Kenya Medical Research Institute v Superrclean Shine Limited & another (Civil Appeal 287 of 2019) [2025] KEHC 9516 (KLR) (Civ) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9516 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 287 OF 2019

JN NJAGI, J

JUNE 26, 2025

BETWEEN

KENYA MEDICAL RESEARCH INSTITUTE ..... APPELLANT

AND

SUPERRCLEAN SHINE LIMITED ..... 1ST RESPONDENT

CLEAN DEGREE LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon.G.MMASI, SPM, in Nairobi CM`s Court Milimani Commercial Courts Civil Case No. 7887 of 2015 delivered on 29/4/2019)

JUDGMENT

1. The Appellant herein contracted the 1st Respondent vide a written contract to offer cleaning and gardening services for a period of one year running form 1st August 2014 and ending on 31st July 2015. The contract provided for a renewal subject to satisfactory performance.

2. It was the contention of the appellant that at the expiry of the contract period, they extended the contract up to the 31st December 2015 pending the finalization of the tendering process for a fresh contract. When the appellant advertised and invited tenders for the provision of services, the 1st respondent sued the appellant purporting that there already existed a subsisting oral contract between the parties. The 1st respondent sought for a permanent injunction to stop the appellant from terminating the contract. They also sought for damages for breach of contract.

3. The appellant denied the claim in toto. They denied that there was any oral agreement to extend the contract. They denied that they were in breach of contract as the same had expired.

4. After a full hearing, the trial magistrate found that there was a subsisting contract between the parties and that the appellant was in breach of contract. The court awarded the 1st respondent Ksh,2,000,000/ = in general damages for breach of contract. The appellant was aggrieved by the judgment and lodged the instant appeal.

5. The grounds of appeal are that:

    1. The learned magistrate erred in law and facts by holding that the Appellant is liable to pay to the Respondent a sum of Kshs. 2,168,040/- which was not pleaded, or prayed for and which was not supported by evidence.

    2. The learned magistrate erred in law and facts in assessing damages by way of computation of the judgement sum.

    3. The learned magistrate erred in law and facts by rewriting the contract between the parties.

    4. The learned magistrate erred in law and facts by taking into consideration on irrelevant facts, and failing to take into account relevant facts.

6. The appeal was canvasses by way of written submissions of counsels appearing for the parties.

Appellant`s submissions

7. The appellant submitted that the award of Ksh.2,000,000/= in damages for breach of contract was not tenable in law as damages are not awardable in cases of breach of contract. Reliance on that legal position was placed in the cases of Kenya Tourist Development Corporation v Sundowner Lodge Limited (2008) KLR and Kenya Breweries Limited v Kiambu General Transport Agency Limited Civil Appeal No.9 of 2000 (2000) 2EA 398.

8. It was submitted that incases of breach of contract there does not exist the discretion to award any liquidated amount as damages. That where there is damage the claimant is required to plead in specific terms the loss and sufficiently prove the same, which the respondent failed to do in this case. There could therefore be no award of damages without such proof.

9. It was submitted that the 1st respondent merely pleaded that the appellant was in breach without it specifically quantifying the loss and proving it. More so that the respondent did not provide any form of evidence showing that the contract was extended for a period of one year. That the trial court in fact never made a finding that the appellant was in breach. That in the absence of a formal contract at the time of filing suit, there could be no breach. Therefore, that the award of damages was erroneous.

10. It was submitted that the assertion by the respondent that there was an oral extension of the contract for one year is untenable as the appellant is a public body whose award of contract is governed by the *Public Procurement and Asset Disposal Act* No.3 of 2005 which mandatorily provides that a contract under the Act must be in writing and as such a contract said to be entered into orally flouts the Act and is consequently null and void.

11. It was submitted that if there was any such oral contract between the parties, then the same was an illegality as it was contrary to the law. It was submitted that the court cannot sanction an illegality. The appellant in that respect relied on the case of Holman v Johnson (1775) 1 cowp.341, 343 as cited with

approval in the case of D. Njogu & Co. Advocates V National Bank of Kenya Limited (2009) eKLR where it was held that:

> " No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff..."

12. It was submitted that a statutory contract cannot be extended orally or for indefinite period as alleged by the respondent.

13. It was further submitted that the trial court took into account non-credible and inadmissible evidence in arriving at its judgment. The appellant urged the court to allow the appeal with costs.

1st Respondent`s submissions

14. The 1st respondent submitted that the contract was extended in a meeting where parties agreed to renew the contract for another one year where the 1st respondent were to continue offering services as per the terms in the earlier contract. That the claim that the extension was for a period of 3 months in a unilateral board meeting of the appellant was untrue and untenable in law as a party cannot unilaterally vary or extend a contract. Reliance was placed in the case of Housing Finance Company of Kenya Limited v Gilbert Kibe Njuguna, HCCC No.1601 of 1999 where it was held that:

> " Courts are not fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with a meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."
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> See also Gimau Estates Limited & 4 others v International Finance Corporation & another (2006) eKLR.

15. It was submitted that the purported unilateral extension of the contract for 3 months by the appellant was of no consequence and was null and void.

16. It was submitted that the appellant was in breach of contract as the 1st respondent was denied access to the premises in total breach of the contract terms.

17. The 1st respondent submitted that in view of the fact that the appellant had breached the contract, the award of damages was proper and warranted. The 1st respondent relied on the case of Hydro Water Well (K) Limited v Sechere & 2 others (sued in their representative capacity as the ....(2021) KEHC 22 (KLR) where Mativo J. held that:

> Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The

court's function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

18. The 1st respondent urged the court to dismiss the appeal.

Analysis and determination

19. This being a first appeal, I am mindful that it is my duty to re-evaluate the evidence adduced before the lower court and, on the basis thereof, come to my own conclusion, bearing in mind however, that I did not have the advantage of seeing or hearing the witnesses. In Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

20. I have considered the grounds of appeal, the record of the trial court and the submissions tendered by the respective counsels for the parties. The issues for determination are:

    (1) Whether there was extension of contract

    (2) Whether there was breach of contract

    (3) Whether statutory contract could be extended orally

    (4) Whether general damages were available to the 1st respondent

21. The 1st respondent called two witness in the case, Anne Murugi Njoroge, PW1 who was a director of the 1st respondent and Charles Kiarie, PW2 who was the operations manager of the 1st respondent.

22. It was the evidence of PW1 that the contract commenced on 1st August 2014 and ended on 31st July 2015. That the same was renewable upon satisfactory performance. That before the contract ended she was called for a meeting in June 2015 by the management of the appellant. She went with one person from her company. They were told that the management of the appellant was satisfied with their work. She took it that the appellant was to renew the contract. They were not given a copy of the minutes of the meeting. That at the end of July 2015, the appellant evaluated their services and gave them a performance certificate and rated their work at 94.5%. At the expiry of the contract they were told to continue working. They worked in the months of August, September, October and November in the believe that the contract had been reviewed. They were being paid. However, in November 2015, the appellant put out a tender advertising for cleaning services. They moved to court and obtained injunctive orders against the appellant. They continued working. She said that their company was being paid Ksh.1,311,562/= per month.

23. It was the evidence of PW1 that for the purposes of performing the renewed contract, they had heavily invested in the contract and bought equipment, materials and other supplies for the work, hired and trained workers and staff and established storage space among other facilities. It was her evidence that their contract had been renewed and that the action of the appellant in attempting to give the work to someone else was illegal, and a breach of the contract.

24. PW2 on his part said that after the appellant advertised the tender he was informed by the management of his company that the appellant refused to pay them. That this caused delay in paying the workers and other difficulties. That the appellant disrupted their work on many occasions and caused a lot of hardship to the company and the workers.

25. The appellant called one witness in the case, Margaret Rigoro, DW1, who was the appellant`s legal counsel. It was her evidence that the contract was valid for one year with effect from 1/8/2014 to 31/7/2015. That there was an extension of the contract by the appellants procurement committee on 29/10/2015 to cover the period 1/8/2015 to 31/12/2015. It was observed in the minutes that the performance of the respondent was satisfactory. She produced the minutes of the committee for extension as exhibit, DExh1.

26. DW1 stated in cross-examination that there was no letter written to the respondent at the end of the contract telling them to stop working. She said that the contract stated that if the respondent`s performance was satisfactory; the contract would be renewed. She stated that the minutes of the meeting held between the appellant and the 1st respondent confirmed that the 1st respondent had provided satisfactory performance. That there was no provision in the contract for it to be extended for a period of less than one year. She said that there was no letter to the respondent that the contract had been extended to 31/12/2015. That there was nothing in the minutes to show that the extension was received by the respondent. She admitted that at the end of the contract there was no letter written to the 1st Respondent telling them to stop the work. She admitted that they advertised the contract towards the end of 2015.

27. It is a principle of law that parties to contract are bound by the terms and conditions thereof and that it is not the business of courts to rewrite such contracts. In National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507, the Court of Appeal stated that:

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved." See also Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR.

28. The Court of Appeal in the case of Amatsi Water Services Company Limited v Francis Shire Chachi [2018] eKLR stated as follows:-

> " The general principle, as we understand it, is that a fixed term contract will terminate on the sun set date unless it is extended in terms stated in the contract. A court cannot rewrite the terms of a contract freely entered into between the parties. Once there is a written contract, the court will seek to give meaning to such contract giving ordinary meaning to its terms in determining any issue that may arise."

29. The parties herein entered into a fixed term contract commencing from 1st August 2014 and ending on 31st July 2015. The contract therefore stood lapsed on the expiry date, i,e. 31st July 2015.

30. The contract however had a clause for renewal that was dependent on satisfactory performance. The 1st respondent argues that the contract was extended orally upon the expiry of the contract and they continued to work and being paid until when the appellant advertised the contract towards the end of November 2015. The appellant on the other hand argues that the contract was extended for 3 months from 29th October 2015 to enable the appellant advertise for fresh bids. The question then is whether there was extension of the contract for another year as argued by the 1st respondent or only for 3 months as contended by the appellant.

31. Although the appellant says that the contract was extended for 3 months by the committee of the appellant, it was admitted that the 1st respondent was not part of that meeting, and even then the decision was not communicated to 1st respondent. The respondent submitted that a party cannot unilaterally vary or extend a contract and to this end cited the case of Housing Finance Company of Kenya Limited v Gilbert Kibe Njuguna (supra). I find that it was legally untenable for the appellant to extend the contract without the concurrence of the 1st respondent. The contract between the parties only provided for a renewal and not extension by any period of time. Parties were bound by the terms of the contract.

32. While the appellant says that the contract was extended on 29th October 2015, they do not explain the fate of the contract between the date of expiry and 29th October 2015, though they allowed the 1st respondent to continue working under the same terms of the expired contract. The 1st respondent on the other hand says that the contract had been extended orally.

33. The trial magistrate in his judgment while holding that there was a renewal of the contract pursuant to a renewal clause held that the appellant conducted itself in a manner that made the plaintiff to believe that the contract had been renewed at the end of the initial contract. That the appellant was therefore in breach of the contract. The magistrate relied on the case of Teresa Carlo Omondi v Transparency International (TI) Kenya (2017) eKLR where it was held that:

> 105. The Court is satisfied the Claimant had legitimate expectation her contract would be renewed. It was not merely a wish, a hope or a desire for continuity; it was legitimate expectation, rooted in the contract of employment. There was a promise for renewal, subject to fulfillment of certain conditions. These conditions were fulfilled. The Claimant performed satisfactorily. She was appointed as an Independent Consultant for a key partner. There is no doubt her services were still required by the Respondent. Another Employee took up the position of Head of Programmes 8 days after the Claimant was ejected.

34. However, when this case reached the Court of Appeal in Transparency International - Kenya v Omondi (Civil Appeal 81 of 2018) [2023] KECA 174 (KLR) (17 February 2023) (Judgment), the court dismissed the case while holding that:

> The court is in agreement with these sentiments. We dare say that an automatically renewable fixed-term contract is a contradiction in terms, as it would subject the parties to an indeterminate employment contract. The respondent was under a fixed-term contract with a definite commencement date and termination date. There was no ambiguity created to create an expectation of contract renewal by the appellant's issuance of a fixed-term contract. The contract terminated automatically when the termination date arrived. Whether a contract with a renewal clause will be extended or not, is an issue that is at the discretion of the employer and it cannot create a legal right under the doctrine of legitimate expectation.

35. The court however added that:

> Concomitantly, the scenario would have been different if there was an indication, by act or omission from the appellant, to indicate renewal was forthcoming to whet the respondent's appetite, that her contract would be renewed and hence rely on the doctrine of legitimate expectation. In the instant case, there was no promise of any sort that was given to the respondent to justify a claim based on legitimate expectation.

36. In the present case, the appellant allowed the 1st respondent to continue working at the expiry of the contract and continued to pay them under the same terms of the expired contract. It is not possible

that the appellant at the expiry of the contract did not tell the 1st respondent anything on whether to continue working or not. They cannot have paid them for three months without telling them anything. It was most likely as testified by the witness for the 1st respondent PW1 that they were told orally that the contract would be renewed. And if that was not the case, the appellant by paying the 1st respondent for 3 months created in them a legitimate expectation that the contract would be renewed. The doctrine of legitimate expectation was therefore applicable in the circumstances of this case.

37. The appellant submitted that a statutory contract could not be extended orally. That the appellant engaged the 1st respondent in matters under issue in strict terms of the Public Procurement and Assets Act No.3 0f 2005 which mandatorily prescribes that a contract under the Act must be in writing. Therefore, that a contract purported to be entered into orally is null and void.

38. The judgment against the appellant was based on the doctrine of legitimate expectation. The Public Procurement and Assets Act does not bar extension of contracts. I therefore find no substance in the argument that the contract could not be extended orally. Of course, the promise to extend the contract had to be followed by a written contract. I find that the appellant was in breach of the contract by purporting to extend the contract for a short period than was provided for in the contract which only provided for renewal and not extension for a short period.

Whether general damages were available to the 1st Respondent

39. The general principal of law is that general damages are not available for breach of contract. In Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 of 2000 [2000] 2 EA 398, the Court of Appeal held that no general damages can lie for a breach of contract. The same Court in Kenya Commercial Bank Limited vs. Charles Otiso Otundo Civil Appeal No. 198 of 2000 held while citing Dharamshi vs. Karsan [1974] EA 41, that there can be no general damages for breach of contract, in addition to, for example loss of profits.

40. General damages are meant to compensate the claimant for the loss incurred due to the negligent act of the respondent. The 1st respondent in this case did not suffer any loss as they were paid the contract sum every end of the month. It would be unfair enrichment on their part for them to be paid anything else. I therefore find that general damages were not available to the respondent.

41. The upshot is that appeal is merited and the award of the trial court is thereby set aside. The appellant to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JUNE 2025

J.N. NJAGI

JUDGE

In the presence of:

Miss Naazi HB for Mr.Kithi for Appellant

Mr. Ongoro for Respondent

Court Assistant -