



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 648 OF 2005

BETWEEN

ROYSAMBU DISTRIBUTORS LIMITED.....PLAINTIFF

AND

KENYA BREWERIES LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff's case is set out in the Plaint dated 19th June 2003 and amended on 17th June 2005. At the material time, the Plaintiff was a stockist of the Defendant's products having been appointed as such through the Defendant's distributor, Kamahuha Limited. Between the year 1999 and 2000, the Defendant operated a trade incentive programme dubbed "FREE BEER ISSUE" which was open to the Defendant's staff and customers. Under the programme, the Defendant would issue free beer vouchers marked "Liquid Only" to its staff and customers who would then present them to the distributors and or stockists for the physical supply of the beers indicated in the voucher. According to the Defendant the Free Beer Programme was "liquid only" meaning that distributors and/or stockists were required to return the empty bottles to the Defendant.

2. The Plaintiff's case is that it honoured the vouchers by supplying beer worth Kshs. 1,292,715.00 which formed part of its stock and lost income by way of profit by supplying 42,343 cases at rate of Kshs. 45 per case thus making a total loss of Kshs. 1,905,435.00. Its Managing Director wrote to the Defendant requesting it to credit the Plaintiff with the beers it had issued on account of the vouchers and upon receiving the claim, the Defendant reconciled its accounts with those of the Plaintiff and established that in April, May and June 2000, the Plaintiff had failed to return the empties to the Defendant.

3. The Defendant states that its reconciliation found that the Plaintiff's account accrued a debit balance of Kshs. 7,541,480.00 being the value of the unreturned empties, which forms the basis of its counterclaim.

4. On 28th June 2001, the Defendant terminated the contract between the Plaintiff and Kamahuha Limited for the supply of beer by directing Kamahuha Limited to stop supplying the Plaintiff with beer. As a result, the Plaintiff claims that it closed its business as a beer stockist thus leading to loss of business. The Plaintiff thus claimed Kshs. 3,198,150.00, damages for the termination of the contract and for loss of business from the 28th June 2001 until the date of judgment.

5. The Defendant filed its Statement of Defence, Set-off and Counterclaim dated 5th August 2013 and amended on 10th May 2016. It denied the Plaintiff's claim and claimed Kshs. 7,541,481.00 being the value of 9,923 cases of beer collected by the Plaintiff and empties not returned. The Defendant states that it shall Set-off the value of the free beer issued to the Plaintiff against the value of its unreturned empties.

6. This suit failed to take off on a number of occasions and for varied reasons. When it came up for hearing on 10th February 2021, I rejected the Plaintiff's application for adjournment. When the matter was called out after the call over, the Plaintiff's counsel indicated that he did not have instructions. He therefore did not call any evidence and as a result, I dismissed the claim and directed the Defendant to proceed with the Counterclaim.

7. At the hearing, the Defendant called its Legal Manager, Eva Kagonda (DW 1) as its witness and produced documents contained in its list of documents dated 14th July 2008 and 11th May 2016 in support of the claim. It also filed written submissions.

8. DW 1 reiterated that the free beer vouchers were marked "liquid only" meaning that once one is given free beer, empties were to be returned to the Defendant by the respective distributors and/or stockists. She stated that despite the vouchers indicating "liquid only", the Plaintiff collected and failed to return a total of 9,923 cases of beer taken in April, May and June 2000 and that each case was valued at Kshs. 760.00 hence the Plaintiff's account had a debit balance of Kshs. 7,541,480.00. By a letter dated 18th July 2000, the Defendant notified the

Plaintiff of the outstanding amount and requested for payment and that the Plaintiff, in its reply vide the letter dated 30th July 2000 through its Managing Director claimed that it was not aware of how the vouchers were administered and that the empties must have been taken by the Defendant's staff as full beer or as total cash. DW 1 added that the Defendant, in an effort to resolve the dispute wrote the letter dated 7th September 2000 to the Plaintiff stating that it was willing to settle its claim if it cleared its debit balance of Kshs. 7,541,480.00.

9. DW 1 denied that the Defendant ever communicated to the Plaintiff that it had cleared the debit balance of Kshs. 7,541,480.00 as alleged in the letter dated 25th August 2000 adding that the said letter is a forgery. Moreover, that if the Plaintiff had been cleared it is strange that it did not acknowledge receipt of the same. DW 1 confirmed that the Defendant through its Company Secretary received a demand note dated 30th April 2003 from the Plaintiff claiming that the Defendant owed it Kshs. 1,708,205.00 allegedly incurred through the Defendant's Free Beer programme but that the Plaintiff reduced the claim to Kshs. 1,292,715.00 without giving a detailed breakdown how the figure was arrived at.

10. DW 1 further stated that the Defendant's investigations revealed that the free beer vouchers were fraudulently obtained by its staff and used at the Plaintiff's business in collusion with the Plaintiff for their benefit. That Defendant's staff found to have perpetuated the fraud were suspended. DW 1 maintained that termination of the Plaintiff's contract as a stockist was lawful.

11. Although the Defendant's counterclaim is not defended, the Defendant bears the burden of proving its claim on the balance of probabilities. Since the Plaintiff's claim was dismissed, the Set-Off which is contingent on the success of the Plaintiff's claim must fall by the wayside leaving the issue whether the Defendant is entitled to Kshs. 7,541,480.00 as the only issue for determination.

12. I have gone through the schedule of Free Issue Vouchers processed between April and June 2000 and I am satisfied that the Plaintiff was supposed to issue the vouchers in exchange beers but return the empties after consumption to the Defendant's distributors and/or stockists. The Defendant had stated that 9, 923 cases of beer collected were expected to be returned with each case was valued at Kshs. 760.00 hence the Defendant proved that the Plaintiff owes it the sum of Kshs. 7,541,480.00 the value of the unreturned cases.

13. Since the Plaintiff's suit has been dismissed, its claim for Kshs. 1,292,715.00 cannot be set off against the Defendant's counterclaim. I therefore find and hold that the Defendant has proved its counterclaim on a balance of probabilities to the extent of Kshs. 7,541,480.00.

14. I enter judgment for the Defendant against the Plaintiff for Kshs. 7,541,480.00. This sum shall accrue interest from the date of filing the Statement of Defence, Set-Off and Counterclaim. The Plaintiff shall bear the cost of the dismissed claim and the counterclaim.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Wachakana instructed by Wachakana and Company Advocates for the Plaintiff.

Ms Gatohi instructed by Ndung'u Njoroge and Kwach Advocates for the Defendant.