



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 282 OF 2007**

**X-CITE NETWORK LTD.....PLAINTIFF**

**VERSUS**

**CELTEL KENYA LTD.....DEFENDANT**

**JUDGMENT**

1. By Distributorship agreement entered into between the plaintiff and the defendant dated 4/2/2009, the plaintiff, agreed to distribute, sell and retail various products on behalf of the defendant. It was a further term of the agreement that the Defendant may provide its products to the plaintiff on credit upon a bank guarantee as security.

At the material times to this suit, Barclays Bank of Kenya Ltd had provided a guarantee to the tune of Kshs.10,000,000/= to secure repayment to the defendants.

2. Sometimes in December 2017, pursuant to terms of the agreement the defendant terminated the distributorship agreement, and demanded a sum of Kshs.18,000,000/= as owing by the plaintiff, and further recalled the Bank guarantee with Barclays Bank Ltd.

On its part, the plaintiff demanded payment of Kshs.25,542,750/= being unpaid commissions; for sold and activated new prepaid sim cards as per the agreement introduced by the defendants on or about the 12/12/2006.

The plaintiff thus claimed pursuant to the agreement, that out of the sold prepaid sim cards, only 46,733 units prepaid units had been paid for, leaving out 63,997 units unpaid for.

3. By an Amended Plaint dated 18/4/2008, the plaintiff sought for

a) A temporary order of injunction to be issued against the Defendant by itself, its agents or servants restraining it against calling the Bank Guarantee and Idemnity with M/s Barclays Bank of Kenya Ltd until the arbitration dispute between the parties is heard and decided.

b) Judgment for Kshs. 25,524,750/=

c) Costs of the suit.

d) Interest at court rates from November 2007 until payment in full.

4. The Defendant filed an Amended Defence and Counter-claim on the 9/5/2008.

It was its statement that the termination of the distributorship agreement was interms of the agreement, and denied owing the sum of Shs. 25,542,750/= and counter -claimed for a sum of Shs.18,499,831/87/=

5. The Counter-Claim.

The defendant agreed in its Re-Amended defence 6/5/2008 that it had paid Kshs.10,000,000/= of the amount claimed leaving a balance of Shs.8,499,831/87/= and that has the as it (defendant) failed to meet its sales targets and or pay for the products collected, it terminated the Agreement on the 10/12/2007; and having recalled and applied the secured sum by the Bank guarantee of Shs.10,000,000/= the said sum of Shs.8,499,831/87/= remains owed to itself by the plaintiff.

The defendant therefore counter-claimed for:

a) Kshs.8,499,831/90

b) Interest on (a) at court rates till full payment; and

c) Costs of the suit.

6. In its defence to the counter-claim dated 29/4/2008, the plaintiff denied failing to meet the set targets, and if it did, which was denied, contended that the failure was occasioned by the Defendant by registering other Distributors in the same region where it was supposed to have a monopoly. It thus urged for dismissal of the plaintiffs claim and judgment in its favour.

7. Numerous and voluminous documents by way of statements of Accounts were filed and exchanged by each party.

Further the parties caused their Respective accountants to prepare and file their Reconciliation reports to assist the court understand the nature of their respective claims.

8. Being an extremely technical field, the preserve of Public Certified Accountants, by an order of the Court, each party appointed an accountant, to prepare reports, with the Mandate to enquire, examine and ascertain the totality of the property sold by the defendant to the plaintiff and the commission accrued during the period in question, 12/12/2006 to 31/12/2007.

9. The plaintiff appointed David Muchungu of KRESTOM KM & Co. who prepared a report that he filed on the 5/1/2017.

10. The Defendant appointed Joseph SEMBEI Mutua of MakeniMutua Certified Public Accountants K. He prepared two reports dated 10/12/2009 and 7/4/2011. Both accountants testified and defended their reports which were admitted as evidence. Two other witness testified for the plaintiff.

PW1 Peter Francis Rukahu Kinyua, a businessman involved in Distribution for Kencell, Celtel trading under X-Cite Network Ltd, the plaintiff.

PW2 Daniel Kama Rukahu is the General Manager of the plaintiff.

For the Defendant, DW1 one, an employee of the defendant testified as well as the accountant Joseph Sembei Mutua.

AGREED ISSUES.

Both Parties agree;

1) That the relevant period of distributorship for purposes of this suit is 12/12/2006 to 31/12/2007

2) That at date of filing of this suit, the Defendant had called in and been paid Kshs.10,000,000/=, being the proceeds of the guarantee issued by Barclays Bank of Kenya Ltd, which was applied to off set the debt of Shs.18,499,831/87/= owed by the plaintiff to the defendant.

3) By the above, the plaintiffs claim against the Defendant stands at Shs.15,524,750/= while the Defendant's counterclaim stands at Shs.8,499,831.87/=

Upon closure of the evidence, both parties filed written submissions. Mr. Kimatta Advocate for the plaintiff's submissions one dated and filed on the 8/5/2019 where the Defendant, represented by Mr. Ojiambo of Ojiambo & Co. Advocates filed his submissions on the 4/7/2019.

I have considered the parties pleadings, evidence and the submissions, including the voluminous documents filed.

Analysis and Determination.

As stated earlier, the relevant period of engagement between the parties was one year, 12/12/2006 to December 2007.

Thus, any units of simcards sold or distributed outside the said period will not be considered.

The computations on scratch cards purchased by the plaintiff from the Defendant is not disputed. This is borne by examination of the statements of Account, invoices of the scratch cards sold and the credit notes between the parties.

The dispute is therefore the amount of mobile kits (Sim Cards) and lines sold to the plaintiff by the Defendant during the relevant period.

Further disputed is the number of lines sold to the public by the Defendant, the exact lines sold by the plaintiff to the public, the activated lines, and the commission earned on the said sim cards/lines.

This dispute, due to the technicality was referred to the experts, and the Reports alluded to earlier prepared.

## THE FIRST REPORT BY MAKENI MUTUA CERTIFIED PUBLIC ACCOUNTS K

Upon interrogating the documents, in his 1<sup>st</sup> Report dated 10/12/2009, Joseph Sembei Mutua, accountant found that the Stocks of Sim Packs were 142,157 Units, with the opening stock of 42,235 Sim Packs, plus 99,924/= purchased during the period; with 35,287 Sim cards not accounted for.

Upon analysis and tables stated, this accountant made findings that the differences in number of SIM packs translated into the remuneration variances stated at Table 6, that during the relevant period, total remuneration of Kshs.19,124,895/= accrued in favour of X-Cite Network, the plaintiff by the defendant.

## REPORT BY KRESTON KM

This report was prepared to counter the findings of the 1<sup>st</sup> Report by MakeniMutua – above. The accountant agrees that the documents presented to him were, agreed to by both parties, and the same used by Makeni Mutua in his report, and concurred with him on numerous aspects.

He agrees that at time of termination of the distributorship agreement, 42,235 – Sim packs were held by agents in the market and were to revert to Celtel, the defendant, and that the relevant period, Celtel sold and delivered to X-Citde 99,924 Units, thus total sim packs available at 142,159, same position with 1<sup>st</sup> report.

He further agreed that the total remuneration attributable to the 54,658 and activated had a remuneration of Shs.19,124,895/=.

He also made a finding that 35,287 sim packs were left unaccounted, and further that 106,872 sim packs were remunerated; and that 23,347 sim packs though activated, did not qualify for remuneration.

In his claim computation, the report makes a conclusion that

· 14,335 Units were invoiced but not paid –	Shs.6,384,931/=
· 28,957 sim packs held by X-Cite	– Shs.2,898,700/=
· 35,287 un-accounted for @347	– Shs.12,244,589/=
TOTAL	- Shs.21,525,220/=
· Add, interest after tax	– Shs.33,316,736/=
TOTAL AMOUNT OF CLAIM	- Shs.54,841,956/=

## The 2<sup>nd</sup> Makeni Mutua Report

This was prepared in response to the KRESTON KM report.

While both accountants agreed substantially on the available, not accounted sim packs, and for those that qualified for remuneration.

This report makes findings that (table 7);

- Number of Sim packs sold to X-Cite – 99,924/=
- Invoice value – Shs.9,439,340/81 in favour of Celtel Kenya Ltd.
- Remuneration in favour of X-Cite – 19,124,895/=

Looking at the three expert reports, what is stated to have been in favour of the Defendant during the relevant period is Kshs.19,124,895/=

From the evidence, pleadings, out of the total claim found by both parties accountants to be due is Kshs.19,124,895/=.

A sum of Shs.10 million was applied to the Credit of Celtel (Defendant) when Barclays Bank of Kenya recalled its guarantee, leaving a sum of Kshs.9,124,895/= unpaid, to the Credit of Celtel Kenya Ltd.

The defendant (Celtel) has however stated that what is unpaid by X-Cite Networks Ltd is Kshs.8,499,831.90/= in its counter-claim

The two experts in their reports agree on the main issues, and come to same conclusions; that upon examining the voluminous statements of accounts, the conclusion is:

That the plaintiff owes the Defendant the sum of Shs.9,123,895/ as hereunder;

a) The commission earned by the plaintiff- Kshs.19,124,895/=

b) Out of which Kshs.10 million was offset by applying the guarantee amount, balance – Shs. 9,124,895/=

By the foregoing, and the plaintiff having not called other sufficient evidence to counter the experts conclusion to prove that it is owed the sum of Kshs.25,524,750/= as pleaded in its Amended plaint. I come to the conclusion that the amount plaintiff has failed to prove its claim to the satisfaction of the court. The claim is therefore dismissed.

On the Defendant’s counter claim, I am persuaded by the expert evidence adduced, tabulations and tables attached to the reports by the two accountants that the counter-claim is merited. Though I find a sum of Shs.9,124,895/= as outstanding, the amount stated in the counter-claim is Kshs.8,499,831/90.

I am bound by the pleading. I therefore find and hold that the defendant has proved its counter – claim to required standard, upon a balance of probability. I proceed to allow the same.

**INTEREST.**

Section 26(1) of the Civil Procedure Act grants power and discretion to the court to order interest at such rate as it may deem reasonable, either from date of the filing of the money claim or any other period before institution of the suit.

To that end, I direct and order that the sum of Shs.8,499,831.90 payable to the defendant by the plaintiff shall accrue interest at court rates from the date of filing counter – claim until payment in full.

**COSTS.**

Section 27 of the Act provides that costs shall follow the event, unless the court, for good reason otherwise orders.

No reason has been advanced as to why the court ought not order costs to the party who succeeds in this suit.

Accordingly, I order that the plaintiff pay costs of the counter – claim to the defendant.

For the above reasons, the plaintiff’s case is dismissed and the Defendant’s counter – claim allowed in the sum of Kshs.8,499,831.90/=s plus costs and interest at court rates from the date of filing of the counter-claim.

Orders accordingly.

**Dated, Signed and Delivered at Nairobi electronically this 27<sup>th</sup> day of May, 2020.**

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**J.N. MULWA**

**HIGH COURT JUDGE.**