Cetin v Wananchi Farm Machinery & Accessories Ltd (Civil Case E083 of 2022) [2024] KEHC 8236 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E083 OF 2022

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

RAMAZAN CETIN .... PLAINTIFF

AND

WANANCHI FARM MACHINERY & ACCESSORIES LTD .... DEFENDANT

JUDGMENT

1. This matter herein is evidence of the worst human beings can be. There is no dispute between the parties. However, parties are raising more smoke than air. At some stage, I also asked parties what they were smoking. It must have been stronger than nicotine.
2. The plaintiff, a Turkish national is being shown the ways of men. He was meant to believe that there is instant kindness in this vast country called Kenya. This is a country endowed with much wealth but everyone is complaining. But completing this statement is that they are not running away from Kenya.
3. The plaintiff filed suit on 7/11/2022 claiming the following: -
   a. Euros 290,380 equivalent to Ksh. 34,465,202.20/-
   b. Costs of the suit
   c. Interest
4. The defendant subsequently filed amended defene and counterclaim at the tail end as the matter was proceeding. They stated that they were yet to receive tractors but received completely broken down units and not tractors. They admitted that log books for the tractors were placed in good faith in the hands of Mohammed Batheif. They stated the same will be recalled since the agreement was cancelled. They denied owing Euros 290,380. The defendants stated that the plaintiff was to comply with the law of the land. It was their case that they paid Kshs. 14,878,535/=. They claimed this money was special damages.

5. They had also filed other applications including the one dated 28/9/2023 and 1/92023. The former was allowed to include the filing of Amended Plaint. The former was withdrawn.

6. The plaintiff entered into a commercial agreement between himself and the defendant and gave Euro 400,000 in instalment to import goods, that is, agricultural machinery, tractors, tire wheels (SR), automotive spare wheels and all kinds of food, textile products and similar goods.

7. They agreed to share 40:60 profit between the Plaintiff and defendants respectively. On 4/3/2021 the defendant acknowledged receipt of 400,000 Euros.

8. The defendant breached the agreement and failed to share accounts. They signed an agreement on 19/7/2021 where they agreed that a sum of 306,190 Euros be converted to credit facility secured with 35 tractor log books. The log books were handed to a neutral party Mohamed Batheif.

9. The proceeds of sale were to be handed to the plaintiff. They stated that the logbooks were transferred without Mohamed Batheif. Proceeds were not remitted.

10. The claim laid was for Euro 290,380. This implies that there was a change from 306,190 by Euro 15,810.

11. It came out in evidence that the difference was created through donation to a charity introduced by the defendant as part of Islamic teaching and was a gift.

12. The defendant filed defence and denied that they owe the money. They stated that the plaintiff was not entitled to be in the country hence cannot recover his money. A reply to defence was filed on 8/12/2022. I heard the matter to conclusion on 12/6/2023.

13. On 9/4/2024 I directed the matter be set for judgement on 7/6/2024. Unfortunately following my transfer from Mombasa, I did not get my original file. I placed the judgement for today, 20 days later.

Evidence

14. The Plaintiff adopted his long statement dated 3/11/2022. He was testifying through a Turkish interpreter. He reiterated the contents of the plaint. He stated that the defendants were evasive in paying the debt. He decided to get a translator to reduce the agreement into writing.

15. He stated that the directors accepted 400,000. The agreement was subsequently signed in English. The translation was carried out by the Turkish Embassy in Nairobi and embassy of Kenya in Ankar. He traveled to Kenya to resolve the issues all in vain. They collected Kshs.3,000,000/=.

16. He stated that on 16/7/2021, a balance of Euros 306,190 was secured but it never came to be except:-

    a. Kshs.1,000,000/- (500,000 in 2 instalments in exchange for KTCC 555).

    b. Another sum for Kshs.1,000,000/- was deposited by cheque No. S29 and 530 for 2/4/2022 for 500,000/- each.

17. He discovered that there were transfers of vehicles that were secured and log books were kept with a third party, without removing the titles. He carried out a search and noted transfers had occurred despite Mohamed Batheif having the log books. This was confirmed in evidence by the 2nd witness Mohamed Batheif.

18. Mohamed Batheif stated that he is holding the cheques. He is holding 33 logbooks, except for KTCC 551 and KTCC 727 B.

19. The plaintiff produced searches. Most except a few were in the defendant's name. They also included documents for the imported tractors instead of payment. The defendants were requesting that the plaintiff's proceeds be refunded.

20. The Plaintiff submitted that it is instructive to note that DW1 was quite dishonest in his testimony. They stated that the witness denied having received 400,000 Euros and the 306,190 Euros. In the same breath, he admitted having signed both agreements. The investment agreement was signed while DW1 was in Turkey.

21. It was their case that the Credit Facility Agreement was signed in Kenya. DW1 in cross examination admitted having received the consignment which comprised of disassembled parts of tractors and other items. It was his case that the foodstuff had expired and were discarded. He alleged that the Plaintiff was informed but this was not true. This part of evidence was not part of pleadings.

22. They stated that parties are bound by their pleadings and as such, the issue of the food stuffs having expired was merely an afterthought and cannot stand.

23. They stated that on the Defendant's counterclaim, the Defendant did not provide any iota to prove the amount of Kshs 14, 878,535/- that it is allegedly claiming as against the Plaintiff. The documents that were produced in evidence by the Defendant as Dexh 7, 8 and 9 (found at page 7, 8 and 9 of the Defendant's List of documents) are all written on the Defendant's letter head and are of no probative value.

24. The parties supported their respective cases with a myriad of authorities. The plaintiff relied on the case of Curtis v Chemical Cleaning & Dyeing Co. Ltd [1951] ALL ER 631, where Lord Denning stated inter alia : -

> "that where a party signs a contract, that signature is evidence of this assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

Analysis

25. The court has perused the pleadings and evidence as well as the submissions and authorities filed by the parties in support and opposition of their respective cases.

26. The issue for determination is whether the Plaintiff is entitled to Euros 290,380 due to breach of contract by the Defendant.

27. The burden of proof is on the Plaintiff. This is set out in Section 107-109 of the *Evidence Act* as follows: -

    107. (1) 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.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

    108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

    109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

28. In the case of Raila Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September, the Supreme Court stated as doth: -

> "62. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.
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> 63. Burden of Proof is used to mean an obligation to adduce evidence of a fact.
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> According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:
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> 1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
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> 2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence."

29. Similarly, in David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177), where he that:

> "[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
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> In Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness."

30. Further, in Anne Wambui Ndiritu v 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 case 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."

31. Further, in Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition 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."

32. The defendant took issue that the plaintiff was not allowed to be in the country. This is irrelevant as this is a deal to import goods which were carried out. Secondly goods came as completely knocked down particularly as imported. The defendant did not reject. I accept explanation by the plaintiff that the plaintiff directors were present when the import to defendant from Turkey was going on. In Housing Finance Co. of Kenya Limited v Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, it was held:

> " ...Courts are not for 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 meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the 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."

33. The defendant committed to pay and refund a sum of Euros 400,000 which they had not paid. This is money he had received. A sum of Euro 290,350 is admitted. I find that it is due and owing. It is based on the contract which the court, in circumstances is unable to rewrite. In Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR the Court of Appeal further stated that: -

    We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.

34. I also dismiss the claim that I must indicate both currencies. I shall indicate the currency of the transaction. The defendant had a duty to show that they have paid in full. Order 2 rule 4 provides as hereunder:

    (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

35. This was also in the decision in the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth [1876] 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible,
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid."

36. Therefore, there is no plausible defence to the claim. Secondly, the defendant entered freely in the contract. It is fully intended as the logbooks are in the name of the defendant. They had also transferred some money in the name of the plaintiffs. In National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd [2002] 2 E.A. 503, [2011] eKLR the Court of Appeal at page 507 stated as follows: -

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.
>
> 24. I therefore do not find it necessary to interfere with the freedom of contract by the parties. No material was placed before the court to demonstrate any factor that would entitle this court to release parties from their contractual obligations. As stated by the court of appeal in Lalji Karsan Rabadia & 2 others v Commercial Bank of Africa Limited [2015] eKLR:
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> We also find no error in principle for the statement that the court has no power to rewrite a contract for the parties as it is based on many authorities including Wallis v Smith (supra) where Jessel, Master of the Rolls, stated, thus:-
>
> "I have always thought, and still think, that it is of the utmost importance as regards contracts between adults – persons not under disability, and at arm's length – that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly

well aware that there are exceptions, but they are exceptions of a legislative character."

37. I find and hold that the claim for Euros 290,380 is due and owing. The plaintiff shall have costs of Euros 5.865.

38. On the counterclaim, there was no basis laid. A party must lay basis for a claim in special damages. In the case of Swalleh C. Kariuki & Another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence 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 nature of the acts themselves."

39. I find no basis for the counterclaim and hold that the same is untenable. It is consequently dismissed. Regarding costs, the same follow the event. Section 27 of the *Civil procedure Act* provides as follows: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

40. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award

of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

41. In the circumstances, I allow the plaintiff's claim for Euros 290,380 and costs of Euros 5,865. The counterclaim is dismissed with costs of Ksh 650,000/=.

Determination

42. The upshot of the foregoing is that I make the following orders:-

a. Judgment be and is hereby entered for the plaintiff against defendant for Euros 290,380.

b. Costs of Euros 5,865.

c. The counterclaim is dismissed with costs of Ksh 650,000/=.

d. There be 30 days stay of execution.

e. The file is closed.

DELIVERED, DATED AND SIGNED, AT NYERI THIS 27TH DAY OF JUNE, 2024.

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KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for Plaintiff

Magolo for Defendant

Court Assistant – Jedidah