had been performed. Reliance was placed on the case of Robinson vs Harman (1848) 1 EXCH 850. While it was alive to the rule that general damages will

not avail a party in a claim for breach of contract, it was Micro- City's case that awards in the nature of general damages under various heads abound, and can range from being nominal, in recognition of the wrong done, to punitive where the conduct of the guilty party is wanton or contumacious, to exemplary damages, which were sought also in their plaint. That the trial Judge cannot therefore be faulted for making the award of general damages, being in recognition of the fact that that Micro-City had suffered injury as a result of the breach, and the quantum thereof was reasonable in the circumstances.

27. The general principle that applies to damages awarded for breach of contract is that they are compensatory, as restated in Halsbury's Laws of England Fourth Edition Reissue Vol 12(1):

> "941...The normal function of damages for breach of contract is compensatory. Damages are awarded, not to punish the party in breach, or to confer a windfall on the innocent party", but to compensate the innocent party and repair his actual loss. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract had been performed. Only in exceptional circumstances do courts depart from this policy and award some greater or lesser sum'. Ordinarily there is just one measure of damages in contract, which is the loss truly suffered by the promisee".

28. This rule is the reason why it has been held in the various judicial decisions cited by NSSF that general damages are normally not awarded for breach of contract, since a party is required to prove the loss that has been incurred for which he or she seeks compensation. In this respect the terminology of general damages is employed to illustrate the difference between damages which are payable per se, that is without proof of any injury or loss or for losses which have no pecuniary equivalent such as pain and suffering, as opposed to the damages which are awarded only upon proof of loss or injury, which are normally referred to as special damages, and hence the rule that special damages must be specifically pleaded and proved.

29. I note in this respect that in awarding the general damages of Kshs. 10,000,000/=, the learned trial Judge correctly restates the applicable principle as follows:

> " 53. The necessity for award of general damages for breach of contract may be seen to flow from the principle of law that there ought to be no injury without a remedy. The author of Anson's law of Contract, 28th Edition at pages 589 and 590 states the law to be that:
>
> > "Every breach of contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant, who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".

30. In applying the principle, the learned Judge then found as follows:

> " 54. In this case l have found that the parties indeed negotiated by a tender process and executed an agreement. I presume it that in the entire tender process there were cost and professional exertion by the plaintiff of course with a legitimate expectation that a financial benefit would accrue once the contract was executed. That is a loss I consider needs to be compensated.

55. The court has further found that the defendant did breach the contract by termination against the law. In those circumstances, I hold that the plaintiff is entitled to general damages for the loss suffered when the contract was breached. This loss is independent of any special damages that may have been incurred by the plaintiff provided it is not capable of being viewed as duplication. All considered, and doing the best with the fact of the matter, including the value of the contract and thus the possible profits, I do assess the plaintiff to be entitled to damages in the sum of Kshs 10,000,000. In coming to this award, I have taken regard of the fact that there was a prayer for loss of business profits."

31. With profound respect to the learned trial Judge, it is my view that there was a misapplication and misunderstanding in his reasoning as regards the award of general damages in a claim arising from a breach of contract, which he had already noted could only be nominal if there is no proof of loss; and also with respect to the type of loss that had been suffered and was being claimed by Micro-City, namely a quantifiable monetary loss and therefore in the nature of special damages. I am in this respect guided by the position of this Court in National Social Security Fund vs Sifa International Limited [2016] eKLR , and also in Kenya Commercial Bank Limited vs Charles Otiso Otundo Civil Appeal No. 198 of 2000 where it was held that there can be no general damages for breach of contract, in addition to, for example loss of profits. The learned Judge in this respect treated the concept of damages as being synonymous with general damages, when in effect damages are of many types. I therefore find that there was an error made by the learned trial Judge in awarding Kshs. 10,000,000/= as general damages for these reasons. Accordingly, that award in favour of Micro-City is hereby set aside.

32. On the award of special damages, Micro-City argued that in dismissing a substantial part of its claim for financial loss, the learned trial Judge erred in his treatment and rejection of the evidence in support of its claim, in his summation that the evidence of loss of profit by PW1 and PW2 remained largely speculative without credible probative value as such falling short of the onus of proof, and in rejecting the element of projected loss of profits. Reliance was placed on the decision in Parabola Investment Limited & Another vs Browallia Cal Limited (2011) QB 477 at 486 that a party suffering loss on account of breach of contract where, as in this case the contract was terminated before it was performed can mostly rely only on projections or a speculative process. It was thus submitted that the projections contained in the detailed report presented by the auditor/financial consultant met the threshold for proof of the Micro-City's expenses which, unlike historical accounts, could not have supporting documents.

33. It was further submitted that an important element in the value and reliability of this report by PW2 was that since the contract was not performed and no payment had been made, one had to rely on projections and hypotheses that reasonably relate to a contract of such nature in computing what would have been residual profit to Micro-City had the contract been performed, since it did not have actuals to deal with. In addition, that since the expert opinion was not controverted by other expert reports, it was the best evidence at the learned Judge's disposal.

34. With regard to whether the special damages as awarded was specifically pleaded and strictly proved, it was submitted that the sum of Kshs. 6,056,378/- was in their pleading under the head 'Tender Preparation Costs and Consultancies', and that the learned Judge was properly guided in his finding that the claim for performance bond, tender security and accountant's professional fees were, on a balance of probability, maintainable; that performance bond and tender security would have been prerequisite to process the tender in the first place and must have been satisfied prior to the award of the contract and awarded the sum of Kshs. 256,378/=; that the accountant's fees had been claimed

as a lump sum under the head of tender preparation costs and consultancies under the head financial consultant's fee at Kshs. 5,000,000/-; that the fee note was annexed and the report contained an additional 16% VAT being Kshs. 800,000/- totalling to Kshs. 5,800,000/-.

35. Lastly, regarding the further amendment to the plaint, it was submitted that the same was valid and effected with the leave of court whose ruling was not appealed, and contained a fair break down of the damages sought. Reliance was placed on the holding in Daniel Migwi Njai vs High View Farm Limited and Another, Civil Appeal No. 139 of 1989 that the grant of leave to amend pleadings after the conclusion of the evidence and during the course of submissions was proper, and it was submitted that in the present case the further amendment was sought and granted way before the defence case commenced, so ample opportunity to redress any prejudice was available; that the further amendment did not introduce a new cause of action but sought only to break down or particularize further the sum claimed in special damage; and that there was therefore justification for the learned Judge making the award that he did.

36. NSSF on its part submitted that the further amendment of the plaint was by way of a Notice of Motion application dated 10th September 2018; leave was granted and Micro-City filed a further amended plaint dated 30th November 2018 but it never reopened its case for the purpose of tendering any evidence in support of the said further amended plaint; that it is trite law that for special damages to be awarded, the particulars of those damages ought to be first specifically pleaded and then strictly proved and this sequence was at the foundation of what constituted the fundamental right to fair hearing since NSSF had a constitutional right to know the claim against them in order to be able to defend themselves against the particulars of the claim;; that since the requirement for proving special damages only came after the particulars of special damages had been pleaded, Micro-City could not purport to supply particulars of special damages way after the hearing the case for them to be considered. On the need to plead particulars of special damages before leading evidence in respect thereof, NSSF relied on the decisions in National Social Security Fund vs Sifa International Limited [supra] and Coast Bus Service Limited vs Murungu Danyi & 2 Others Civil Appeal No. 192 of 1992 and submitted that the trial Court erred in entering judgment for Micro-City based on the further amended plaint dated 30th November 2018 for which no witness testified in support and which was therefore not proved as required by law.

37. NSSF's position therefore, was that the sum of Kshs. 214,544,220/- as pleaded in the amended plaint dated 14th June 2017 was in the nature of a special damages claim and was not proved contrary to sections 107, 109 and 110 of the *Evidence Act* as well as the holding in the case of National Security Fund Board of Trustees vs Sifa International Limited [supra]. In particular, it was submitted that since the Appellant had particularized its loss as the sum of Kshs. 214,544,220/-, the trial court erred in awarding it Kshs. 6,056,378/- which was neither specifically pleaded not strictly proved, and reliance was placed on the decision in Sirce Limited vs Lake Turkana El Milo Lodges (2008) 2 EA 521 for the need to seek as special damages a claim that is capable of being calculated to a cent; Ratcliff vs Evans (1892) 2 QB for the need for specificity in pleadings special damages; John Richard Okuku Oloo vs South Nyanza Sugar Co Ltd [2013] eKLR for the necessity of pleading each particular type of special damages; and IEBC & Another vs Steven Mutinda Mule & 3 Others [2014] eKLR for the binding effect of pleadings.

38. Additionally, that PW1 during cross examination stated that he had not particularised how Kshs. 214,544,220/- was arrived; that there was no pleadings or particulars for the auditor's fees of Kshs. 5,800,000/- either in the original plaint dated 6th April 2017 or in the amended plaint dated 14th June 2017, nor did it appear in the further amended plaint dated 30th November 2018; that the amounts for the alleged tender preparations were neither pleaded as required for special damages nor strictly proved;

that PW1's evidence was that the cost of the project would have exceeded Kshs. 216,000,000/- and if the projected cost were to be deducted from the tender amount of Kshs. 244,825,708/- the balance which would be the profit would be much less than Kshs. 26,000,000/-; and that in those circumstances the evidence of PW1 for loss amounting to Kshs. 214,544,220/- was not supported nor corroborated by PW2's audit report dated 14th March 2017.

39. It was further submitted that PW1 admitted that there was no evidence of payments having been made to the engineers. In this regard the Respondent cited the case of Great Lake Transport Co. (U) Ltd vs Kenya Revenue Authority [2009] eKLR and Douglas Odhiambo Apel & Another vs Telkom Kenya Ltd for the proposition that a claim for special damages ought to be supported by documentary evidence since pleadings alone do not amount to such evidence. Lastly, that the letter cancelling the award of the tender was issued on 21st May 2012; that PW1 confirmed in his evidence during his examination-in-chief that the site was never handed to him to enable him execute the project; and that in those circumstances, it was submitted that there was no evidence to support the engineers' claim for working for 6 years. According to NSSF, PW2's report was fabricated and did not support Micro-City's claim; that while the documents used to prepare the report were annexed in the report, the report made provision for what was termed as operating expenses totalling Kshs. 79,172,258/= in computing the profits, yet not a single supporting document was provided; and that in the absence of the supporting documents, the report was not reliable and this Court was urged to disregard the same.

40. The first aspect of my determination is that of the loss, if any, that Micro-City suffered. For pecuniary losses, the normal policy of the law is to award such sum of money which will put the innocent party in the position which he or she would have been in had the contract been duly performed, as explained in McGregor on Damages Nineteenth Edition at paragraph 4-002 as follows:

> " Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the claimant is entitled to compensation for the loss of his bargain. This is what may best be called the normal measure of damages in contract."

41. Since most contracts are based upon a money consideration, the normal measure of damages in a wrongfully terminated contract would be the amount the contractor would have earned under the contract. The only limitations in this regard are two. Firstly, that the damages should not be remote, and in this respect the general principle is what is referred to as the rule in Hadley vs Baxendale (1854) 9 Ex Ch 341, namely, that in the absence of some special statutory or contractual provision, the damages to which an innocent party is normally entitled in respect of a breach of contract are such as may fairly and reasonably be considered either as arising naturally (that is according to the usual course of things) from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

42. The subject contract between Micro-City and NSSF provided as follows in clause 6.2 on "Breach and Termination":

> " A breach shall occur where a party fails to fulfil any of the terms and obligations of this agreement and shall entitle the aggrieved party to any remedies available to it in law Provided any delay by any party to exercise the rights and remedies due to it under this agreement and/or the law applicable shall not be deemed and/or construed to be a waiver thereof and/or a limitation to any other rights which it may have in law arising out of a breach of the terms of this agreement and are additional to any other rights.

> The Employer shall have the right at any time and for any reason to terminate the Contract in whole or in part by giving the Contractor a one (1) month written notice whereupon all the terms of the Contract shall be discontinued in which event the Employer's sole liability shall be to pay the Contract the price for the Goods and Services already supplied as at the termination date but such payment shall not include loss of anticipated profits or any consequential loss."

43. It is clear from the letter of 21st May, 2021, that the notification to Micro-City bringing the engagement between it and NSSF to an end did not comply with clause 6.2 of the contract, since it did not give the required one-month notice. In those circumstances, NSSF could not benefit from that clause in order to deny Micro-City any remedies available to it either under the said agreement or the law.

44. Secondly, the breach of contract must also causally contribute to the damage or loss sustained. The traditional tests is the 'but for' test, that is. 'Would the damage of accrued but for the defendant's action'. Causation is therefore an issue of fact, either by way of a positive act or omission, even though the actual assessment of damages may still depend upon future and certain events. In the present appeal the fact of causation is not disputed, since Micro-City's claim arises from NSSF's termination of the subject contract and is based on the contract terms. Lastly, the plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided. In the present appeal, NSSF has not raised the issue of Micro-City having failed to mitigate, and in any event, this contract having been one for a specific tender and award, it was not possible for the Micro-City to enter into a similar contract.

45. The loss pleaded in the original plaint dated 6th April, 2017 by Micro-City was that as a result of the failure by NSSF to perform and discharge its obligations under the said contract, it suffered loss in its business at the rate of Kshs. 15,000,000.00 from the year 2013; that as a direct consequence of the said breach, Micro-City suffered loss of business as well as costs in preparation for the performance of the said agreement in the sum of Kshs. 214,544,220.00; and that its claim was therefore for general and exemplary damages resulting from loss of business profits and costs incurred in the preparation aforesaid. In its prayers, Micro-City sought general damages and exemplary damages for breach of contract, interests and costs of the suit. There was however an amended plaint dated 14th June, 2017 by which Micro-City specifically prayed for Kshs. 214,544,220.00 as loss of business and costs incurred but also sought to restrain NSSF from proceedings with the process of awarding the said tender to another person.

46. NSSF did not amend its defence, and the hearing commenced on 13th December, 2017 when PW1 testified, based on the original plaint, the amended plaint and the defence. It seems that by the time of the testimony by PW1, NSSF had not filed its witness statements since it sought for 14 days to do so after the said testimony. On 22nd February, 2018, PW1 was recalled and he clarified that the Micro-City's claim was not for the contract sum of Kshs. 244,825,708.00 but for the projected profits in the sum of Kshs. 214,544,220.00 While admitting that this sum was not explained in the plaint, he stated that it was clarified in the accounts. PW1 eventually concluded his testimony on 4th July, 2018 and PW2 commenced his testimony on 24th July, 2018 after which Micro-City closed its case. However, upon the resumption of the hearing of the defence case on 6th November, 2018, Micro-City had on record an application dated 10th September, 2018 seeking leave to amend the plaint. It was disclosed that the amendment was necessitated by the need to align the plaint to the evidence tendered and that the same was meant to particularise the figures. On 29th November, 2018, the said application was allowed and NSSF intimated that it was intending to appeal the decision. There is

no record that NSSF filed an appeal, nor did it seek leave to amend its defence. The matter therefore proceeded for defence hearing on 7th February 2019 based on the pleadings on the record. The further amended plaint introduced the particulars of loss of business profits and costs in the total sum of Kshs. 214,544,220.00, which was broken down as loss of profits in the sum Kshs. 103,447,136.00; tender preparation costs and consultancies in the sum of Kshs. 9,930,000.00; payments of engineers in the sum of Kshs. 8,794,336.00; and interests on contractual amounts paid to engineers in the sum of Kshs. 7,374,324.00, which were therefore specifically pleaded.

47. NSSF's case, as I understand it, is that following the further amendment of the plaint, Micro-City ought to have reopened its case and recalled its witnesses, and that without having done so, the evidence already on record which was based on the amended plaint, could not be used to prove the claim in the further amended plaint which was filed later. My view is that this position is not legally correct. As appreciated by the predecessor to this Court in Allah Ditta Qureshi vs C T Patel [1951] 1 EACA 1, amendment may be made "at any stage of the proceedings". The effect of an amendment of pleadings was explained by the same Court in Eastern Radio Services & Another vs R J Patel T/A Tiny Tots and Another [1962] EA 818, is as follows:

> "Once a plaint is amended, it speaks from the commencement of the action. The writ as amended becomes the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum. Leave to amend involves that the claim as amended may be treated as if it were the original claim in the action. Upon the amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon endorsed is substituted for the claim originally indorsed. Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried."

48. It follows that upon the further amendment to the plaint, the said pleading related back to the time when the original plaint was filed and as long as there was evidence on record in support of the further amended plaint, this plaint could properly form the basis upon which judgement could be based. Without an appeal having been lodged against the ruling allowing the amendments, the trial court would not have had any justification for ignoring the further amended plaint. In addition, the question as to whether the evidence adduced supported the further amended plaint was one to be answered by the trial Court in its analysis and findings, and the option and right of recalling any of the witnesses it needed examined based on the amended pleadings was also available to NSSF. I therefore have no doubt that the claims for loss of profits in the sum Kshs. 103,447,136.00; tender preparation costs and consultancies in the sum of Kshs. 9,930,000.00; payments of engineers in the sum of Kshs. 8,794,336.00; interest on loss of profits in the sum of Kshs. 75,166,276.00, direct tender preparation costs in the sum of Kshs. 9, 832,145.00 and contractual amounts paid to engineers in the sum of Kshs. 7,374,324.00 were specifically pleaded.

49. The second aspect I need to consider is whether the claim for loss of profits was proved. In this respect, the claimant is required to prove a difference between the position he is in ('the breach position') and the position he would have been in but for the breach ('the non-breach position'). The breach position is a question of historical and actual fact, and what happened, what was spent, and what was received can be established with precision by the claimant on the balance of probabilities. On the other hand, the non-breach position is of its nature a hypothetical, and proof of it is a different type of exercise, namely an approximation of how the parties would have operated and the situation the claimant would have been in if the primary contractual obligations had been performed. (See in this respect the chapter on 'Damages and Proof', by Adam Kramer in the text Commercial Remedies: Resolving Controversies, 2017 Edition).

50. The need for flexibility in the manner of proof arising from the uncertainty of the non-breach position was appreciated in Ratcliffe vs Evans [1892] 2 QB 524 by Bowen L.J. as follows:

> "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to 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 pendantry."

51. Likewise, it was held by the Indian Supreme Court in MSK Projects India (JV) Limited vs State of Rajasthan & Another (2011) 10 SCC 573 that a claim of expected profits is legally admissible on proof of the breach of contract by the erring party, as a reasonable expectation of profit is implicit in a works contract, and its loss has to be compensated by way of damages once the breach on part of the other party is established and estimations made on quantum of loss. The Indian Supreme Court held as follows in the case:

> " 30. In M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR 1984 SC 1703, while interpreting the provisions of Section 73 of the Indian Contract Act, 1972, this Court held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that what would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid.

52. It is therefore my view that a claimant should not be penalized for the uncertainty surrounding proof of loss of business and profits as a claim of special damages, especially where that uncertainty has been caused by the wrongdoing of the other party. I am guided in in this perspective by the decision in Parabola Investment Limited & Another v Browallia Cal Limited (2011) QB 477 at 486 where Toulson LJ held:

> " Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

53. It was held in that case that where the quantification of loss involves a hypothetical exercise, the Court does not apply the same balance of probabilities approach as it would to the proof of past facts, but instead estimates the loss by making the best attempt it can to evaluate all the chances, great or small, taking into account all significant factors. Similarly, in Yam Seng Pte Ltd vs International Trade Corp. Ltd (20130 1 Lloyd's Rep 526 [188] Leggatt J. opined as follows:

> 'The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.'

54. McGregor on Damages (supra) also recognizes this approach at page 349 paragraph 10-002 when it states that:

> " Indeed, if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss...Generally, therefore, although it remains true to say that 'difficulty of proof does not dispense with necessity of proof', the standard demanded can seldom be that of certainty. Even if it is said that that the damage must be proved with reasonable certainty, the word 'reasonable' is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating the amount."

55. At paragraph 10-006, the learned author states that:

> " Further cases presenting this difficulty of showing the amount of profitable sales that would have been made by the claimant had there been no tort or breach of contract by the defendant have indicated that the claimant is assisted by the principle in the very old case of Armory v Dalamirie, which has today received a new lease of life, the principle being that the court is required to resolve uncertainties by making assumptions generous to the claimant where it is the defendant's wrongdoing which has created those uncertainties."

56. The tradition of favouring the claimant in such circumstances also has a long history in United States jurisprudence, and see in this respect the decisions in Story Parchment Co. vs Paterson Parchment Paper Co. 51 S Ct 248 (1931) and Bigelow vs RKO Radio Pictures Inc 66 S Ct 574 (1946). This Court similarly expressed itself along the same lines in 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; Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others, Civil Appeal No. 192 of 1992; and Jackson K Kiptoo vs. The Hon Attorney General [2009] KLR 657 where it was held that:

> " the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

57. However, I must emphasize that the scope of the benefit to the claimant where there is such uncertainty in proving the non-breach position does not apply where there is evidence available which the claimant has not deployed. The claimant in addition is not given a free ride, the law still expects and requires the claimant to deploy the best evidence reasonably available to him, to enable the Court to make

reasonable assumptions about what would have happened. Therefore, the requirement for strict proof of the special damages stated by this Court in National Security Fund Board of Trustees vs Sifa International Limited [supra] will still obtain, and the flexibility allowed to a claimant is in the manner and methods of proof that are employed, and may not necessarily be the traditional receipts and payment vouchers.

58. Coming back to the present appeal, the learned trial Judge, while dealing with proof of loss of business and profit by Micro-City, expressed himself as follows in his judgement:

> "On special damages, the law remains trite that the same must not only be specifically proved but also strictly proved. Having reviewed the evidence I find that the plaintiff did not produce evidence in support of the particulars of loss of business profits and costs. In cross- examination, PW2 stated that the expenses put on page 17-25 of the report are not supported by any payment documents but are just reasonable expenses incurred in a real trading situation. That does not meet the threshold for proof of special damages. In addition, even the usual basic business operation documents like of bank statement to prove payment of the preliminary expenses that it incurred in the preparation of the tender document and the cost of all the consultancies which it is entitled to by dint of clause 16.3 of the subject contract, were never produced in evidence yet these are document which be (sic) with the plaintiff if indeed they exist. The specific claim of 103,447,136/=, called for specific proff (sic) in my view by way of some documents. The evidence of loss of profits resulting from non- performance of the main contract by PW1 and PW2 remained largely speculative with credible probative value thus falling short of the plaintiff's onus of proof."

59. It is my respectful view that this finding was based on an erroneous understanding that what was being claimed by Micro-City was actual losses as opposed to loss of anticipated profits, and is not supported by the applicable legal principles demonstrated in the foregoing authorities. In the present case, there was an audit report prepared by PW2 who also appeared before the trial court and defended the said report. No other report was availed to the trial Court. PW2's evidence having been in the nature of expert opinion, was entitled to the highest possible regard as held by this Court in Juliet Karisa vs. Joseph Barawa & Another, Civil Appeal No. 108 of 1988, and although the trial Court was not bound to accept and follow it and was required to form its own independent opinion based on the entire evidence before it, such expert evidence must not be rejected except on firm grounds.

60. Whereas the evidence of PW2 was subject to the court finding favour with it, as held in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 that "...such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so", I note that the trial Court disallowed the findings in the audit report and evidence by PW2 solely on the ground that the expenses specified in the report were not supported by any payment documents. The trial Court in my view ought to have analysed the relevance, reliability, and credibility of the findings in the report and evidence, and whether the said evidence was sufficient to make a reasonable assumption or inference as regards the income and expenses that Micro-City would have incurred over the subject period.

61. I have perused the said audit report and note that as testified to by PW2, it is indicated therein that the subject contract document, Bills of Quantities and other documents and information availed by Micro-City were used to compute the projections of the contract income and costs for the years 2011 to 2018, based on the main contract execution period of 16 months, and annual maintenance contract

after the warranty period. The contract document and Bill of Quantities were annexed to the report. Also annexed was a copy of the tender security and performance bond, professional fees charged by the accountants, a statement of fees by the project architect, agreements entered into between Micro-City and various engineers, and correspondence with NSSF on the tender evaluation and award.

62. On the item of loss of profits resulting from non-performance of the main contract and maintenance contract, and in the absence of contrary evidence, we have no basis for finding that the audit report a fabrication as alleged by NSSF, or faulting the methodology used by PW2 in arriving at the anticipated profits that Micro-City stood to make had the contract not been breached. We have in this respect already made a finding on the need for flexibility in the method of proof, particularly since the uncertainty as to the damage was caused by NSSF'S breach. It is notable in this respect that the projections on income in the table on "Summary Statement of Comprehensive Income" annexed to the audit report was derived from the subject contract sums. In addition, on cross-examination, PW2 explained the lack of supporting documents for the projected expenses as follows:

> " I have however not computed loss of revenue but loss of profits. In it (the report), I have put expenses for page 17 - 25 of but without documents in support of payment but these are reasonable expenses in a normal trading situation. I have calculated loss on the maintenance contract for 5 years that having been the reasonable length of the maintenance contract. Maintenance of the equipment would have been dependent on the contract of installation but there was no completion. My report is valuable because I am here to support it and I am answering your questions. My expenses are based on projections which unlike historical accounts cannot have support documents. My report is reliable and claim verifiable."

63. On re-examination, PW2 confirmed that the figures were derived from Micro- City which was operational and trading with directors and employees. This Court in the case of Ikumbu vs Wanjiru (Civil Appeal 157 of 2017) [2022] KECA 81 (KLR) while dealing with similar circumstances held that;

> " Having laid the basis for the claim, we now proceed to address the prerequisites for sustaining a claim of this nature, being a special damage claim. We take it from the decision of this court in Hahn vs. Singh [1985] KLR 716 for the holding, inter alia, that special damages must not only be claimed specifically but must also be proved strictly, with a caveat that the degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves. In this appeal, as we have already alluded to above, the respondent tendered evidence through PW2 a registered valuer. She admitted on oath that she did not have receipts to show the costs of the improvements. There was no further pressure for her to avail them. Neither did the appellant seek the court's authority to have these renovations valued by a valuer of his own choice. The trial Judge cannot therefore be faulted for allowing the same."

64. As regards proof of the other heads of special damages, the learned judge found that the claim for a performance bond of Kshs. 246,128/=, the tender security of Kshs. 10,250/ together with the accountant's professional fees for the preparation of the audit report at Kshs. 5,800,000/=VAT inclusive were proved. The claims in respect of the performance bond and tender security were pre-contract expenses which were necessarily spent in the process of tender award and no challenge was taken to them. In addition, the supporting documents with respect to these claims were attached to the audit report, and their basis was sufficiently proved. I also note that there was an invoice of Kshs. 5,800,000/= by the accountants that was attached to the audit report to support this award. However, the invoice by the project architect of Kshs. 3,000,000/= which was also attached was not considered nor taken into account by the learned trial Judge.

65. There were also actual costs alleged to have been already incurred as at the date of breach, which were included in the particulars of the tender preparation costs, namely the local travel and accommodation costs of Kshs. 1,600,000/=, and photocopies, binding, communication and petties of Kshs. 185,638/=, and also alleged payments to various engineers contracted to perform the contract. These costs were not supported by any of the documents annexed to the audit report. In addition, no contractual basis was provided for the 10% interest rate charged on the loss of profits, tender preparation costs and alleged payments paid to the contract engineers. These heads of damages were therefore properly excluded by the learned trial Judge as they were not proved.

66. In the premises, I find that Micro-City was, based on the evidence on record, entitled to an award of loss of business and anticipated profits, in addition to the award for the various tender preparation costs and consultancy costs which were proved. I accordingly allow the appeal by Micro-City, set aside the award of special damages by the trial Court and substitute therefore an award of Kshs. 103,447,136/=, being loss of anticipated profits. I also award costs in respect of tender preparation and consultancies as follows- Kshs. 246,128/= in respect of the performance bond, Kshs. 10,250/= in respect of the tender security, Kshs, 3,000,000/= in respect of tender preparation (Architectural drawings), and Kshs. 5,800,000/= being the accountant's professional fees for the preparation of the audit report, aggregating to a sum of Kshs. 9,056,378/=. Accordingly, the total sum of special damages awarded to the Appellant is Kshs. 112, 503, 514/=, and it shall attract interest at court rates from the date of filing of the suit in the trial Court.

67. I also partially allow the NSSF's appeal as regards the award of general damages of Kshs. 10,000,000/= which I hereby set aside. In light of my findings, I will make no order as to the costs of the two appeals.

68. Those are my orders.

Dated and delivered at Mombasa this 12th day of April, 2024

Nyamweya

.....

Judge of Appeal

Concurring Judgment of Odunga, JA

1. I have had the benefit of reading, in draft, the judgment of Nyamweya, JA in which the learned Judge has comprehensively set out the background of the case and I concur with the conclusion arrived at by the learned Judge.

2. It was expressly agreed in the contract between Micro-City and NSSF provided, in respect of Breach and Termination, in Clause 6.2 as follows:

> "A breach shall occur where a party fails to fulfil any of the terms and obligations of this agreement and shall entitle the aggrieved party to any remedies available to it in law Provided any delay by any party to exercise the rights and remedies due to it under this agreement and/or the law applicable shall not be deemed and/or construed to be a waiver thereof and/or a limitation to any other rights which it may have in law arising out of a breach of the terms of this agreement and are additional to any other rights.
>
> The Employer shall have the right at any time and for any reason terminate the Contract in whole or in part by giving the Contractor a one (1) month written notice whereupon all the terms of the Contract shall be discontinued in which event the Employer's sole liability

shall be to pay the Contract the price for the Goods and Services already supplied as at the termination date but such payment shall not include loss of anticipated profits or any consequential loss."

3. It is clear that the parties contemplated that the respondent could terminate the contract by giving one month's notice. If that was done, then the appellant would only be entitled to the price of the goods and service already supplied as at the date of the contractual termination. In that event the appellant would not be entitled to loss of anticipated profits or any consequential loss. By expressly excluding the claim for loss of anticipated profits or consequential loss in the event of lawful termination, the parties clearly contemplated that in the event of unlawful termination, the appellant may well claim for loss of anticipated profits or consequential loss. That was what the appellant and the respondent arrived at presumably after negotiations. We are not at liberty to substitute the parties' agreement with our own.

4. In this case it is clear that the contract was not terminated in accordance with the terms of the contract. In that event the appellant was properly entitled to claim loss of anticipated profits and consequential loss. The said clause is in tandem with the opinion expressed in McGregor on Damages Nineteenth Edition at paragraph 4-002 where the learned authors state that:

> " Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the claimant is entitled to composition for the loss of his bargain. This is what may best be called the normal measure of damages in contract."

5. In determining such loss, the court ought to be guided by the position adopted by the Indian Supreme Court in MSK Projects India (JV) Limited vs State of Rajasthan & Another (2011) 10 SCC 573 in which it was held that:

> " 30. In M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat, AIR 1984 SC 1703, while interpreting the provisions of Section 73 of the Indian Contract Act, 1972, this Court held that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was further observed that what would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid."

6. Proof of claims for anticipated profits or consequential loss are by their nature hypothetical and their mode of proof are not to be treated on the same plane as claims for actual losses already incurred. As

was appreciated by Toulson, LJ in Parabola Investment Limited & Another v Browallia Cal Limited (2011) QB 477 at 486:

> " Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

7. In determining such a loss, the court must necessarily proceed on the basis of estimates and in so doing attempt to evaluate all the chances, great or small, taking into account all significant factors. I therefore agree with the opinion of Leggatt J in Yam Seng Pte Ltd vs International Trade Corp Ltd (2013) 1 Lloyd's Rep 526 [188] that:

> " The court is aided in this task by what may be called the principle of reasonable assumptions – namely, that it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties."

8. The danger of insisting on absolute certainty in such matter is pointed in McGregor on Damages (supra) at page 349 paragraph 10-002 and 10-006where it is stated that:

> " Indeed, if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss...Generally, therefore, although it remains true to say that 'difficulty of proof does not dispense with necessity of proof', the standard demanded can seldom be that of certainty. Even if it is said that that the damage must be proved with reasonable certainty, the word 'reasonable' is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating the amount...Further cases presenting this difficulty of showing the amount of profitable sales that would have been made by the claimant had there been no tort or breach of contract by the defendant have indicated that the claimant is assisted by the principle in the very old case of Armory v Dalamirie, which has today received a new lease of life, the principle being that the court is required to resolve uncertainties by making assumptions generous to the claimant where it is the defendant's wrongdoing which has created those uncertainties."

9. That the manner of proof depends on the circumstances of the case was appreciated by this Court in Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited [2004] 2 KLR 269, where it was held that:

> " the degree of certainty and particularity of proof required depends on the circumstances and the nature of acts complained of."

10. In this case, the only evidence available to the learned Judge in respect of the estimates was that of PW2, which was an expert opinion. I agree with the position in Juliet Karisa vs. Joseph Barawa & Another

Civil Appeal No. 108 of 1988 (UR) that such opinion is entitled to the highest possible regard and though not binding, must not be rejected except on firm grounds. As held in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139:

> "...such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

11. In this case the respondent had an opportunity of presenting contrary opinion but did not do so. The learned Judge therefore had no reason to reject the only and best evidence availed to him.

12. I accordingly agree with the conclusions arrived at by Nyamweya, JA and I would make the orders in the terms proposed by Nyamweya, JA.

Dated and delivered at Mombasa this 12th day of April, 2024

Dissenting Judgment of Gatembu, JA

1. In these consolidated appeals, the judgment of the High Court of Kenya at Mombasa (P. J. Otieno, J.) delivered on 30th April 2020 is challenged by Micro-City Computers limited (Micro-City) (the appellant in Civil Appeal No. 49 of 2020) on the main ground that the learned Judge wrongly rejected its claim for loss of profits. On the other hand, National Social Security Fund Board of Trustees (NSSF) (the appellant in Civil Appeal No. 59 of 2020) has challenged the judgment for awarding Micro-City general damages on a claim for breach of contract; awarding special damages without supporting evidence; and for failing to consider all material facts in reaching its decision.

2. The facts, in brief, are that following a bid, in a letter dated 2nd March 2011, NSSF awarded Micro-City a tender for the "design, installation and commissioning of an appropriate electronic surveillance and restricted access control system at Social Security House Complex-Nairobi" at the quoted tender sum of Kshs. 244,825,708.00 and an annual maintenance cost of Kshs. 15,000,000.00 after expiry of the warranty period. Micro-City was required to signify its acceptance of the tender within 14 days whereafter a contract would be entered into. Micro-City accepted the award by its letter dated 4th March 2011.

3. Thereafter contractual negotiations followed and on 23rd March 2011, it was minuted that payments for the contract price would be spread out as follows: 50% upon delivery of the equipment; 20% upon installation; 20% upon commissioning; and 10% at the expiry of the retention period of six months. The parties then entered into a Contract Agreement dated 8th April 2011 in which Micro-City undertook to execute and complete "The design, supply, installation and commissioning of appropriate electronic surveillance system – Closed Circuit Television, (CCTV)), and Restricted Access Control Systems (equipment) under Tender No. 04/2010-2011 located as Social Security House complex Nairobi." It was agreed that upon execution and completion of the works, Micro-City would cede and/or transfer the rights and interests in the equipment for the contract price of Kshs. 244,825,708.00 and an annual maintenance cost of Kshs. 15,000,000.00 applicable after expiry of the two (2) years warranty period all-inclusive of taxes.

4. Slightly over a month after entering the contract, and before Micro-City could take possession of the site, NSSF, without invoking provisions of the contract on termination, informed Micro-City by letter dated 21st May 2011 thus:

> " ...Further to our letter of award dated 2nd March 2011 in which you were awarded the above tender, we regret to inform you that the Fund is unable to proceed with the project due to budgetary constraints. Any inconvenience is highly regretted."

5. In that regard, he learned trial Judge held that:

> "Because the mandatory one month written notice of termination was never issued and served by [NSSF], I hold that the contract was never validly and lawfully terminated and that [NSSF] was in unlawfully terminating breached the terms of the subject contract. (sic)"

6. As regards the remedies, the judge held that Micro-City was "entitled to general damages for the loss suffered when the contract was breached" which, in the Judge's words "doing the best with the fact of the matter, including the value of the contract and thus the possible profits, I do assess the plaintiff to be entitled to damages in the sum of Kshs. 10,000,000.00. In that regard, I am fully in agreement with Nyamweya, JA that there was no basis for an award of general damages for breach of contract and that award must be aside. In that regard, in Postal Corporation of Kenya vs. Gerald Kamongo Njuki t/a Geka General Supplies [2021] eKLR, this Court expressed as follows:

> " (25) In Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR this Court had this to say regarding general damages for breach of contract:
>
> > "...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, and with good reason. In Dharamshi vs. Karsan [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication....
> >
> > The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic).
> >
> > What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove."

7. Regarding the claim for loss of profits, the Judge expressed that the specific claim of Kshs. 103,447,136.00 "called for specific proof...by way of some documents" and that the evidence for loss of profits resulting from the non- performance of the contract "remained largely speculative with credible probative value thus falling short of the plaintiff's onus of proof." The Judge found that

Micro-City had "not proved the claim for loss of anticipated profit." The Judge however awarded Micro-City an amount of Kshs. 6,056,378.00 comprised of performance bond of Kshs. 246,128.00; tender security of Kshs. 10,250.00; accountant's professional fees for preparation of the audit report of Kshs. 5,800,000.00.

8. As already stated, the main complaint by Micro-City is that the Judge wrongly rejected its claim for loss of profits. In its initial plaint dated 6th April 2017, Micro-City pleaded that because of the breach, it suffered "loss in its business at the rate of Kshs. 15,000,000.00 from the year 2013" and "loss of business profits and...costs in preparation for the performance of the said contract...all in the sum of Kshs. 214,544,220.00". However, judgment was sought for general and exemplary damages for breach of contract.

9. In his witness statement, the Managing Director of Micro-City stated that since signing of the contract, Micro-City engaged the officials of NSSF verbally and in writing "so that the said contract could commence and be completed" but that NSSF always came up with excuses thus forestalling the execution and that the claim by Micro City "is for general damages for breach of contract, exemplary damages and for Kshs. 214,544,220 being loss of business profits and costs incurred" by Micro-City in preparation for performance of the contract.

10. In its amended plaint dated 14th June 2017, Micro-City, in addition to the other reliefs sought judgment for the specific amount of "Kshs. 214,544,220 being loss of business and costs incurred." A Further Amended Plaint dated 30th November 2018, albeit amended after Micro-City had closed its case, itemized "particulars of loss of business profits and costs" as follows:

> Loss of profits resulting from non performance of the main contract and service contract Kshs.103,447,136.00
>
> Tender preparation costs and consultancies Kshs. 9,930,000.00
>
> Payment of engineers contracted for performance of the contract Kshs. 8,794,336.00
>
> Interest on loss of profits Kshs. 75,166,276.00
>
> Interest on direct tender preparation costs Kshs. 9,832,145.00
>
> Interest on contractual amounts paid to engineers contracted for the project Kshs. 7,374,326.00
>
> Total Kshs.214,544,220.00

11. Being claims for special damages, Micro-City had a duty to prove the same. As this Court stated in National Social Security Fund Board vs. Sifa International Limited [2016] eKLR:

> "It has been stated time without number that special damages must not only be pleaded, they must be specifically or strictly proved. This Court in the case of William Kiplangat Maritim & Another v Benson Omwenga, Civil Appeal No. 180 of 1993 (Nairobi) cited with approval its decision in Coast Bus Service Ltd v Murunga Danyi & 2 Others, Civil Appeal No. 192 of 1992 (UR) and stated as follows:-
>
> > "We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only

be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars..."

And later in the same judgment:

"Special damages, we repeat can only be awarded when they have been properly pleaded and strictly proved. There is no middle ground. It is either they are strictly proved or not. In this case, there was no such proof and therefore the Judge erred in granting them. That award therefore had no legal basis and must be rejected."

12. In the same vein, in the case of Bangue Indosuez vs. DJ Lowe and company Ltd [2006] 2KLR 208 cited with approval in Satwant Singh Danjal & 2 others t/a Paramount Hauliers vs. Kenya Revenue Authority [2017] eKLR, the Court expressed that:

"Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by Bowen LJ in Ratcliffee V. Evans (1892), 2 QB 524, 532, 533, Lord Macnaghten in Storms Bruks Aktic Bolag v. John & Peter Hutchinson, [1905] AC 515, 525, 526 Lutta JA in Kampala City Council V. Nakaye, [1972] EA 446, 447 and Chesoni, J in Ouma V. Nairobi City Council [1976] KLR 294, 304 and in Sande Charles C. V. Kenya Co- Operative Creameries LTD. Civil Appeal No. 125 of 1996 (unreported). "

See also Finmax Community Based Group & 3 Others vs. Kericho Technical Institute [2021] eKLR.

13. With those principles in mind, I observe, that the claim for Kshs. 214,544,220 was pleaded from the very onset in paragraph 11 and 12 of Micro-City's plaint dated 6th April 2017. The breakdown of that figure was then provided in the Further Amended Plaint filed in September 2018 pursuant to leave granted by the Court. Apart from the fact that NSSF did not challenge the ruling of the trial court allowing the amendment, NSSF had prior knowledge of the breakdown having already been in receipt of Micro-City's supplementary list of documents dated 14th June 2017 which contained the Statement of Financial Claim by Mokua Onwonga & Co. Certified Public Accountants from which the breakdown was evidently extracted.

14. By the time the trial started on 22nd February 2018, NSSF was already in possession of the report containing that breakdown, and it cannot therefore complain that it was deprived an opportunity to interrogate Micro-City's witnesses on those figures. The complaint by NSSF regarding the Further Amended Plaint is therefore not well founded.

15. That said, did Micro-City discharge its burden of proof? In that regard, Micro-City's main grievance is that the trial court erred in failing to uphold its claim for loss of profits. NSSF on the other hand complains that the award of Kshs. 6,056,378.00 is not supported. I will address the issue of loss of profits first.

16. The principle in Hadley vs. Baxendale (1854) 9. Exch 214 has it that in cases of breach of contract such as this, the innocent or aggrieved party should be able recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. And what was at the time reasonably foreseeable depends on the knowledge then possessed by the parties. Anderson P stated in that case that:

> " Where two parties have made a contract which one of them has broken, the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally. i.e. according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it."

17. In Delilah Kerubo Otiso vs. Ramesh Chandra Ndingra [2018] eKLR, this Court stated:

> "In Hadley v Baxendale (1854) 9. Exch. 341, the measure of damages is such as may be fairly and reasonably 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 also Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB - Civil Appeal No. 37 of 2003 (2004) eKLR). As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the plaintiff is to be put as far as possible in the same position he would have been if the breach complained of had not occurred."

See also Total Kenya Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR; and Johnson Mugwe Wangang vs. Joseph Nganga Karingi [2014] eKLR.

18. Githinji, JA in Standard Chartered Bank Kenya Ltd vs. Intercom Services Ltd & 4 others [2004] eKLR, expressed as follows:

> " The appellant Bank could not be liable for any conceivable financial loss precipitated by the alleged breach of contract. Any financial loss would be considered too remote and therefore irrecoverable unless it actually resulted from the breach and which, in addition, was in contemplation of the parties or put in another way, was reasonably foreseen by the parties at the time of the contract as likely to result from the breach of the contract. Thus the general rule in Hadley v Baxendale [1854] 9 Ex 341 applies in this case. Moreover, a breach of contract would sound in damages only if it were the dominant or effective cause of the plaintiffs losses and not if it had merely given opportunity for the loss to be sustained Galoo Ltd v Bright Grahame Murray [1994] 1 WLR 1360."

19. A claim for loss of profits poses particular challenges of proof. Bowen, L.J of the English Court of Appeal confronted it in the context of a defamation action in the case of Ratcliffe vs. Evans [1891-4] All E. R 699 at page 704 where it was claimed that publication of untrue statements had resulted in loss of business. He stated:

> " In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the act themselves, which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity, with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to 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."

20. Bowen, L.J went on to state that in the circumstances of that case, the nature and circumstances of the publication of the falsehood may accordingly require admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to be produced; and that to refuse to admit the general evidence presented in that case "would be to misunderstand and warp the meaning of old expressions; to depart from and not to follow old rules; and in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed."

21. Mativo, J. (as he then was) grappled with a claim for lost profits in the case of Hydro Water Well (K) Limited vs. Sechere & 2 others (sued in their representative capacity as officers of Chae Kenya Society, Civil Suit E212 of 2019 [2021] KEHC 22(KLR) where a contract for drilling, equipping of boreholes and construction of tanks was entered into and, like in the present case, terminated before the work could begin.

22. In rejecting the claim for loss of profits on the basis that the plaintiff in that case did not adduce evidence that laid a basis for the award, the learned Judge held that the most important consideration in any lost profits case was how much, and which type of evidence are apparently needed to prove their alleged loss profits. The learned Judge? stated that it was incumbent upon the plaintiff to show proximate cause, namely, that the conduct upon which the claim was based caused the lost profit damage; secondly, foreseability, namely, that the parties contemplated the possibility of lost profit damage, or that the lost profit damages were a foreseeable consequence of the conduct; and thirdly, reasonable certainty, namely that the profits were capable of proof with a reasonable degree of certainty. At paragraphs 25 and 26 of the judgment, the Mativo, J stated:

> " The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd) ([2010] EWCA Civ 486; [2011] QB 477, para 22
>
> > "Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."
>
> An example relevant to the present case is the situation where a breach of contract affects the operation of a business. The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained. It may, for example, estimate the effect of the breach on the value of the business, or the effect on its profits, or the resultant management costs, or the loss of goodwill. The assessment of damages in such circumstances often involves what Lord Shaw described in Watson, Laidlaw at pp 29-30 as "the exercise of a sound imagination and the practice of the broad axe."

23. The Judge went on to state that in the determination whether contracting parties contemplated lost-profits damage the provisions of the contract itself are a material consideration.

24. What then are the circumstances in this case? For a start, the Contract had provision for termination under Clause 6 which dealt with breach and termination, and which, as already noted, was not invoked. However, under 6.2 of the Contract, it was clearly within the contemplation of the parties that the contract would be terminable by NSSF giving Micro-City one month written notice whereupon all work on the contract would be discontinued in which event NSSF would be liable to pay for the goods or services already supplied as at the date of termination excluding "loss of anticipated profits or any consequential loss."

25. Clause 6 in its entirety provided:

> " 6.
>
> 1. A breach shall occur where a party fails to fulfill any of the terms and obligations of this agreement and shall entitle the aggrieved party to any remedies available to it in law.
>
> PROVIDED any delay by any party to exercise the rights and remedies due to it under this Agreement and/or the law applicable shall not be deemed and/or construed to be a waiver thereof and/or a limitation to any other rights which it may have in law arising out of a breach of the terms of this Agreement and are additional to any other rights.
>
> 6.
>
> 2. The Employer shall have the right at any time and for any reason to terminate the Contract in whole or in part by giving the Contractor a one (1) month written notice whereupon all work on the Contract shall be discontinued in which event the employers sole liability shall be to pay the contractor the price for the goods or services already supplied as at the termination date, but such payment shall not include a loss of anticipated profits, or any consequential loss."

26. Whereas NSSF did not invoke clause 6.2 in terminating, that clause, in my view, demonstrates that loss of anticipated profits, were not at all contemplated and that compensation would be on basis of quantum meruit. Moreover, even if Micro-City was to be given the benefit of doubt, the evidence it presented in support of its claim for loss of profits in my view fell far short of establishing the claim with any reasonable degree of certainty.

27. The evidence presented by Micro-City in that regard comprised of the report by Mokua Onwonga & Co Certified Public Accountants titled "Statement of Financial Claim" dated 14th March 2017 produced through the appellant's supplementary list of documents dated 14th June 2017 in which projected "loss of profits resulting from non-performance of the main contract and maintenance contract" was quantified at Kshs. 103,447,136.00. The accompanying schedule spanning the period 2011 to 2018 projects the contract income of Kshs. 211,056,645.00 over the period of those years, and maintenance contract income of Kshs. 8,620,690 for the year 2013 which grows year on to the figure of Kshs. 12, 931, 034.00 for the year 2018 resulting in a total maintenance contract income of Kshs. 73,275,862.00 over those years. That figure is then added up to the figure Kshs. 211,056,645.00 to yield the figure of Kshs. 284,332,507 taken as the total income over those years. Figures for total cost of sales spanning over the period 2011 to 2018, with separate figures for each year, is aggregated to a total

of Kshs. 141,299,241.00 which is then deducted from the total income to yield a gross profit of Kshs. 141,299,241.00 from which operating costs spread over the years 2011 to 2018, with separate items for each year, amounting to Kshs.39,586,130.00 are deducted to yield the amount of Kshs. 103,447,136.00 claimed as loss of net profit. That schedule, by itself, has in my view little probative value. Whereas the claim for loss of profits appears to be based on 'profits' accruing from the Contract itself, it seems that the operating expenses relate to the operation of Micro- City as a whole entity. Without demonstration of income, if any, from the Micro-City's other business over the period, the picture is distorted.

28. Secondly, one would expect that at the very least, the figures relating to costs of sales and the operating expenses for the year, 2011, would be actual, and for which supporting evidence would have been readily available and would have been produced. It is little wonder that the report is preceded by a caveat that "all observations and recommendations made in this report are based on the assumption that the information provided to us is correct and accurate" and that Mokua Onwonga & Co. Certified Public Accountants "were not in a position to test" or verify the information provided.

29. Furthermore, unless the record of the transcript of proceedings before the trial court is inaccurate, Paul Okolo Ananga, PW1, the Managing Director of Micro-City when recalled for further cross examination on 22nd February 2018 stated about the contract sum, that, "I was to use about 150,000.000 for the equipment to be installed. I projected labour costs to be 26,000,000.00. The V.A.T was about Kshs. 40,000.000. The total expenses was therefore Kshs. 214,000,000.00 or about therefore the projected profits would be about Kshs. 26,000,000.00"

30. Based on the foregoing, I am fully in agreement with the trial Judge when he stated that Micro-City "has not proved the claim for loss of anticipated profit" and that the figures given were speculative."

31. I would also disallow the amounts claimed in respect of Engineers and Architects fees. As an illustration, the claim for Kshs. 3,305,528.00 for Engineer Murithi Gitonga is only supported by an 'Agreement with Engineer' dated 1st April 2011 under which Micro-City agreed to pay that amount payable over the contract period of 16 months starting 1st April 2011. No evidence of payment was tendered. Same goes for Engineer Kennedy Gichuhi Mwai who was to earn a total contract sum of Kshs. 3,171,632.00 payable at the rate of Kshs. 198,227 per month over the period of 16 months starting 1st April 2011 till 31st July 2012. In as far the architect's fees are concern, beyond a "statement" for Kshs. 3,000,000.00 dated 11th February 2011, there is no evidence that it was incurred, invoiced, or paid.

32. Considering also that the scope of work under the contract involved "Design, supply, installation", there should have been, at the very least, evidence of the design work done by the Engineers and Architect to justify the charges. Considering that Micro-City had not even been granted possession of the site to commence work, the circumstances in this case are reminiscent of sentiments express by the Court in Hudani vs Mukunya & 5 Others (Civil Appeal 353 of 2018) [2022] KECA 93 (KLR) (4 February 2022) (Judgment) Neutral citation: [2022] KECA 93 (KLR) where the Court stated that:

> "Looking at the pleadings as drafted, it is our considered view that the claims for special damages were speculative as they were hinged on events that were yet to happen and it was not certain for a fact that indeed they would happen. How could the appellant for example claim inter alia special damages for loss of profits on planned scheme development and costs of additional civil works required for adjoining plot necessitated by non-completion of purchase of the suit property when he had not legally acquired it."

33. In the end, beyond an award for nominal damages for breach of contract, which I would peg at Kshs. 1,000,000.00 and an award for the performance bond of Kshs. 246,128.00 and the tender security of Kshs. 10,250.00 I would disallow the other claims all together.

34. I would consider the accountants professional fees for the preparation of the audit report and testimony before the trial court to be part of the costs of the suit, subject to taxation by the Deputy Registrar who would then consider the reasonableness or otherwise of the fee charged by the witness.

35. As the majority of the Court are of a contrary opinion, the final orders in these consolidated appeal will be as proposed by Nyamweya, JA.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR