



Inclusive Agencies Limited v Maersk Kenya Limited & another (Civil Case 7 of 2018) [2024] KEHC 10296 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 10296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 7 OF 2018
F WANGARI, J
APRIL 26, 2024**

BETWEEN

INCLUSIVE AGENCIES LIMITED PLAINTIFF

AND

MAERSK KENYA LIMITED 1ST DEFENDANT

AP MULLER MAERSK AS T/A MAERSK LINE 2ND DEFENDANT

JUDGMENT

1. By an Amended Plaint dated 21st October, 2022 the plaintiff prays for the following reliefs as against the defendants;
 - i. A mandatory order directed to the defendants restraining them from contracting a third party to vender the service crew transfer, crew logistical support pending the hearing and determination of the main suit.
 - ii. General damage.
 - iii. Costs of the suit.
 - iv. Such further and other relief as this honorable court may deem fit and just to grant.
 - v. Kshs.49,994,160/-.
2. The Plaintiff averred that the Defendants were in breach of a Crew Transfer Agreement by terminating the agreement, leading to a loss of income as claimed.
3. In their Statement of Defense dated 1st February, 2023, the Defendants denied the Plaintiff's claim and averred that there was no breach of contract as the agreement did not have an exclusivity clause. That the agreement between the plaintiff and the defendants remained in force until the time it terminated as a result of effluxion of time. The defendants pray that the plaintiff's claim be dismissed with costs.



The Evidence

4. The plaintiff called two witnesses in support of its case. Pw1 John Evangelist Otieno while relying on his statement dated 14th October, 2015 and another dated 12th April, 2023, told the court that his company had entered into an agreement with the defendant on the 1st January, 2015 for crew provision services for an initial period of one year.
5. That mid-stream, the defendants had breached the contract by enlisting another company known as Sea Trade Agencies Limited to take over the said services. The resultant effect was that the plaintiff had suffered damages which he quantified as Kshs.49,994,160/-.
6. He told the court that he had invested a colossal amount of money in anticipation of the contract. That as at the time the contract was terminated, there was an outstanding amount of unpaid invoices totaling to Kshs. 1,484,320/-.
7. Upon cross examination by the defendant's counsel, PW1 stated that the defendant had terminated his services without notice. That though there was no exclusivity clause in the agreement, the defendant had stopped giving the plaintiff's company work.
8. PW2, Joseph Waweru Kimathi an auditor by profession, who had been contracted by the plaintiff to prepare a projected financial statement based on last income between June 2015 and December, 2016. In his report presented in court, he stated that the plaintiff's company lost a total of Kshs.55,458,720/- in gross sales revenue and upon deducting the expenses that could have been incurred, he came to the conclusion that lost income amounted to Kshs. 49,994,160/-.
9. Upon being cross examined by counsel for the defendant, Pw2 told the court that he was not given any invoices in preparation of the report as the invoices were with the defendant. That he had relied on the bank statements of the plaintiff in coming to the conclusion of income lost. That from the bank statements presented to him, the plaintiff earned an average of Kshs. 3m per month. That he had not included tax in his report as it was not an expense.
10. The defendant's case stands on the evidence of three witnesses; Natasha Nyakerario Gichuki, Zipporah Nyaberi and Hellen Nyakindi.
11. DW1 a legal officer at Maersk Kenya Limited told the court that the 1st defendant had entered into an agreement on behalf of the 2nd defendant with the Plaintiff and that the same was to run from the 1st January, 2015 to 31st December, 2015. That there was no exclusivity clause in the agreement and that the same was not terminated by the defendants but had lapsed due to effluxion of time. She told the court that all outstanding invoices had been paid.
12. Upon cross examination by counsel for the plaintiff, she told the court that the plaintiff had filed the suit before the contract was terminated. That there was no notice of termination of the said contract.
13. While relying on her witness statement dated 29th June, 2023 DW2 told the court that the contract between the plaintiff and the defendant did not specify any minimum financial commitment to the plaintiff.
14. Upon being cross examined by counsel for the plaintiff, she stated that she did not have proof of payment of the disputed invoice which stood at Kshs.870,820/-. That if there was any pending payment, the plaintiff fought to have followed up the same
15. DW3 was an Accounts Receivable Manager with the defendant and she told the court that she had never received any email or letter from the plaintiff raising concerns as to delays due to payments. Upon



being cross examined by counsel for the plaintiff, she told the court that she was the contact person between the plaintiff and the defendant and she had paid out all invoices brought to her attention

The submissions

16. Both parties filed written submissions. The plaintiff submits that they have proved their case on a balance of probability and thus the prayers sought ought to be granted. The plaintiff submits that they proved that there were unpaid invoices totaling to Kshs.1,484,320/-, that they lost business and profits from the time the breach arose up to December, 2015 which they totaled at Kshs.16,516,680/- and anticipated profits for the year 2016 at Kshs.33,477,480/-.
17. The defendants on their part submit that the plaintiff failed to prove its case and the same ought to be dismissed. The defendants framed the issues for determination thus;
 - a. Whether the defendants breached the agreement between the parties?
 - b. Whether the plaintiff is entitled to the reliefs sought in the plaint?
 - c. Who should bear the costs of the suit?

Analysis

18. A convenient starting point is to recall that the law of contract gives effect to consensual agreements entered into by individuals in their own interests. Accordingly, remedies granted by the courts are designed to give effect to what was voluntarily undertaken and agreed by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed.
19. In *Robinson v Harman* {1848} 1 Exch 850, it was held as follows;

“the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”
20. By now its trite law that a contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. In *Dormakaba Limited v Arcitectoral Supplies Kenya Limited (Civil Suit 136 of 2020)* [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment) Justice Mativo (as he then was) set out what a plaintiff must prove in such a claim thus,

“A Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant's breach. The Plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.”
21. The Plaintiff is then required at the end of a trial to show no more than a probability that it would not have suffered the loss if the contract had been properly performed. The defendant on their part are to show that there was no such probability.



22. In the instant case, there is no dispute by the parties that there was an agreement between the parties. That the agreement was for the provision of crew transfer services and was to run from 1st January, 2015 to 31st December, 2015. The plaintiff contends that the defendant had stopped honoring the agreement on the 30th June, 2015 and that the actions of the defendant in giving crew transfer services to another company served to terminate the contract without notice.
23. The defendant on their part contend that the contract subsisted and that as at November, 2015 the agreement between the parties was subsisting as deponed in the replying affidavit dated 23rd November, 2015. This averment however, was not backed with any document to prove the subsistence of such contractual engagement. What was annexed as exhibits to the Replying Affidavit alluded to was the agreement itself.
24. The measure of proof in civil cases is a preponderance of probabilities. The court must examine the credibility, reliability and probability of the evidence tendered by the witnesses. Starting then with credibility, this court had the benefit of not only hearing the parties orally, but also relating the evidence to the pleadings, affidavits, witnesses' statements, documents produced and the submissions.
25. The Plaintiff bears the burden of prove. The Plaintiff's witness testified that the defendant the defendant had given its contractual duties to another company. The defendant did not dispute this fact but stated that there was no exclusivity clause in the agreement.
26. From the statements and documents produced by the plaintiff, it is clear that the defendant did not assign to him any crew transfer services from 30th June, 2015. The last assignment was on 26th June, 2015. The evidence of the plaintiff was put to test through cross examination and he was consistent. The court finds his evidence credible.
27. On their part, the defence witnesses stood on the substrata of their case that the contract was not exclusive and that there were no pending invoices. This argument is attractive at face value, but indeed if the contract was not exclusive, what precluded the defendant from assigning the services to another company alternately or earlier than 30th June, 2015?
28. The bark upon which the defendant's evidence hang has suddenly become overly slippery and their evidence slips away and fails. I find the account as rendered by the plaintiff credible.
29. Having passed the credibility test, we turn to probability. It is trite that the party bearing the onus of proof can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the other party is therefore false or mistaken and falls to be rejected.
30. In deciding, whether that evidence is true or not, the court will weigh up and test the respective parties' allegations against the general probabilities. The inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities, a court will bear in mind that the more serious the allegation, the more cogent will be the evidence required.
31. The plaintiff had produced the agreement between it and the defendant and the subsequent demand for unpaid invoices. The plaintiff had also produced several documents to show the many instances he picked up crew on behalf of the defendant and dropped them off at different hotels and/or airports.
32. The defendant made stated in their pleadings that they had settled all invoices but in evidence, DW3 stated that there was outstanding amount. The inconsistency in the evidence could only be to the benefit of the plaintiff. DW3 told the court that if there were any outstanding invoices, the same ought



- to have been brought to her attention to settle, but then again, she does not dispute the existence of the outstanding balance.
33. The court finds that the scales tilt in favour of the plaintiff as it is more probable than not the invoices remained unpaid.
 34. Having found that the plaintiff's evidence is credible, reliable and probable, I shall proceed to assess the damages if any for breach of contract.
 35. The Black's Law Dictionary 9th Edition, Page 213 defines a breach of Contract as: -

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
 36. 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 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.
 37. The objective of compensating the plaintiff for the loss sustained as a result of non-performance makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.
 38. The plaintiff's loss is identifiable as the contract was to run until 31st December, 2015 but was breached by the actions of the defendant. According to Pw2, the plaintiff could have made a total of 49,994,160/-. This amount covers the period up to December, 2016 as per the report presented in court.
 39. The court is alive to the terms of the contract that the same was not to be extended automatically but at the “Maersk jurisdiction”. This means that the extension of the same for another year was not guaranteed. The assessment of damages for breach of contract will therefore be limited to the period of existence of the contract.
 40. The plaintiff lost business that is quantifiable and therefore awardable. In Chitty on Contracts, 32nd ed (2015), paras 26-172 - 26-174, it was observed that for a court to award damages for breach of contract, 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.
 41. 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.”
 42. In this case, the plaintiff had enjoyed over 10 years of doing business with the defendants and at no time had there been a breach of contract or failure to deliver on the part of the plaintiff. It is on this strength that the plaintiff knew that it would carry on the business of crew transfers on behalf of the defendants to the end of the year 2015. The change of circumstances in June 2015 caused the plaintiff



to suffer loss that the effect of the breach by the defendants on the plaintiff's business is quantifiable based on the good business relations it enjoyed with the defendants.

Determination

43. From my analysis of the issues discussed above, it is my finding that the Plaintiff has established its claim to the required standard. Accordingly, I find for the Plaintiff and enter judgment in favour of the Plaintiff against the defendant as follows;
- i. Unpaid invoices of Kshs. 1,484,320/-
 - ii. Damages for breach of contract in the form of loss of business and profits from 30th June 2015 to 31st December 2015 at Kshs.16,516,680/-
 - iii. Claim for anticipated profits for year 2016 fails as the contract lapsed on 31st December, 2015.
 - iv. The said sums shall attract interests at court rates from date of filing suit.
 - v. Costs to the plaintiff.

Orders Accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 26TH DAY OF APRIL, 2024.

F. WANGARI

JUDGE

In the presence of;

N/A by the Plaintiff

N/A by the Defendant

Barile, Court Assistant

