



5 Factors to Consider before Suing for Breach of Contract

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Many civil suits arise out of breach of contract hence the contract will be the basis of the suit. Instituting a suit could seem like the best option when the party in breach of the contract is not willing to rectify the breach or perform their part of the contract. However, there are factors you need to consider before filing the suit.

1 Validity of the contract

Before attempting to enforce the contract in court, consider whether the contract is valid. A contract may be invalidated by factors such as illegality of the contract or impossibility in performing the contract. It is advisable to review the contract and ascertain whether it has complied with legal formalities such as execution. If there is a valid contract, consider perusing the contract to rule out any clauses that may prevent you from suing such as arbitration clauses or clauses that preclude Kenyan courts from hearing any disputes relating to the contract. This is because courts will only enforce your agreement and not alter it.

2 Identity and availability of the adverse party

Before filing a suit, you need to know exactly whom you are claiming from and whether the person or entity is still in existence at the time of filing the suit. This not only simplifies service of suit papers but also enables you determine whether such an entity can be sued or whether you need to directly sue the owners. For instance, while companies are legal persons that can sue and be sued, the owners of sole proprietorships are sued as individuals. Knowing the person or entity you are suing also ensures that in the event the judgment is in your favor, you are able to execute it. If it is a business, conducting an official search at the companies registry will enable you know the correct name of the business and its owners. Suing the wrong person or entity may mean withdrawing the suit and filing it afresh or having the suit dismissed thus lengthening the litigation process and increased costs.



3 Costs of the suit

Before suing, you need to consider the financial implications the suit will have on your business. You need to keep in mind that there will be costs of litigation for your legal representation and the likelihood of losing and/ or paying your opponent's lawyer if the court orders that you pay the costs of the suit. If the amount you are likely to recover is less than the legal fees it will cost to recover it, you may wish to consider other means of recovering the amount owed such as negotiation or mediation.

4 Availability of witnesses and evidence

It is well known that the party that alleges must prove the allegation hence a case is entirely dependent on the available documentary evidence and the testimony of witnesses. You need to prove your case and lack of the necessary documentation relating to the contract or lack of witnesses will weaken your case. Therefore, you need to ensure beforehand that your witnesses are able to attend court for the hearing, they are willing to testify and that you have collected all the necessary documents relating to the contract before filing a suit.

5 Possibility of enforcement

If the judgment is in your favor, you will need to execute it. Possibility of enforcement may depend on the location of the opposing party and their financial position. If for instance the adverse party has no funds to meet the judgment, you will need to consider whether you wish to go through the process of disposing their assets if any, to enforce the judgment. If the adverse party is insolvent, you may not recover the full amount of the judgment. The location of the adverse party's assets could also pose a challenge in execution if they are outside the court's jurisdiction. It is pointless to sue a party who does not have the money or assets to pay you if the judgment is in your favor or against whom you may not be able to execute.