



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 315 OF 2003**

**LEISURE LODGES LIMITED.....PLAINTIFF**

**-VERSUS-**

**TELKOM KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

1. On 15<sup>th</sup> December, 2003, the plaintiff, Leisure Lodges Limited filed a claim against the defendant, Telkom Kenya Limited. The claim was amended on 8<sup>th</sup> March, 2017. The claim was on account of access fees the defendant allegedly overcharged the plaintiff for maintenance of internal telephone extensions. It was the plaintiff's case that the said charges were only payable to the defendant if the plaintiff had not retained the services of a private maintenance contractor. The plaintiff averred that it had contracted Tele Bell Limited to provide maintenance services for its internal telephone extensions.

2. It was alleged that despite the plaintiff demanding for a credit of the overcharged access fees, the defendant adjusted the plaintiff's account but only backdated the adjustment to August, 2002 but declined to give the plaintiff the credit for the entire period the said charges were unlawfully made from April, 1991 in respect to its account DNA P/L 320-2620. The plaintiff claimed the full rebate for the said access fees unlawfully charged to the said account from April, 1991 to July, 2002 in the sum of Kshs. 10,987,190.25. It also claimed interest thereon at the prevailing interest rate from April, 1991 to the date of payment and/or as the court shall order. The plaintiff also prayed for the costs of the suit and such further relief as the Court may deem just and expedient.

3. The defendant filed its statement of defence on 23<sup>rd</sup> April, 2004. A draft amended statement of defence dated 19<sup>th</sup> October, 2006 was filed together with an application seeking leave to amend the defence. The said application had a prayer for the draft amended defence to be deemed as being properly on record.

It is not clear from the court proceedings when the said application was heard and determined.

4. On 24<sup>th</sup> February, 2017 this court granted the parties leave to file amended pleadings. On 15<sup>th</sup> May, 2017 the defendant filed a further amended defence and counter-claim in which it denied that the plaintiff had a contract with Tele Bell Limited, and if there was, the plaintiff did not notify the defendant until 27<sup>th</sup> August, 2002.

5. The defendant also averred that upon being notified of the access fees overcharged, it adjusted the plaintiff's accounts on 31<sup>st</sup> December, 2002 and gave the plaintiff a total of Ksh. 363,712.00 in credit and the correct access fees was charged thereon. The defendant averred that after it adjusted the plaintiff's account, it credited it with effect from August, 2002.

6. The defendant alleged that the plaintiff's actions of engaging a private contractor without notifying the defendant had brought the disagreement, if any, between them. The defendant averred that it could not have made adjustment from April, 1991 to 2002 as the plaintiff never notified it of the anomaly until 27<sup>th</sup> August, 2002. The defendant alleged that the plaintiff's actions were malicious, fraudulent and not done in good faith. The defendant outlined the particulars of the alleged fraud committed by the plaintiff in the further amended defence and counter-claim filed on 15<sup>th</sup> May, 2017.

7. In the counter-claim, the defendant claimed against the plaintiff the sum of Kshs. 10,987,190.25 being the outstanding telephone bill lawfully charged its account DNA P/L 320-2620 from 1991 to July, 2002. The defendant also prayed for general damages for breach of contract and interest on the 2 prayers at court rates until payment in full. It also prayed for costs of the counter-claim and any other relief as the court may deem fit to grant.

8. On 29<sup>th</sup> June, 2017 the plaintiff filed a reply to the further amended defence and counter-claim in which it averred that there was no contractual or any basis at all for the defendant to charge monthly "access fees" and any such charges debited to the plaintiff's account No.

DNA P/L 320-2620 and if any amount so charged was wrongly charged, it amounted to unjust enrichment which the defendant should account for and refund to the plaintiff in full.

9. The plaintiff also averred that it was the defendant who gained undue advantage by wrongly charging the plaintiff monthly "access fees" and failing to refund the same in full once the plaintiff discovered the same and duly notified the defendant. The plaintiff denied the particulars of fraud set out by the defendant against it in the further amended statement of defence and counter-claim.

10. In regard to the counter-claim, the plaintiff denied the same and stated that the defendant's claim was misconceived, bad in law and time barred and prayed for the counter-claim to be struck out or dismissed with costs.

11. In support of its case, the plaintiff called 1 witness who testified as PW1. He was John Kioko Mutua, an Executive Director of the plaintiff company. He indicated that he had worked for the plaintiff for 16 years and 8 months as at the time he testified on 12<sup>th</sup> October, 2017. He indicated that he was a Chief Executive Officer for 12 years before he became an Executive Director. He stated that previously, Leisure Lodge Hotel which was built in 1972 was known as South Beach Leisure and it is owned by Leisure Lodges Limited. He adopted his statement filed on 15<sup>th</sup> May, 2017 as evidence and proceeded to elaborate that the defendant used to be the monopoly telephone provider and provided Leisure Lodges Hotel (the Hotel) with both national and international lines.

12. PW1 adduced evidence that the defendant gave the Hotel a pilot line No. 32026020 before the year 1991, which had various extensions. He stated that they did an audit in July, 2002 and found that the plaintiff's internal telephone extensions were charged monthly access fees for maintenance by the defendant. He testified that the Hotel Accountant by the name Patel gave them a schedule of the charges for April, 1991 to July 2002, which PW1 produced as P. exhibit 1. He indicated that the charges came to Kshs. 10,987,190.25. He produced P. exhibit 2 which was a file containing a bundle of receipts for the payments made to the defendant for advance access fees. He stated that the charges should not have been reflected in the bills because maintenance of the lines was outsourced from another company. He further stated that the outsourcing had been approved by the plaintiff's Board Chairman and that the defendant provided them with a list of service providers for maintenance.

13. PW1 indicated that they then contracted Tele Bell Limited (Tele Bell Ltd) to service the telephone extensions as per a contract dated 5<sup>th</sup> September, 1996. He also indicated that Tele Bell Ltd was an agent of the defendant. He stated that after the Hotel contracted Tele Bell Ltd, the defendant should have stopped charging it access fees. He produced the contract as P. exhibit 3. He indicated that a letter dated 5<sup>th</sup> September, 1996 from Tele Bell Ltd quoted the maintenance and survey charges as Kshs. 250,000/=. He produced a copy of the said letter.

14. PW1 produced another letter dated 1<sup>st</sup> September, 2007 which renewed the service contract with Tele Bell Ltd. He also produced copies of 8 letters from the plaintiff addressed to the defendant. He stated that in the 1<sup>st</sup> letter they were requesting the defendant for a credit of the payment for the advance access fees for the pilot line. He stated that the 2<sup>nd</sup> letter dated 9th August, 2002 was a reminder of the 1<sup>st</sup> letter in which the plaintiff was seeking a refund by either cash or by way of cheque.

15. PW1 testified that on 20th November, 2002 the defendant wrote to them saying that they had been undercharging the plaintiff for telephone access fees. He stated that prior to that, they had written several letters which he produced in a bundle as P. exhibit 6(a) to (d). PW1 further testified that on 31<sup>st</sup> December, 2002 the defendant wrote to the plaintiff stating that it had credited the latter's account with Kshs. 363,712.20. On 13<sup>th</sup> January, 2003, the defendant was informed by the plaintiff that it had been given a copy of the contract by Tele Bell Ltd. PW1 produced 2 letters dated 31<sup>st</sup> November, 2002 and 20th December, 2002 from the defendant as P. exhibits 7(a) and 7(b). PW1 stated that the defendant did not pay back the other amounts going back to 5<sup>th</sup> September, 1996. He further stated that the plaintiff issued the defendant with a demand letter but there was no response.

16. It was PW1's evidence that the counter-claim filed by the defendant for the sum of Kshs. 10,987,190.25 was wrong as the plaintiff was claiming a similar amount from the defendant. PW1 also testified that through a letter dated 24<sup>th</sup> January, 2003 addressed to the plaintiff's Financial Controller, the defendant claimed the sum of Kshs. 4,013,952.35 or it would disconnect the plaintiff's telephone line and the plaintiff paid the said amount.

17. PW1 testified that the plaintiff's claim was not fraudulent as alleged by the defendant in its statement of defence. He also stated that the amount the defendant was claiming was not for any services rendered to the plaintiff and that the defendant was not entitled to the costs in the counter-claim. He prayed for the plaintiff's case to be allowed.

18. The defendant called Peter Tonui, its former employee as a witness. He stated that he retired after working for the defendant for 22 years. He adopted his statement filed on 15<sup>th</sup> May, 2017 as his evidence. He stated that he previously worked as the Area Manager of Telkom and that he used to cover Mombasa, Kilifi and Taita Taveta Counties. DW1 testified that on 16th July, 2002, the plaintiff wrote to the defendant about overcharging on access fee for line No. 3202620 for external and internal extensions. He stated that on 27th August, 2002 the plaintiff gave them information that they had engaged a sub-contractor by the name Tele Bell Ltd to maintain internal extensions and that the letter with the said contractor was dated 5<sup>th</sup> September, 1996.

19. DW1 stated that the defendant asked for further information about it and that on 5th December, 2002, the plaintiff gave the defendant a copy of the maintenance contract. He further stated that the defendant reviewed the access fee downwards from Kshs. 83,937.00 to Kshs. 6,240.00 which was reflected on the bill for November, 2002. He stated that the said billing had been captured in the bills for August to October, 2002 and came to Kshs. 363,712.20, which sum was inclusive of VAT. DW1 indicated that they reviewed the bill to maintain their customers. It was DW1's evidence that when the defendant received the sub-contract, it withdrew its staff from servicing the internal extensions.

20. He stated that on 3<sup>rd</sup> December, 2002, the plaintiff went back to the defendant asking for a further discount going back to the year 1991

as it was claiming that it had been overcharged. He stated that the plaintiff had been one of their customers since the year 1971.

21. DW1 testified that the defendant declined the requests by the plaintiff because it never informed the defendant that it had taken a sub-contractor in its company. He further indicated that if the plaintiff had given the defendant the sub-contract agreement it would have looked at the capacity of the company to maintain the lines, and if it had found that the said company did not have capacity to do so, the defendant would not have allowed it to undertake the work.

22. He stated that the defendant kept on offering services to the plaintiff from the exchange by way of maintenance and a signal internally but externally Tele Bell Ltd continued offering internal maintenance services. He explained that the defendant used to offer a dedicated line to the plaintiff which was maintained 24 hours a day. He also stated that if the dedicated line was affected then there would be no telephone access to the plaintiff.

23. The plaintiff's Counsel filed written submissions on 10<sup>th</sup> November, 2020. The defendant's Counsel did not file any. Mrs Kibe, learned Counsel for the plaintiff highlighted their written submissions by stating that they had tabulated the summary of the amounts charged by the defendant, yet the plaintiff had sub-contracted Tele Bell Ltd for maintenance of the extensions following approval by the defendant. She stated that in July, 2002 the plaintiff wrote to the defendant requesting to be given credit for the amount charged from April 1991 to July 2002.

24. Mrs Kibe submitted that the defendant did not give the plaintiff credit from April, 2001 to December 2002 as it said that it discovered the erroneous charges and payments in August, 2002. She contended that the defendant acknowledged that it did not provide the service it had charged the plaintiff for and that it had the sub-contract with Tele Bell Ltd.

25. Counsel for the plaintiff submitted that the claim herein is with regard to the consideration paid by the plaintiff to the defendant but no services were rendered as the same was done by Tele Bell Ltd. She indicated that Kshs. 363,712.00 was credited to the plaintiff by the defendant and that the same was an admission made by the defendant that it received the said amount but provided no services.

26. Mrs Kibe urged this Court to grant orders for the defendant to pay back the amount of money it received from the plaintiff with no services being provided. She also prayed for 18% VAT as the amounts paid by the plaintiff to the defendant included the said charge. She also stated that the credit made by the defendant in the sum of Kshs. 363,712.00 included 18% VAT. She indicated that there was no evidence given by the defendant to refute the evidence of PW1 on the fact that some money was not paid back to the plaintiff.

27. The plaintiff's Counsel indicated that in his witness statement, the defendant's witness (DW1) admitted that he was aware that the defendant had sub-contracted Tele Bell Ltd to provide maintenance services and therefore credit was given to the plaintiff for the amount paid for access fees. She stated that the claim for a full refund was warranted as no services were rendered and allowing the defendant to retain the said amount would result in unjust enrichment. She relied on the case of **Samuel Kamau Macharia v Kenya Commercial Bank & Others** [2003] eKLR, where Kuloba J defined the term unjust enrichment. Mrs Kibe indicated that the plaintiff's claim falls under non-voluntary conferment of benefit such as through mistake or on account of compulsion and voluntary conferment of benefit for total failure of consideration.

28. It was submitted that the defendant decided to give credit to the plaintiff for a few months but not for the full amount. The plaintiff's Counsel relied on the case of **Sedina Agencies Ltd. v Presbyterian Foundation** [2017] eKLR, where the Court found that there was no consideration for the payment the plaintiff made hence it was entitled to a refund of its money paid to the defendant.

29. While submitting on the issue of limitation of time, Mrs Kibe submitted that the acknowledgement of the amount paid by the plaintiff to the defendant revived the cause of action on 20<sup>th</sup> November, 2002 being the last day of such acknowledgement. She relied on the case of **Laemthong Rice Co. Ltd v Principal Secretary Ministry of Finance** [2002] 1 EA 119 and **Shire v Thabiti Finance Co. Ltd** [2002] 1 EA 279 to support her submission.

30. With regard to the issue of interest, Mrs Kibe relied on the case of **Sedena Agencies Ltd v Presbyterian Foundation** (supra) and stated that the Court in the above case said that the purpose of interest is to compensate the plaintiff for the time his money was kept away from him. She also prayed for the suit to be allowed with costs. She also prayed for interest from April, 2002.

31. Mr Said, the defendant's learned Counsel in making oral submissions acceded to the fact that the plaintiff and the defendant had an agreement for maintenance of internal extensions at the plaintiff's premises. He relied on the evidence of DW1.

32. The defendant's Counsel stated when the defendant was informed that Tele Bell Company was maintaining the said extensions at the plaintiff's premises, the defendant stopped charging for the same. He stated that DW1 had indicated in his evidence that the plaintiff was not entitled to a refund but due to liberalization of the market for telephone services, the refund was made.

33. The defendant's Counsel observed that Tele Bell Ltd had not been made a party to this suit and that the plaintiff did not call a witness from the said company to confirm in court that they were maintaining the internal telephone lines for the plaintiff.

34. He also submitted that the letter dated 31<sup>st</sup> December, 2002 was not an admission by the defendant but was written because it did not want to lose a valuable customer. He contended that the suit herein was filed outside the time prescribed for limitation of actions.

35. Mr. Said stated that issue of unjust enrichment did not arise as the defendant provided services to the plaintiff. He prayed for the suit to be dismissed with costs to the defendant.

36. An agreed list of issues had been filed by the Counsel for the parties on 16<sup>th</sup> July, 2017. The said issues are-

- (i) Was the defendant Company established after the defunct Kenya Posts and Telecommunication Corporation?
- (ii) If so, did it take over its predecessor's assets and functions as a provider of telecommunication services including the provision of fixed telephone lines?
- (iii) Was the plaintiff a registered subscriber of the defendant's services? If so, was it provided with a fixed telephone service at the Diani Telephone Exchange under account No. DNA P/L 320-2620, a main line with numerous extensions?
- (iv) Did the defendant debit all charges and fees for the plaintiff's use of the said telecommunication services including "access fees" every month?
- (v) What was "access fees" and when was it chargeable to a subscriber?
- (vi) Did the plaintiff have a contract with Tele Bell Limited to provide maintenance services on its internal telephone extensions? If so, when did the plaintiff notify the defendant of the said contract?
- (vii) After notification, did the defendant adjust the plaintiff's account and credit it from August, 2002?
- (viii) Did the defendant wrongly charge the plaintiff "access fees" every month from April, 1991 to August, 2002?
- (ix) Is the plaintiff entitled to a reconciliation of its account for DNA P/L 320-2620 from April, 1991 to August 2002 and a refund of the "access fees" charged from April, 1991 to August, 2002?
- (x) Does the defendant owe the plaintiff Kenya Shillings Ten Million (Kshs.10,000,000/=) charged as "access fees" from April 1991 to August, 2002 together with interest and if so, from which date?
- (xi) Is the defendant entitled to claim general damages from the plaintiff for breach of contract? If so, what is the quantum thereof?
- (xii) Were the plaintiff's actions from April, 1991 to August, 2002 fraudulent?
- (xiii) Is the defendant's counter-claim against the plaintiff time barred?
- (xiv) Who should pay the costs of the suit?

**Issues Nos. 1, 2, 3, 4 and 5.**

37. It is not disputed that the defendant, Telkom Kenya Limited, was established to take over the services of the defunct Kenya Posts and Telecommunications Corporation. It therefore took up its predecessor's assets and functions as a provider of telecommunication services including the provision of fixed telephone lines. Both the plaintiff and the defendant were in agreement that the plaintiff was a registered subscriber of the defendant's services. The plaintiff as per the evidence of PW1 and DW1 was provided with a fixed telephone service at the Diani Telephone Exchange under account No. DNA P/L 320 – 2620 which was a main line with several extensions. From the documentary evidence produced by PW1, it was evident that the defendant debited charges and fees for the plaintiff's use of the said telecommunication services including "access fees" every month up to July 2002. From the evidence adduced, the access fees was charged for the use and maintenance of telephone extensions from the PABX at the Hotel to different places in the said establishment.

**Issues Nos. 6, 7 and 8**

38. The plaintiff exhibited and produced a contract with Tele Bell Ltd for provision of maintenance for its super hybrid PBX system Model No. 6MNIS3. The said service contract was signed on 5<sup>th</sup> September, 1996 by R.C Kantaria, the Chairman of the plaintiff and William G. Njiri on behalf of Tele Bell Ltd. It is shown to be a full maintenance contract.

39. According to the documents produced by the plaintiff, it informed the defendant of the existence of the said contract through a letter dated 27<sup>th</sup> August, 2002. The said letter stated the following-

*"Further to our letter of 9th August, 2002, we wish to clarify as follows-*

*1. We, Leisure Lodges Ltd, do maintain the service and repairs of our telephones from the PABX to all extensions within the property. This includes all direct lines.*

*2. Telkom Kenya Ltd. has responsibility (sic) for maintaining telephone lines from their exchange to out PABX. This service does not require a contract since Telkom are simply maintaining their own installations. We trust that the above fully clarifies the situation."* (emphasis added).

40. In a follow up letter dated 22<sup>nd</sup> November, 2002 the plaintiff informed the defendant that it was stressing upon them that it had been maintaining the lines from the PABX to all the extensions within their compound. The plaintiff further informed the defendant that it was looking into their records of the past 7 years to secure documents to support their point in that regard.

41. The plaintiff wrote several reminders to the defendant which responded vide a letter dated 20th November, 2002. In the said letter, the defendant informed the plaintiff *inter alia*-

*“In July, 1998 the company issued instructions to remove Access fee on external extensions within the same compound, if a customer engages “a private contractor” to maintain them. In your letter of 27th August, 2002, you have alleged that you have been maintaining the lines from the PABX to all the extensions within your compound. However, we have not evidence (sic) in our records to support your allegations. We neither have a signed contract from your “maintenance contractor” nor any other authority advising us to terminate the charges. In view of the foregoing, charges being raised are proper and payable.”* (emphasis added).

42. In a subsequent letter dated 31<sup>st</sup> December, 2002 from the defendant to the plaintiff, it wrote as follows-

*“...this is in reference to your various letters to this office and in particular the letter dated 27<sup>th</sup> August, 2002 informing this office that you have engaged a private maintenance contractor. It has been noted that your contract with Tele Bell Ltd is dated 5<sup>th</sup> September, 1996. However, we had no information to that effect in our records nor did we have any knowledge of the contract until the 27<sup>th</sup> August, 2002. In view of the foregoing the company has seen it fit to adjust your account backdating to August, 2002. A total credit of Kshs. 363,712.20 inclusive of VAT has been reflected in your November, 2002 bill and the correct access fee charged. In view of the foregoing you are kindly asked to pay the balance in full to put this matter to rest”* (emphasis added).

43. It is apparent from the above correspondence that the defendant adjusted the plaintiff's account and credited it from the month of August, 2002. As to whether the defendant wrongfully charged the plaintiff access fees every month from April, 1991 to August, 2002, DW1's evidence was that the plaintiff never informed the defendant that it had sub-contracted Tele Bell Ltd to provide maintenance for its internal extensions until the 27<sup>th</sup> August, 2002. The plaintiff's contention was that the said information was communicated to the defendant by Tele Bell Limited. The plaintiff further stated that Telkom approved and gave the plaintiff the nod to go ahead in sub-contracting Tele Bell Ltd to render the said services.

44. The degree of proof in civil cases was well pronounced in the case of **Miller vs Minister of Pensions** [1947] AC cited with approval in **D.T Dobie Company (K) Limited v Wanyonyi Wafula Chebukati** [2014] eKLR, where the Court stated thus-

*“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say “we think it more, probable than not, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standards will not have been attained.”* (emphasis added).

45. The plaintiff bore the burden of proof as it had made allegations that the defendant had been notified of the plaintiff's sub-contract with Tele Bell Ltd. This court's view of the evidence adduced orally by the two witnesses who testified for the parties in this case and the documentary evidence relied on by the plaintiff fell way short of the threshold of the proof required in civil cases.

46. The plaintiff failed to produce documentary evidence to prove the date when Tele Bell Ltd informed the defendant that it had been sub-contracted to provide maintenance services of the plaintiff's extensions from its PABX. If at all the said sub-contractor had informed the defendant and submitted a copy of the said sub-contract between it and the plaintiff, a copy showing the date when it was submitted to the defendant was not produced in Court by the plaintiff.

47. The plaintiff alleged that the defendant approved the provision of maintenance services of its extensions by Tele Bell Ltd but failed to produce any evidence of such approval. The plaintiff also failed to produce evidence that it or Tele Bell Ltd communicated the said information to the defendant before 27th August, 2002. Given the said circumstances, the defendant cannot be faulted for having charged the plaintiff the access fees from 5<sup>th</sup> September, 1996 to July, 2002 since the plaintiff was kept it in the dark.

48. Section 107 (1) of the Evidence Act provides as follows-

*“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.”*

49. The evidential burden of proof lies with the plaintiff which invoked the aid of the law in this case. The Court of Appeal in the case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi** [2013] eKLR, when addressing the issue of evidential burden held as follows-

*“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “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.”*

50. The plaintiff in this case alleged that Tele Bell Ltd informed the defendant about the sub-contract it had entered into. It however failed to call a witness from Tele Bell Ltd to adduce evidence as to when the alleged communication took place. Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. The plaintiff did not discharge the burden of proof and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

51. Having considered the facts and the applicable law, it is evident that the plaintiff is not entitled to a reconciliation of its account for DNA P/L 320-2620 from April, 1991 to August 2002 and to a refund of the access fees being claimed. It is clear that the plaintiff was negligent and must bear the pain for its lack of prudence.

**Issues Nos. 10,11 and 12.**

52. Having found that the defendant was not informed of the sub-contract between the plaintiff and Tele Bell Ltd until 27<sup>th</sup> August, 2002, this court's finding is that the defendant does not owe the plaintiff Kshs. 10,987,190.25 charged as access fees from April, 1991 to August, 2002, together with interest and VAT.

53. The plaintiff is also not entitled to a claim for general damages for breach of contract. The measure of damages for breach of contract is quantifiable and a party cannot be awarded general damages for breach of contract. Such a claim must be specifically pleaded and proved, but in this case the plaintiff has failed to do so.

54. What is apparent to this court is that the plaintiff seems to have kept a meticulous record of its telephone bills but failed to retain the most essential document which would have nailed its case against the defendant, namely, the communication to the defendant about its sub-contract with Tele Bell Ltd, immediately after the said agreement was executed. No element of fraud was proved against the plaintiff by the defendant as none of the particulars of fraud set out in the further amended statement of defence and counter-claim was proved.

**Issues Nos. 13 and 14.**

55. The defendant in the said further amended defence and counterclaim dated on 12<sup>th</sup> May, 2017 claimed from the plaintiff the sum of Kshs. 10,987,190.25 together with interest from the date of filing the suit. It also sought general damages for breach of contract and costs of the counter-claim. The defendant's counter-claim is to say the least mischievous as the defendant largely copied and pasted the prayers sought by the plaintiff in its amended plaint dated 8<sup>th</sup> March, 2017 and filed on 15<sup>th</sup> March, 2017. The defendant did not attempt to adduce even an iota of evidence to prove the counter-claim which falls squarely on its feet.

56. The result is that the plaintiff failed to prove its claim and the defendant failed to prove its counter-claim on a balance of probabilities. The plaintiff's suit and the defendant's counter-claim are hereby dismissed for want of merit. The plaintiff shall bear the costs of its suit and the defendant shall bear the costs of the counter-claim.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 23<sup>RD</sup> DAY OF JULY, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

**Mrs. Kibe for the plaintiff**

**No appearance for the defendant**

**Mr. Cyrus Kagane – Court Assistant.**