THE SUPREME COURT OF KENYA

NATIONAL SOCIAL SECURITY FUND, BOARD OF TRUSTEES VS. MICRO-CITY COMPUTERS LIMITED

SC PETITION NO. E037 OF 2025

DATE OF JUDGMENT: 30TH OCTOBER 2026

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allows the appeal.

Background

Sometime in September 2010, NSSF Board of Trustees (the appellant) advertised a tender for the design, supply, installation and commissioning of an electric security surveillance system-closed circuit television (CCTV) and restricted access control system (security system) at its Social Security House Complex in Nairobi. Micro-City Computers Ltd.'s (the respondent) tender was successful and the parties entered into a contract dated 8th April 2011. The terms of the said contract included a project sum of Kshs.244,825,708 and an additional annual maintenance cost of Kshs.15,000,000 upon expiry of the two-year warranty period from the date of installation of the security system. However, the appellant did not hand over the premises to the respondent and instead by a letter dated 21st May 2012 indicated it could not proceed with the contract due to budgetary constraints.

Consequently, the respondent filed a suit in the High Court claiming that the respondent had breached the contract. In that regard, the respondent sought general damages for the breach of contract including Kshs.103,447,136 for loss of profits resulting from non-performance of the main contract and service contract amongst other special damages. In support of its claim for loss of anticipated profits, the respondent produced a report prepared by a firm of certified public accountants which assessed reasonable/fair financial loss occasioned to the respondent on account of cancellation of the contract. According to the respondent, since the contract had not been performed and no payment had been made thereunder, the respondent could only rely on projections and assumptions that relate to a similar contract in computing the profits that would have accrued to it had the contract been performed. On its part, the appellant maintained that the contract was illegal as the contract sum had exceeded the amount that had been budgeted and allocated for the said project in the appellant's annual procurement plan. Besides, that, the contract had introduced unfounded annual maintenance cost which was not in the tender documents. To that extent, the appellant stated that upon investigations the Director of Public Prosecution (DPP) and the Ethics and Anti-Corruption Commission (EACC) found the contract to be illegal on account of the aforementioned grounds and even went a step further to recommend

disciplinary action against some of the appellant's officers. Therefore, the appellant maintained it could not proceed with the contract and denied that the respondent was entitled to the reliefs is sought.

The High Court by a judgment dated 30th April 2020 partially allowed the respondent's claim. In doing so, the court found that the appellant had breached the contract by failing to issue the respondent with one-month notice (as per the terms of the contract) prior to terminating the contract. Further, the court found that the investigations by DPP and EACC absolved the respondent from any illegality or wrongdoing, and as such, the respondent was entitled to a remedy for the breach. As a result, the High Court granted the respondent general damages for the breach of contract amongst other special damages. However, the court dismissed the prayer for loss of profit of Kshs.103,447,136 on the basis that the evidence tendered in that regard was speculative and fell short of the requisite threshold of proof of special damages.

On appeal, the Court of Appeal (*Nyamweya, Odunga & Gatembu, JJ.A.*) unanimously set aside the award of general damages to the respondent on the ground that general damages are not available for breach of contract. However, by a majority judgment (*Nyamweya & Odunga, JJ.A. with Gatembu, J.A dissenting),* the court held that the respondent was entitled to Kshs.103,447,136 for loss of anticipated profits for non-performance of the contract. Subsequently, the appellant obtained leave from the Court of Appeal to file its appeal before the Supreme Court.

The following issue and sub-issues of arose for consideration by the Supreme Court:

1. *What is the applicable scope and evidentiary standard of proof, for awarding anticipated profits as special damages for breach of contract?*

    i. *What is the juridical basis and permissible scope of an award of anticipated profits for breach of contract;*

    ii. *What is the applicable evidentiary standard for proving anticipated profits as special damages for breach of contract;*

    iii. *Did the evidence relied upon by the Court of Appeal provide a sufficiently reliable factual foundation for the anticipated profit awarded in the present case?*

Upon consideration, the Supreme Court allowed the appellant's appeal for the reasons that:

1. **Issue 1:**
    i. The legal basis for awarding anticipated profits lies in the expectation or performance interest protected by the law of contract. Anticipated profits may be recovered where they represent the net financial benefit that the claimant would have obtained if the contract had been lawfully performed. Their recovery is, however, limited by causation, remoteness, mitigation and, more importantly, the terms of the contract itself. A claimant cannot recover profits that are too remote, profits that it would probably not have earned, gross revenue without deducting the costs of earning it, losses that could reasonably have been avoided, or profits extending beyond the period or benefit that the contract actually guaranteed. Where the contract gives one party a lawful right to terminate, that right must also be taken into account when assessing the value of the lost contractual expectation.
    ii. anticipated profits, as special damages, must be strictly proved, but strict proof does not impose a standard of persuasion higher than the balance of probabilities. It requires the claimant to produce the best evidence reasonably available and to establish with

sufficient particularity and cogency the factual foundation from which the anticipated profit can rationally be inferred. The claimant must first prove, on a balance of probabilities, that the breach caused the loss of a profit-earning contractual benefit. Once that loss is established, its amount may be assessed by reasonable and informed estimation, taking into account the relevant probabilities and contingencies. No single form of evidence is invariably required, but the evidence must provide a reliable basis for the projection. Expert evidence may assist the court in analysing the relevant material and estimating the loss, but it cannot substitute proof of the facts and assumptions on which the calculation depends. Nor does an expert opinion become conclusive merely because no competing expert evidence has been produced.

iii. The material before the Court did not provide a sufficiently reliable factual foundation for the specific award of Kshs.103,447,136 for loss of anticipated profits.

Accordingly, the Court issued the following orders:

a. ***The appeal dated 7th August, 2025 and filed on 12th August, 2025 is hereby allowed.***
b. ***The Judgment of the Court of Appeal delivered on 12th April 2024 in Civil Appeal Nos. 49 and 59 of 2020 (Consolidated) is hereby set aside only to the extent of the award of Kshs.103,447,136 for loss of anticipated profits. For the avoidance of doubt, all the other orders of the Court of Appeal shall remain undisturbed.***
c. ***Each party will bear their own costs of the appeal before this Court.***

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