



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 3 OF 2019 (FORMALLY CMCC NO.1900 OF 2017)**

**EDWARD JOSEPH NGARACHU ..... PLAINTIFF**

**VERSUS**

**BROOKSIDE DAIRY LIMITED..... DEFENDANT**

**JUDGMENT**

1. Pursuant to a plaint dated 16/11/2017 and subsequently amended on 30/07/2019, the plaintiff claims from the defendant lost income and loss of business at Kshs 2,100,000/= and 21,600,000/= as well as costs and legal fees on account of alleged breach of contract of supply of milk. The loss of income is calculated at Kshs. 150, 000 per month for 12 months while loss of business is calculated on the basis of his remainder of working years from the date of termination to the age of 70 years. The brief facts of the case were stated to have been that the parties had traded since 2001 during which period the defendant would supply the products to the plaintiff for sale provided that the plaintiff would pay for each daily supply by the end of each day but a practice developed with acquiescence of the defendant by which failure to pay everyday had never attracted any sanctions. The plaintiff then contended that the decision to terminate without any notice was wrongful and injurious.

2. In support of the plaint was filed a witness statement and a list of documents dated 16.11.2017 containing some 6 documents, a supplementary list of documents dated 26.01.2018 containing 5 documents and another supplementary list containing the same documents but now dated 30.07.2019. The aggregate of the lists totaling some 9 documents can be summarised to include correspondence between the parties, deposit receipts, account, discount and refund statements as well as the letter before action.

3. The claim was resisted by the statement of defence filed on 21/12/2017 later amended on 2/09/2019 by which the defendant denied the plaintiff's claim in total. It averred that the terms of engagement between itself and the plaintiff were that all milk supplied each day would be paid in full by the plaintiff at the end of each day. It further contended that the plaintiff had breached the said terms of engagement by failing to settle the unauthorized overnight outstanding sums without any justification despite being severally requested by defendant in writing to do so and that the decision to terminate the milk supply to the plaintiff was lawful and with notice. The defendants filed a witness statement by George Githambo and a list of 5 documents being text messages from the defendant to the plaintiff, email correspondent, notice of intention to terminate, response by the plaintiff to the notice and the statement of accounts between the parties.

4. At a case conference parties consented that each would call the witnesses who had filed witness statements to adopt such statements as evidence in chief then be cross examined. The bundles of documents were produced and marked PEXH1 and DEXH1 respectively.

5. Following such directions, the matter finally came up for hearing on 27/02/2020 when the plaintiff testified. The Plaintiff reiterated the contents of the Plaint and took the Court through how the events unfolded. He relied on his witness statement dated 7/11/2017 as his evidence in chief. He also produced the documents he had filed as exhibits in support of his case.

6. He contended that he had been a milk distributor for the defendant from 2001 and that he would earn a profit/commission of Ksh. 150,000 per month. That on 15/06/2017 the defendant without notice discontinued supplying him with milk despite the good working relationship he had with the defendant for the past 17 years. He emphasized that there was no justification for the termination of his milk supply engagement with the defendant resulting to loss of income as well as breach of contract. That he had been refunded his deposit upon termination.

7. During cross-examination, he disputed ever receiving text messages from the defendant as their official mode of communication was via emails. The plaintiff further contended that there was no agreement that there would be no overnight outstanding. He further stated that at the time of termination, his overnight balance was nil and therefore he was entitled to the reliefs sought in his plaint. He stated that he had been running errands for some cleaning agents since 2017.

8. **DW1, George Githambo** testified that the plaintiff was a milk distributor contracted by the defendant pursuant to an agreement in which it was mutually agreed that the plaintiff would settle the value of the milk supplied by end of each day and ensure there was no overnight outstanding but which agreement the plaintiff reneged upon by maintain unauthorized overnight balances forcing the defendant to render several notices but no remedial steps came from the plaintiff.

9. In cross examination, he contended that for the 3 years he had worked with the plaintiff, he could not say the plaintiff was a problematic customer. That the text messages at page 20 of the defendant's bundle of documents did not have dates when they were sent. That he did not have a signed copy of the letter at page 33 of the defendant's bundle of documents neither did he have any prove that the same had been served upon the plaintiff.

10. That distributors had contracts and the contracts gave rights and obligations between the parties including payment for supplies. That overnight outstanding do occur and can be settled the next day. That he did not have a copy of the termination letter.

11. After the close of respective cases, parties sought to file and exchange submissions. The plaintiff filed his submissions on 11/03/2020. In the submissions reliance was placed upon the decision in **Hort Limited v Attorney General (2016) eKLR** in support thereof but without any attempt at the application of the decision to the facts of the case. The gist of those submissions is that the contract and dealings having not been denied there had been injury and damage and the figure claimed was not a pipedream.

12. The defendant equally filed its submissions on 22/09/2020 and cited cases including **Menginya salim Murgani vs Kenya Revenue Authority, HCC 1139 OF 2002** and **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd (2016)** in support of the position that there is no basis for payment of damages to the date of retirement where there is an exit procedure.

13. I have considered the evidence on record and the rival submissions of the parties. The issues that isolate themselves for determination are as follows: -

- i) **whether there was a breach of the contract between the parties?**
- ii) **whether there would be overnight outstanding and how it would be settled?**
- iii) **whether the plaintiff was issued with the any notice for termination of the contract?**
- iv) **whether the suffered any loss and the extent and quantum thereof?**
- v) **What orders should be made as to costs**

14. In coming up with the issues, it is appreciated that the existed of the distributorship between the parties is common ground and admitted by both save that none of the parties deemed it necessary to avail a copy of the agreement to disclose the terms thereof. That notwithstanding, the law recognizes both oral and written contracts. It is also not in dispute that the plaintiff was refunded his deposit by the defendant and further agreed that the plaintiff made his monthly earnings in commissions on sale of the supplies by the defendant. In the words of DW1, the said commission was never constant but would range between Ksh. 140,000 to Ksh. 160,000. I am therefore convinced that there was a binding distributorship contract between the parties herein the question however is its terms and if there was ever a breach by the defendant.

15. The dispute is centered on whether overnight outstanding balances were permissible. The plaintiff's position is that the same was permissible and that there had always been balances carried forward without any precipitate action being taken by the defendant while the defendant takes the position that all supplies for everyday would be due and payable by close of the day. I think the answer to the question must be found in the financial dealings between the parties as disclosed in the statement of accounts. The statement of accounts exhibited by both parties show that the account kept oscillating, most of the time between positive and negative balances and nil balance is only seen once. That statement tells me that there was never an agreement or practice by which the plaintiff had to pay everyday's supply in full by end of that day. Without the written contract and while relying on the statement of accounts, I find that the dealing between the parties permitted sums to be due from each side and that mere pendency of payment of any sum overnight should not have amounted to a breach to merit termination.

16. In any event I have correlated the statements and the defendants 'correspondence demanding payment of outstanding sums and I have been unable to find any sum outstanding on the specific dates the demands were made. That coupled with the fact that the defendants witness admitted that he had nothing to prove that the letters for demand were signed nor delivered lead me to the conclusion that there was no basis to terminate.

17. In the absence of evidence of justification to terminate, I find that the termination was therefore wrongful and thus a breach of contract. The law remains that where a party to a contract breaches its terms as to cause a loss to the innocent party, the party in breach is obligated to restore the innocent one as close as possible to the position he would have been had there been no breach<sup>[1]</sup>.

18. Here, both sides agree that the plaintiff would earn monthly commissions ranging between Kshs.140,000/= and Kshs.160,000/= in the words of DW1 on cross examination. That to my mind is sufficient evidence of earning that was lost when the contract was wrongfully terminated. That is a loss I consider tangible and for which the plaintiff is entitled to recompense.

19. The plaintiff has pleaded the loss and claimed same at the rate of Kshs 150,000 per month for 12 months, so as to take the face and character of special damages. No plausible challenge was mounted against the claim by the defendant. I do find that there is a reasonable yardstick availed by the plaintiff to help measure his loss as to be able to put it in the position he would have been if not for the breach<sup>[2]</sup> and I do enter judgment for the plaintiff in the sum of Kshs 2,100,000 being loss of income for a period of 12 months. In **Hadley v Balendale {1854} 9 EX 341** the principle of the law applicable was stated to the effect that *where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time.*

20. Having found and held so, I find that after restitution, nothing remains as an injury to be compensated by any additional awards. For that associate myself with the sentiments of the court in *Engineer Francis N. Gachuri v Energy Regulatory Commission (2011) eKLR* where it was held that:

**“There is no provision for payment of damages to the date of retirement because employment like any other contract provides for exit from the contract. The fact that the claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the un procedural or lack of substantive reason for the termination. No employment is permanent and that is why the Employment Act does not mention the word permanent employment.”**

21. In conclusion I do enter judgment for the plaintiff against the defendant in the sum of Kshs 2,100,000 plus costs and interests. Interest shall be computed from the date of the suit and at court rates till payment in full

**Dated, signed and delivered at Mombasa this 26th day of February 2021**

**Patrick J O Otieno**

**Judge**