



**Spacebuster Limited v Kisumu City Board & another (Civil Case E006 of 2022) [2025] KEHC 2281 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2281 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE E006 OF 2022  
MS SHARIFF, J  
FEBRUARY 27, 2025**

**BETWEEN**

**SPACEBUSTER LIMITED ..... PLAINTIFF**

**AND**

**KISUMU CITY BOARD ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KISUMU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated 22/4/2022 the plaintiff herein filed this suit against the defendants and craved for the following orders:
  - a. A declaration that the defendants acted maliciously, irregularly and unlawfully frustrating the contract with the Plaintiff herein executed on 2/12/2020 and are in breach by violating its express terms and conditions and are therefore liable in law to compensate the plaintiff for the direct expenses and costs incurred and suffered by the plaintiff.
  - b. That the defendants compensate the plaintiff to the extent of Kenya Shillings 363,330,000, being the total sum incurred and suffered by the plaintiff in executing its obligations under the agreement as detailed in paragraph 16(a) to (j) hereinabove.
  - c. That the defendants to compensate the plaintiff to the extent of Kenya Shillings 6,840,000,000, being the aggregate income that the plaintiff would have realized from the project for the entire term of the contract of ten years as agreed.
  - d. General damages for breach of contract
  - e. Any other relief that this Honourable Court may deem just and expedient to grant.
  - f. Costs and interests.



2. The Plaintiff pleaded that it was a limited liability company duly registered in Kenya pursuant to the provisions of the Companies Act Number 17 of 2015 and that it carried out its business throughout the Republic of Kenya.
3. The 1<sup>st</sup> defendant was described as a body corporate established pursuant to the provisions of Section 12 (1) (a) of the Urban Areas and Cities Act Number 13 of 2011, for purposes of governance and management of the City of Kisumu, whose mandate was as provided for under Section 20 of the said Act.
4. The 2<sup>nd</sup> defendant was said to be a County Government established Pursuant to Chapter 11 of the Constitution of Kenya 2010, as a Devolved Government whose mandate was to manage the affairs of Kisumu County, as per the provisions of the County Governments Act NO. 17 of 2012 and is thus in charge of Governance and Administration of the City of Kisumu.
5. Whereas the defendants entered appearance they failed to file a defence within the requisite time frame wherefore the plaintiff filed a request for judgment dated 3.6.2022. On 13.6.2022 the said request for judgment was acceded to by the Deputy Registrar Hon W.K Onkunya and interlocutory judgment was thus entered against the defendants.
6. Subsequently the defendants herein moved the court vide a notice of motion dated 27.6.2022 for leave to file a defence and counter-claim out of time. The application was settled by consent of the parties and a consent order was recorded on 18.10.2022. Surprisingly no reference was made to the interlocutory judgment that was in force.
7. The defendants eventually filed a defence and a counter claim dated 18<sup>th</sup> February 2023 and they pleaded as against the plaintiff for the following orders :-
  - a. Specific damages for breach of Contract for Ksh360,000,000
  - b. Compensation for loss of Ksh10 billion for loss of business
  - c. General damages for breach of contract
  - d. Costs of the counter-claim; and
  - e. Such other relief as this Honourable court may deem fit to grant.
8. On 27<sup>th</sup> February 2023 a reply to the defence and a defence to the counter-claim was filed by the plaintiff.
9. All parties duly complied with the provisions of order 11 of the Civil Procedure Rules and after a ruling was delivered on the defendants' preliminary objection dated 27.6.2022, this case was set for hearing in the presence of parties advocates. On the date of the hearing of the plaintiff's case, the defendants sought unsuccessfully, for an adjournment on grounds that their witness, one Abala Wanga was outside the jurisdiction of the court. Subsequent to that denial of an adjournment the defendants sought for the recusal of the trial judge without success. They then opted not to participate in these proceedings.

#### **Plaintiff's Case:**

10. The plaintiff called one witness; one Babior Newton Ong'ende (PW1), the managing director of the plaintiff who adopted his statement filed on 5<sup>th</sup> December 2022 as his evidence in chief and produced the plaintiff's documents as per the list of documents; bundles No. 1, 2 and 3 also filed on 5.12.2022 as Plaintiff's exhibits NO. 1 - 62.



11. The Plaintiff pleaded and its witness testified that it had successfully placed a bid for the defendants' tender NO. CGK/COK/REP/2020 and that on 2.12.2020 a contract was entered between itself and the 1<sup>st</sup> defendant.
12. That the plaintiff was to design, install and manage Tuck shops for rental purposes alongside designated streets within the Central Business District and elsewhere in Kisumu County for a period of 10 years. During the contract period the plaintiff was expected to install at least 6000 tuck shop each attracting a rent of Kshs 10,000 per month and the plaintiff was to remit Kshs 500 per tuck shop per month to the 1<sup>st</sup> defendant.
13. It is the plaintiff's evidence that vide a gazette notice N0 4945 dated 9.6.2020, the defendants had designated some of the market kiosks/souks sites in the following areas:
  - a. Omino Crescent Road.
  - b. Maendeleo Market
  - c. Uhuru Business Park
  - d. Ojino Okew Street lower
  - e. Nyamasaria Bus Park.
14. The PW1 testified that in part performance of the contract, the plaintiff engaged services of an expert who developed suitable designs and plans for each site, which designs were duly approved by the defendants. That subsequent to the said approval the plaintiff purchased 465 containers from Mombasa at a sum of Kshs 520,000 per container, had them transported to Kisumu where they were, at the defendant's instance stored at defendant's Kisumu Works yard where fabrication was done.
15. Mr. Ong'ende testified that when the plaintiff started installing the tuck shops at the designated areas, its work was frustrated by the defendants who became uncooperative by denying the plaintiff access to the designated areas, failing to provide security, acted with 3<sup>rd</sup> parties to disrupt peace and to damage and vandalize the plaintiff's containers that were then stored at the defendant's yard within Kisumu City and frustrate peaceable enjoyment of tenancy in areas where the plaintiff had already given vacant possession to up-takers.
16. PW1 testified that the defendants started imposing extraneous and strange levies and demand upon the plaintiff, beyond the contract terms. Further that the defendants were openly hostile.
17. The plaintiff's witness testified that when the plaintiff commenced the project, it did an exhibition show at the gazetted area and the same received overwhelming response by off-takers. However, when the plaintiff wrote to the defendants seeking approval to install the Tuck Shops in all the gazette areas, the witness received a call from one Elijah Adul, the chairperson of the 1<sup>st</sup> defendant who told him that he (PW1) should go and meet Mr. Abala Wanga, the acting City Manager and hear him and comply with his demands before approvals could be granted.
18. This witness said that he duly went to see Mr. Abala Wanga who demanded for a bribe of Kshs 10,000,000 (ten million) up front as a precondition before he could allow the plaintiff install the tuck shops in designate areas; that the bribe of Ksh 10 million was not a one off payment but rather it was to be paid to the City Manager Abala Wanga whenever the plaintiff sought for an approval for installation of the tuck shops in a designated site. Appalled by this turn of events, the plaintiff wrote to the Governor of Kisumu Professor Anyang Nyongo and to the 1<sup>st</sup> defendant to no avail.



19. Further that Mr Abala Wanga wrote to the plaintiff demanding for meetings to discuss on the rent payable by off-takers and the amount payable to the 1<sup>st</sup> defendant yet the same was expressly provided for in the contract vide clause 8.1.1; the revenue sharing clause. This witness testified that Mr Abala Wanga generally started making unilateral amendments to the contract without reference to the plaintiff and when the plaintiff declined to pay the bribe Abala Wanga, the acting City Manager wrote a letter to Lugano & Lugano Advocates on 30.3.2021, suspending the installation of the tuck shops along Ojino Okew street and the implementation of the entire contract NO. CGK/COK/REP/2020. Further that on 31.3.2021 Mr Abala Wanga called for a press conference whereat he read out a written statement that was libelous of the plaintiff and also supervised the destruction and vandalism of the plaintiff's tuck shops along Back street yet he had on 3.2.2021 written to the plaintiff requesting a placement at Back street. That the traders who had already taken possession also suffered destruction of their wares and losses.
20. PW1 stated that several meetings were held to in an attempt to resolve the impasse without success and eventually the matter was escalated to the County Assembly. That a dispute resolution committee was established in the month of May 2021 but on 3.11.2021 the chairman of the first defendant sent an email to law firm of S.B. Otieno & Company Advocates who were representing the plaintiff and intimated that the defendants did not wish to share the report of the resolution committee with the plaintiff nor did they wish to implement the resolutions contained therein. This witness stated that a demand letter sent to the 1<sup>st</sup> defendant by S.B Otieno & Company Advocates on 15.11.2021 demanding for compensation elicited no response from the defendants thus necessitating the filing of this suit.
21. The plaintiff's witness stated that the defendants constructively terminated the contract by the acts aforesaid and that it acted in breach by letting out the designated sites to 3<sup>rd</sup> parties.
22. PW1 stated that the contract agreement made provision for payment of loss by a party who breaches the contract.
23. PW1 maintained that the Counter-claim was baseless given that the plaintiff was to pay Kshs 500 per stall per month and not otherwise.

#### **Defendant's Case:**

24. The defendant's advocate Mr. Mongeri opted not to cross-examine the Plaintiff's witness nor call any evidence on grounds that it intended to have the trial court recuse itself. The defendants thus filed a notice of motion dated 17.7.2024 craving for inter alia recusal of the trial Judge Mwanaisa S. Shariff. This application was determined on 24.12.2024 by a dismissal of the same.

#### **Analysis and determination:**

25. I have considered the evidence of the plaintiff and the its submissions. The case herein is one of contract and the duty of this court is to enforce the rights of the parties as spelt out in the contract. Given that interlocutory judgment was already entered for the plaintiff against the defendants on 13.6.2022, what is required of the plaintiff is to formally prove its case.
26. The plaintiff has through the testimony of its witness Babior Newton Ong'ende proved on a preponderance of evidence that the plaintiff made a successful bid to the defendants' tender No. CGK/COK/RFP/2020/001 where after a contract was signed on 2.12.2020 between the plaintiff and the 1<sup>st</sup> defendant.



27. Subsequent thereto the Plaintiff duly part performed its part of the contract by purchasing 465 containers at Kshs 520,000 each. It also incurred storage charges of Kshs 41,830,000, transport charges of Kshs 7,840,000, fabrication costs of Kshs 32,640,000, site planning and designing costs of Kshs 700,000, ground clearance costs of Kshs 1,500,000, Cabro costs of Kshs 5,000,000, loss of Kshs 27,000,000 due to vandalism and destruction of plaintiff containers at Kisumu Works yard, travel expenses of its directors of Kshs 5,350,000, logistic costs for 30 containers from the yard to the site at ksh 15000 per container translating to Kshs 450,000, lost income of Kshs 9500 for 6000 tuck shops per month for 10 years totaling to Ksh 6,840,000,000.
28. I find that the defendants deliberately frustrated the implementation of the contract between the parties and the same was eventually suspended by the acting City manager Abala Wanga on 30.3.2021 vide a letter addressed to the Plaintiff's then advocates Lugano & Lugano Advocates after the plaintiff declined to pay him a bribe of Ksh 10 million per every installation of tuck shops in a designated area. It is unfortunate that Mr Abala Wanga who was the signatory to the contract between the parties and who was thus alive to the financial implications of a material breach by the Contracting Authority willfully, and callously exposed the defendants to liability and by extension the tax payers due to his own personal interest. A county's development project was thus sacrificed at the altar of selfish aggrandizement and corruption by the defendants.
29. Clause 11.2 of the contract made express provision for compensation by a defaulting party thus;
- “Subject to the provisions of this agreement, in the event of the Contracting authority being in material default of breach of this Agreement at any time after the appointed Date, the Contracting Authority shall pay to the Service provider by way of compensation, all direct costs suffered or incurred by the service Provider as a consequence of such material default or material breach to place the service Provider (without double counting) in no better no worse position provided that no such compensation shall be payable for material breach or material default in respect of which Damages or costs have been expressly specified in this agreement. Where the Contracting Authority by any act or omission precipitates the termination of this agreement, it shall be liable to pay the Service Provider the rent, fees or otherwise (as is quantified) that the Service Provider would have earned for the remainder of the term of this agreement were it not for the act or omission of the Contracting Authority precipitating the termination of this agreement.”
30. Clause 14 of the agreement prescribed for resolution of disputes among the parties through conciliation, failing which parties were at liberty to refer the dispute to a panel arbitration panel and eventually if that fails to a court of law. The plaintiff has tendered evidence that shows that conciliation was attempted but the defendants declined to release the report of the dispute resolution committee and further refused to implement the resolutions of that committee.
31. The defendants have raised the issue of jurisdiction in their defence on grounds that the plaintiff ought to have referred the dispute to arbitration prior to coming to court. A reading of clause 14 of the agreement provides thus:
- 14.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of this Agreement (including its interpretation) between the parties, and so notified in writing by either party to the other party (the Dispute) may, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedures set forth in Clause 14.2.



## 14.2 Conciliation

In the event of any Dispute between the parties, either party may call upon, in the case of a dispute, the conciliator to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the conciliator, either party may require such dispute to be referred to an arbitration panel agreed upon by the parties as per the Arbitration Act 1995 for amicable settlement and upon such reference, the said persons shall endeavor to meet not later than 7(seven) from the date of reference to discuss and attempt to amicably resolve the Dispute. If such a meeting does not take place within the 7(seven) days period or the Dispute is not resolved amicably within 15(fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30(thirty) days of notice in writing referred to in clause 14.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the dispute to a court of law.

32. It is evident that conciliation did not work and thereafter neither party referred the matter to arbitration. It is instructive to note that the word used in the Clause 14 is “may” wherefore parties were at liberty to either refer their dispute to an arbitration panel or to go to court. In any event the defendants herein filed a defence and a counter-claim wherefore they submitted to the jurisdiction of this court and thus waived their option of a reference to arbitration.
33. The plaintiff’s evidence was not subjected to any cross examination for reasons that I have already given hereinabove and no evidence rebuttal evidence was tendered by the defendants. The contract made express provisions for compensation of the Service Provider by the Contacting Authority in the event of a breach of material terms.
34. As regards the defendants’ counter-claim, no evidence was adduced in support of thereof wherefore it remains just a pleading and no more. See John Didi Omulo Vs Small Enterprises Finance C Ltd & Another (2005) eKLR.
35. On the balance I enter judgment for the plaintiff against the defendants jointly and severally and I make the following orders:
  - a. A declaration is hereby made that the defendants acted maliciously, irregularly and unlawfully frustrated the implementation of the contract with the plaintiff and were in breach of material terms thereof.
  - b. The defendants are liable to pay the plaintiff a sum of Kshs 363,330,000 as compensation for expenses incurred and suffered by the plaintiff in part performance of the contract.
  - c. The defendants are liable to pay the plaintiff a sum of Kshs 6,840,000,000 being the aggregate projected lost income that the plaintiff would have realized from the contract but for the breach by the defendants.
  - d. The prayer for general damages is disallowed.
  - e. The above sums in (b) and (c) above shall attract interests at court rates from the date of filing of this suit until payment in full.
  - f. The plaintiff is awarded costs of this suit.

**DELIVERED, SIGNED, AND DATED AT KISUMU THIS 27TH DAY OF FEBRUARY 2025.**

**MWANAISHA S. SHARIFF**

**JUDGE.**

