



REPUBLIC OF KENYA



KENYA LAW
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Great White Investment Limited v National Oil Corporation of Kenya (Civil Suit E029 of 2021) [2024] KEHC 10302 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEHC 10302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E029 OF 2021
F WANGARI, J
APRIL 22, 2024**

BETWEEN

GREAT WHITE INVESTMENT LIMITED PLAINTIFF

AND

NATIONAL OIL CORPORATION OF KENYA DEFENDANT

JUDGMENT

1. Through a plaint dated 21st September, 2020 and filed in court on 19th March, 2021, the Plaintiff for judgement against the Defendant for: -
 - a. Special damages of nineteen million, seven hundred and three thousand four hundred and seventy four shillings Kshs.19,703,474/- for unpaid monies by the defendant.
 - b. General damages for breach of contract;
 - c. Any other reliefs that the Honourable Court may deem just and equitable.
2. The defendant had filed an amended statement of defence and counterclaim dated 18th February, 2022 and filed in court on the 1st April, 2022. The defendant had counterclaimed for:
 - a. Kshs.190,716,876/- for value of products unaccounted for and cost of forensic audit carried out following the grave anomalies noted by the defendant during the plaintiff tenure as site manager.
 - b. Interest on a) above
 - c. Any other or further relief that this honorable court may deem just to grant.
 - d. Costs of the suit.



3. On the 8th February, 2023 the plaintiff had testified and closed its case. The defendant on its part called a total of three witnesses.

The Evidence.

4. While relying on his statement and the documents filed together with the pleadings in this case the plaintiff told the court that sometime on 31st October, 2016 the plaintiff was awarded a tender and entered into a contract with the defendant for the provision of transportation and site management services at Kenya Ports Authority as per the agreement. The agreement was to run for a period of three years from the 15th October, 2016 until the 30th September, 2019 but it was unfairly terminated on the 31st May, 2019.
5. That the plaintiff had suffered great financial loss including being sued by its subcontractors for breach of contract. That the total amount claimed included site management charges, Mombasa amounting to Kshs.12,409,542.19/-, Site management charges, Nairobi amounting to Kshs. 3,290,892/-, transport charges for Mombasa amounting to Kshs.1,753,040/-, Transport charges Nairobi ICD amounting to Kshs. 2,250,000/-.
6. That the defendant had in March 2019 written to the plaintiff claiming that there was a discrepancy of Kshs.401,138,443/- but later in June 2019, the defendant had alleged that investigations had been done and the amount demanded from the plaintiff was now Kshs.9,248,671/-.
7. The plaintiff told the court that during the pendency of the contract, the defendant could take a period of up to 3 months to settle. PW1 James Mwangi had produced invoices, letters and delivery notes in support of the plaintiff's claim.
8. On its part, the defendants pegged their suit on the counterclaim and told the court that initially, the discrepancy was Kshs. 401,138,443/- but after they engaged an external auditor from KPMG, the amount had been reduced to Kshs. 190,716,876/-.
9. DW1 Laban Serem a manager in charge of stock control with the defendant company told the court that the plaintiff had acted without due diligence and professionalism in carrying out its obligations by failing to furnish the true statement of reconciliation to the corporation, keep proper books of accounts and records and exposed the corporation to financial risk/losses. That the defendant was aggrieved with the losses incurred and had been forced to terminate the contract with the plaintiff.
10. DW2 William Kigoro Kamau an accountant with the defendant company told the court that he had noted a variance of Kshs.9,248,671 in the cash account of the plaintiff company but when an external audit was conducted the total losses discovered was Kshs. 190,716,876/-. Dw3 Carol Musau a senior legal officer at the defendant company told the court that the contract was lawfully terminated and notice issued.
11. The parties had filed their submissions in support of their rival positions.

Analysis and Determination

12. I have considered the pleadings, submissions together with the authorities relied upon by the Plaintiff as well as the law and in my respectful view, the following are the issues for determination: -
 - a. Whether the Plaintiff specifically pleaded and strictly proved special damages in the sum of Kshs.19,703,474/-
 - b. Whether the Plaintiff is entitled to general damages for breach of contract;



- c. What is the order as to costs and interests?
In respect to the counterclaim:
- a. Whether the defendant specifically pleaded and strictly proved special damages in the sum of Kshs. 190,716,876/-.
- b. What is the order as to costs and interests?
13. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:
- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
14. Therefore, it follows that the Plaintiffs had the duty to prove their claim against the Defendants. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below. In *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:
- “As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*.”
15. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. Further, in *Evans Nyakwana -vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:
- “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
16. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau -vs- George Thuo & 2 Others* [2010] 1 KLR 526 stated that:
- “In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
17. In finding whether the plaintiff proved its case as against the defendant it is worth noting that there is no doubt that there was a tender awarded to the plaintiff and subsequently an agreement signed that was to last from the 15th October, 2016 until the 30th September, 2019. It is also not disputed that the contract was terminated on the 31st May, 2019. According to the plaintiff, the termination was



- communicated orally and it was unfair. That he had engaged sub-contractors and as at the time of such termination, the monies due to it from the defendant amounted to Kshs.19,703,474/-
18. The plaintiff had produced invoices and delivery notes to support his claim. Upon being cross examined by counsel for the defendant the plaintiff told the court that it had rendered services for which it was not paid and for each service rendered they had raised an invoice. He further stated that they used to carry out reconciliations attended by officials from the defendant company and that there was no ground for termination of the contract.
 19. Having considered the law, the facts of this case and the authorities cited above, I do find that the plaintiff proved its case as against the defendants on a balance of probability.
 20. Did the plaintiff prove the special damages claimed? The Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
 21. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. The plaintiff had in its evidence produced invoices and delivery notes that were not disputed nor questioned by the defendants. The position of the defendant throughout the trial was that it too had suffered loss. They had failed to confirm that the invoices had been honored and that there was nothing owing to the plaintiff.
 22. I thus find that the plaintiff had set out his claim specifically and strictly proved through the documents in court that the amount standing at Kshs.19,703,474/- remains unpaid.
 23. In respect to the second issue of general damages for breach of contract. As was held in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company* [2016] eKLR, a party seeking general damages for breach of contract has the cardinal duty to lead evidence to bring the Defendant’s conduct within the exceptions.
 24. The plaintiff told the court that the contract was orally terminated and that the same was unfair. In a letter dated 31st May, 2019 the defendant wrote to the plaintiff terminating the contract and cited clause 12.1 of the agreement.
 25. Clause 12.1 of the agreement dated 31st October, 2016 states;

“The transporter undertakes to adopt appropriate policies to ensure a drug and alcohol free work place while performing work for National Oil.”
 26. The termination letter cited unexplained losses as the reason for termination and the letter had nothing to do with “drug and alcohol use.” From the evidence on record, the defendant had immediately stop trading with the plaintiff thus exposing the plaintiff to claims for breach of contract between it and subcontractors.



27. In their defence, the defendants insisted that the termination was lawful. But they never adhered to the one-month notice and more so, the ground for termination of the contract was not founded on clause 12.1.
28. I do find that the action by the defendant to terminate the contract immediately without adhering to the one month's notice was unlawful and it amounted to a breach of the contract. That the plaintiff had suffered damages as a result. To that extent therefore I find that the plaintiff deserves an award for general damages for breach of contract and I award the plaintiff a sum of Kshs.3,000,000/- on this head.
29. Before I delve to the issue of costs, I shall first deal with the counterclaim.
30. The defendant counter-claimed against the plaintiff for a sum of Kshs. 190,716,876/-. This is a special damage claim and as noted in the authorities above, it must be specifically pleaded and strictly proved.
31. The claim by the defendant was pegged on an external audit report from KPMG. During the hearing of the case, the counsel for the plaintiff had objected to the production of the said report and sought that the maker be called. The defendant had sought adjournments four times on the grounds that they were awaiting the expert witness from KPMG. At the close of the defence case, they had failed to call the said witness.
32. There is therefore no evidence to prove the special damage claim. The same fails and the counterclaim is dismissed in its entirety.
33. On interest, it is trite that special damages attract interest from the date of filing suit while general damages attract interest from the date of judgement. I see no reason to depart from what the law has settled and I so hold that special damages shall attract interest at court rates from the date of filing suit while general damages shall attract interest from the date of judgement.
34. Finally, on costs, the same follows the event and the Plaintiff being the successful party is entitled to its costs.
35. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. Judgement is hereby entered in favour of the Plaintiff against the Defendant as follows; -
 - i. Special damages in the sum of Kshs.19,703,474/- plus interests at court rates from the date of filing suit till payment in full;
 - ii. General damages for breach of contract assessed at Kshs. 3,000,000/= and the same shall attract interest from the date of this judgement until payment in full;
 - iii. Counterclaim is hereby dismissed.
 - iv. Costs of the suit to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND APRIL, 2024

F. WANGARI

JUDGE

In the presence of;

M/S Abdalla Advocate for the Plaintiff

Kurgat Advocate h/b for Peter Wanyama Advocate for the Defendant



