



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 661 OF 2007

NASSER AHMED T/A AIRTIME BUSINESS SOLUTIONS.....PLAINTIFF

-VERSUS-

CELTEL KENYA LIMITED.....DEFENDANT

JUDGMENT

1. Through an amended plaint dated 25th July 2014, the plaintiff herein, NASSER AHMED t/a AIRTIME BUSINESS SOLUTIONS, sued the defendant, CELTEL KENYA LIMITED, seeking the following orders:

a) An order for accounts of the business between the plaintiff and the defendant to date

b) Payments for;

i. Installed sims SIM cards	Kshs 36,354,630.00
ii. Partner support	Kshs 5,706,142.00
iii. Remuneration	Kshs 15,000,000.00
iv. Container deposit	Kshs 2,000,000.00
v. Holiday Prepaid Uhuru bonus balance	Kshs 2,965,161.00
vi. Regional target incentive commission	Kshs 384,804.00
vii. Damages for the loss of business	<u>Kshs 60,000,000.00</u>

TOTAL Kshs 122,410,737.00

c) An injunction restraining the defendant by itself, its agents, servants and others claiming through it from interfering with the plaintiff's ownership or operation of his business outlets shops, containers and other business assets or from recalling or realizing the Bank Guarantees issued in favour of the plaintiff.

d) Costs of the suit.

e) Interest on (a) and (b) at Commercial Bank Rates.

f) Such further or other remedy as this Honourable court may deem apt to grant.

2. A summary of the plaintiff's case, as stated in his further amended witness statement dated 30th July was that he on 24th February 2004 entered into a Stock Distributorship Agreement (SDA) with the defendant's predecessor Kencell Communications Limited (hereinafter "Kencell") to stock and distribute the defendant's products to retail outlets. The plaintiff states that he also signed a Community Payphones

Distribution Agreement dated 18th August 2004 and further agreement for Electronic Voucher Distribution (EVD) and Electronic Voucher Distribution services dated 28th October 2004.

3. The plaintiff states that pursuant to Clause 12.0 of the Stock Distributorship Agreement, his remuneration was to be by way of commissions that were to be guided by variable terms which were to be communicated to him by the defendant in writing. The terms of the remuneration were however varied throughout the course of the agreement.

4. The plaintiff also signed a Distributorship Appointment Form dated 10th December 2006 with the plaintiff to establish his own points of sale in which he would sell distribute the defendant's products to a network of retail outlets. The plaintiff had established a very wide distribution network for the defendant's products.

5. In performing the contract, the plaintiff would order stock from the defendant and he would be issued with a delivery note upon collection of the goods. The purchases the plaintiff made from the defendant would be reflected in the statements of account as debits to his account and the payments he made would reflect as credits to his account. Similarly, the commissions he would earn from the defendant would reflect as sums credited to his account.

6. To facilitate the release of stocks to him, the defendant required, and the plaintiff obtained bank guarantees in the sum of Kshs 20,000,000.00.

7. The plaintiff's case is that he discharged his obligations as dealer and distributor of the defendant's products with diligence and after a lot of hard work and substantial investment in the business, the defendant rated him as the leading dealer and distributor of its products countrywide in 2006 for which he received many accolades from the defendant including various certificates and trophies.

8. The plaintiff also states that he achieved/exceeded his sales targets and was awarded several certificates for his exemplary performance. He claims that he would earn an average of Kshs 5,000,000.00 per month from the distributorship remuneration.

9. The plaintiff further states that despite his stellar performance as a dealer and distributor of the defendant's products, on 10th December 2007, without any prior notice and in flagrant breach of the terms of the Stock Distributorship Agreement, the defendant served him with a notice of termination of the agreement alleging failure to achieve targets on the plaintiff's part.

10. He states that as a result of the unjustifiable termination of the distributorship agreement by the defendant, he suffered great financial loss as the defendant continued to benefit from his investments over the years.

11. After the filing of this suit parties agreed to appoint a referee to examine their accounts after which it was agreed that the firm of M/S RSM (Eastern Africa) Consulting Limited would audit the accounts between the parties. The defendant was unable to provide the referee with the statements of the dealings between them thus frustrating the audit process.

12. In his testimony at the hearing, the plaintiff stated that his performance in the course of his trading with the defendant's products was fantastic and that he successfully sold the said products to end users and retailers. He testified that he was required to provide the defendant with the bank guarantee which stood at Kshs 20 million as at December 2007.

13. He stated that the closing balance of his statement of account as at 15th December 2007 was Kshs 21,972,954.23 and the closing balance on his statement of account as at 30th September 2007 was Kshs 33,353,740.00 against a bank guarantee of Kshs 20,000,000.00. He confirmed that even though he received products from the defendant that exceeded his bank guarantee, the defendant would never advance any products to a person who was not able to pay.

14. On the claim under the partner support and staff route Scheme in the sum of Kshs 5,706,142.80 he stated that clauses 3 and 17 of the distribution remuneration scheme October 2007 provided that to qualify for the incentives his account balance should not be in excess of the amount of security provided by the bank guarantee. The defendant has increased his credit limit and approved the staff route.

15. On the claim for payments for installed/activated sim cards in the sum of Kshs 36,354,630.00, he testified that he sold 74,958 sim cards and was therefore entitled to commission at Kshs 485.00 each. He added that the summarized report for all installed sims by various distributors as at 10th December 2007 and prepared by the defendant supported his claim.

16. He testified that his claim for the Holiday Prepaid Bonus Scheme was Kshs 2,965,161.00 and that the letter of 13th December 2006 from the defendant to the plaintiff introduced the Uhuru Bonus Scheme which was to run until 31st December 2006. He added that even though his target for the duration was to sell 43,943 SIM kits, he only sold 29,091 SIM kits which translated to 66% of this target and that he was not paid in full bonus on the amount of kits sold.

17. He testified that even though he had not adduced the signed distributorship agreement form that was to indicate his agreement to participate in the Uhuru Bonus Scheme, the prepaid uhuru activation bonus remuneration statement for the period 12 December 2006 to 12th January 2007, prepared by the defendant, and the letter of 14th December 2006 both addressed the Uhuru bonus scheme that he had taken part in.

18. On his claim for remuneration in the sum of Kshs 15,000,000.00 as monthly commission for mobile lines activated for the months of October–December 2007, he claimed the amount of Kshs 5,000,000.00 which was the average of what he would earn as commission per month for the months of July, August and September 2007, captured in the statements of accounts for the months of August, September and October 2007 as 'REM/AIRTIME'.

19. On the claim for regional target incentive commission in the sum of Kshs 384,804.00 for the months of October- December 2007, he stated he was entitled to the same and further, the defendant had approved the same.
20. On the claim of Kshs 2,000,000.00 as container deposit, he confirmed that he had taken five containers situate at Mito Andei, Voi, Malindi, Westlands and Eastleigh and paid a deposit of Kshs 400,000.00 each. That he returned the containers to the defendant after the agreement was terminated.
21. On the claim for damages for loss of business on the sum of Kshs 60,000,000.00, he testified that he arrived at the figure being the net average monthly income of Kshs 5,000,000.00 that he would have made for 12 months.
22. He testified that at the termination of the agreement, there was a balance on his account in the sum of Kshs 21,972,954.23 but that he continued to earn commissions on activated SIM cards he has already sold and his amounts would be credited into his account even after the agreement was terminated, thereby gradually reducing the balance he owed the defendant. He stated that the last statement of account as at 23rd April 2008 confirmed that the balance had reduced to Kshs 17,907,638.23. The defendant had therefore credited his account with the sum of Kshs 4,065,316.00 in four months, an average of Kshs 1,016,329.00 per month.
23. He added that the defendant would generate the statements of accounts showing the balances due to it from the plaintiff and any commissions earned by the plaintiff for any given period from the sale of sim kits and airtime but that the defendant did not furnish him with statements of accounts for the period between October-December 2007.
24. On re-examination, he stated that even though the Distributorship Agreement at Clause 22.6.1 provided for at least fifteen (15) days written notice requiring the distributor to remedy breach before the defendant could exercise its right to terminate the agreement, the defendant did not give him any notice or particulars of breach that he was required to remedy.
25. He maintained that even though his airtime credit limit with the defendant was not to exceed the amount secured by his bank guarantee, the defendant at its own instance, from time to time, would increase his credit limit having considered his age with Celtel and payment history. By a letter dated 11th May 2007, his credit limit for the period between May 2007-June 2007 was enhanced to Kshs 36,125,000.00 being 113% of his bank guarantee and that he was not required to enhance his bank guarantee despite the increased credit limit.
26. He stated that as at 17th October 2007, the defendant had already increased his credit limit to Kshs 36,125,000.00 hence he qualified for the new pricing and remuneration structure in the letter of 17th October 2007.
27. He testified that he only sold 29,091 SIM kits being 66% of the 43,939 SIM kits target that the defendant had set under the Uhuru Bonus Scheme as he was only supplied with 29,091 SIM kits by the defendant following technical problems on its part thus affecting the deliveries of kits to distributors as confirmed by the letter dated 12th January 2007 from the defendant.
28. He maintained that between 2004-2007, he met all his targets as set with the defendant and averaged commissions of about Kshs 5,000,000.00 per month. He stated that he continued to earn commissions for SIM kits already sold with every activation even after the termination of agreement but the defendant has refused to furnish him with a statement of account to dated and that he therefore has no way of knowing how much had accrued as commissions due to him.

Defendant's case.

29. On 25th January 2008 the defendant filed its Statement of Defence and Counterclaim to the plaintiff's suit wherein it concedes that it appointed the plaintiff as a distributor of its products within specified regions through a written agreement.
30. It states that upon his appointment as a distributor, the plaintiff was under an obligation to promote and market the defendant's products which promotion cannot be interpreted as loss or damage.
31. The defendant admits that it received two Bank Guarantees from the plaintiff as security for the products it supplied to the plaintiff and adds that the plaintiff is indebted to it in the sum of Kshs 21,972,954.25 which sum is recoverable from the Guarantees.
32. The defendant denied the existence of a partnership between it and the plaintiff and states that it appointed the plaintiff as a distributor of its products for which it would from time to time give incentives to distributors who achieved prior set targets. The defendant maintains that the said incentives were not paid as a matter of course but were based on merit and achievement for a specific period.
33. The defendant further denies all the claims made by the plaintiff in the plaint and states that despite giving a Guarantee of Kshs 20 million the plaintiff failed to stock sufficient products to meet the regional demands thus falling below its set targets thereby subjecting the defendant's subscribers to great inconvenience thus necessitating the termination of the distributorship agreement and the demand for the repayment of kshs 21,972,954 that was outstanding on the plaintiff's account.
34. The defendant claims that the plaintiff wrongfully withheld its assets namely 5 Celtel Kiosk containers, 6 pieces of Celtel Light Boxes, a computer with printer, UPS and link antennae for one shop at Nakumatt Karen which assets it claims or the payment of their equivalent monetary value.
35. The defendant further claims for rent arrears since December 2007 for the 5 Celtel Kiosk containers used as retail shops by the plaintiff in Westlands, Eastleigh, Voi, Malindi and Mito Andei at Kshs 15,000, 10,000, 8,800, 8000 and 400 respectively and that such rent shall be calculated when the containers are returned.

36. In sum, the defendant's counterclaim is as follows: -

- a) Kshs 21,972,954.25.
- b) Return of all its assets
- c) Rent arrears.
- d) Interest
- e) Costs.

37. At the hearing of the case, the defendant's witness, **Ignatius Wamalwa**, adopted his witness statement dated 11th December 2013 as his evidence in chief.

38. On cross examination, he stated that even though the plaintiff's credit limit exceeded the amounts secured by his bank guarantee, the defendant did not require the plaintiff to enhance bank guarantee to match the increased credit limit which the defendant has on its own volition revised at 113% of the plaintiff's bank guarantee.

39. He also confirmed that there was no warning issued by the defendant to the plaintiff regarding his failure to meet its targets during the period between October –December 2007 or at all.

40. He further confirmed that the plaintiff participated in the Uhuru (Holiday Prepaid Bonus Scheme) wherein he sold 29,091 SIM kits. He conceded that he did not have anything to show that the containers kiosks issued to the plaintiff continued to accrue rent and added that the plaintiff has not demanded for the deposits for the kiosks from the defendant. He also confirmed that the plaintiff's account balance reduced from kshs 21,972,954.23 on 15th December 2007 to Kshs 17,897,046.23 on 8th May 2009.

41. On re-examination, he stated that the plaintiff was paid 66% of the bonus amount for the 29,091 SIM kits he had sold and activated.

42. Parties canvassed their positions by way of written submissions which I have carefully considered.

Issues for determination.

43. Having considered the pleadings filed herein, the testimonies of the parties' respective witnesses, the written submissions together with the cited authorities, I find that the main issues for determination are as follows: -

- a) Whether the plaintiff has made out a case for the granting of the prayers sought in the amended plaint.*
- b) Whether the defendant has made out a case for the granting of reliefs sought in the counterclaim.*
- c) Who is to bear the costs of the suit.*

The Plaintiff's Claim.

44. The gist of the plaintiff's case was that the Distributorship Agreement he had with the defendant was unlawfully terminated. It was not disputed that on 24th February 2004 the plaintiff and the defendant entered into a Distributorship Agreement which agreement was terminated by the defendant on 10th December 2007. The plaintiff's case was that the said termination was made without any prior notice and in flagrant breach of the terms of their agreement.

45. On its part, the defendant maintained that it was justified to terminate the agreements as the plaintiff failed to stock sufficient products to meet customer demands thus negatively affecting the overall sales of and customer base of the defendant. It was the defendant's case that it terminated the agreement owing to the plaintiff's poor performance.

46. The plaintiff however argued that its performance over the entire contract period was fantastic thus attracting numerous accolades and that at no time did he receive any warning from the defendant regarding the alleged poor performance. The question which then arises is whether the termination of the agreement was in line with the terms of the Agreement.

47. I have perused the Distributorship Agreement and noted that Clause 22 thereof stipulates as follows: -

“22.0 --TERMINATION

22.1 --Termination by KENCELL forthwith

22.1.1 --KENCELL shall have the right forthwith terminate this Agreement by given notice in writing in the event of any of the following: -

Breach

22.2.1-- If the distributor commits breach of any of the terms and conditions of this Agreement.

22.3-- Insolvency /Bankruptcy

22.3.1 - If the distributor becomes insolvent, bankrupt or enters into any arrangements with its creditors or takes or suffers any similar action in consequence of debt or enters into liquidation whether compulsory or voluntarily or threatens to do any of these things or any judgment is made against the Distributor and remains unsatisfied for a period of 30 days.

22.4 - change of shareholding.

22.4.1 - If the Distributor being a partnership firm or a limited a liability company without the written consent of KENCELL alters the constitution of the firm either by dissolution or by retirement of a partner or by taking any new partner and if a limited liability company changes its shareholders.

22.4.2- If the Distributor is found to be responsible for any conduct which is (in the sole opinion of KENCELL) prejudicial to the business of KENCELL or the marketing of the products.

22.4.3 - If the Distributor, its servants, and/or agents or POS is found by KENCELL to have opened the packaging of or separated any elements of a combination sale.

22.5 -Termination with notice by KENCELL

22.6 -- Breach

22.6.1 In case the Distributor commits any breach (which is in the sole opinion of KENCELL) is remediable, without prejudice to any other remedy which KENCELL may be entitled to, KENCELL shall give to the Distributor at least 15 days' written notice requiring the Distributor to remedy such breach. If the Distributor fails to remedy any such default within the notice period, then this Agreement shall terminate after the expiration of the time stated therein.

22.6.2 --KENCELL shall be entitled to terminate this agreement by giving not less than one-month notice in writing, one month prior to the anniversary of the Agreement.”

48. Clause 12.2 of the Distributorship Agreement, on the other hand, stipulates as follows on the action that the defendant could take in the event that the plaintiff failed to meet the set targets:

“KENCELL shall be entitled to exercise the following if the Distributor and/or its POS is/ are unable to meet the targets set by KENCELL; -

12.2.1 – Re-allocate a territory permanently, temporarily, partially or completely or assign another Distributor in the territory with immediate effects upon giving the Distributor seven (7) days written notice of their intention;

12.2.2- Retain the qualitative remuneration as shall be determined by the monthly ratio issued by KENCELL.

12.2.3- Terminate this agreement.”

49. In the present case, it was not disputed that the termination letter of 10th December was sent to the plaintiff without any prior notice. The contents of the said letter were as follows: -

December 10,2007

Mr. Nasser Ahmed

Airtime Business Solutions

Hilton Arcade

NAIROBI

Dear Mr. Ahmed,

RE: DISTRIBUTORSHIP AGREEMENT.

We refer to the above agreement.

We wish to bring to your attention your breach of the above agreement.

Your failure to deliver monthly targets has denied Celtel Kenya business revenue to stock-outs in your assigned market. Our customers have also been greatly inconvenienced by your poor marker service and this contravenes our Distributorship contract which states that you shall be responsible for product availability in your assigned market(s).

Please note that Celtel views the above breach as material breach of the Agreement.

In the circumstances we hereby give you notice of termination of your contract with immediate effect.

Consequently:

- *You are with immediate effect required to pay all the outstanding amounts to Celtel.*
- *You are required to return/surrender all Celtel property with immediate effect.*
- *Any remuneration due to you under the Agreement will be paid to you only after you have fulfilled the above two conditions.*

Please contact the undersigned to settle your account.

Yours faithfully

Amos Jere

Sales and Distribution Director

c.c.: Sales & Distribution Manager

Regional Managers

Sales Managers.”

50. To buttress the argument that he was a leading distributor who had performed exceptionally during the term of the contract and that the termination was baseless, the plaintiff exhibited the following awards/certificates: -

- i. Trophy for ‘Best National Shops Network Growth Distributor’;*
- ii. Trophy for ‘Best National Events and Promotion Sales Distributor’*
- iii. Certificate of Appreciation for Sales and Distribution Performance during the period 1st January to June 2005;*
- iv. Trophy for ‘Best Regional Distributor, for the year 2005 at the Coast’;*
- v. Certificate of Appreciation for “Best Overall Prepaid Distribution’ during the period January to May 2006;*
- vi. Certificate of Appreciation for ‘Best Airtime Sales- Coast ‘during the period of January to May 2006; and*
- vii. Certificate of Appreciation for ‘Highest Partner Shop & DOS Rollout’ during the period January to May 2006.*

51. Having regard to the above cited clauses of the Distributorship Agreement and the exhibits/certificates produced by the plaintiff as exhibits, I am persuaded that not only was the defendant supposed to give the plaintiff requisite notice before terminating their Agreement, but that the reasons advanced for the termination, being alleged poor performance, was not supported any concrete evidence from the defendant.

52. Indeed, the evidence availed by the plaintiff showed that his performance was exemplary. It did not escape the attention of this court that DW1 conceded that the termination letter did not give the 15 days’ notice to the plaintiff to remedy any default or give the particulars of breach as provided for under Clause 22.6.1 of the Distribution Agreement.

53. I also note that even though the defendant faulted the plaintiff for failing to meet the set targets in respect to Uhuru Prepaid Activation, the defendant’s witness conceded that all the 29,091 SIM kits supplied to the plaintiff were sold off and that even though the defendant was to supply the plaintiff with 43,943 kits, only 29,091 kits were supplied.

54. Having regard to the above facts I find that the defendant’s claim that the plaintiff underperformed thus leading to the termination of their contract was not founded on any evidence.

55. None of the customers who were allegedly inconvenienced by the plaintiff’s alleged under performance testified in court. I therefore find

that the defendant was not justified in terminating their said Agreement.

I will now turn to consider each of the prayers made by the plaintiff in the amended plaint.

An order for accounts.

56. The plaintiff's case was that owing to the lawful/unjustified termination of the Distributorship Agreement, he suffered great financial loss while the defendant continued to benefit from his investment over the years. The plaintiff added that even though the parties consented to his application for appointment of a referee to examine the accounts between the parties and provide a report to court, the defendant did not furnish the referee with the statement of their dealings thus frustrating the audit process. It was not disputed that the understanding between the parties was that the plaintiff would earn commissions on activated SIM cards which amounts were credited into the plaintiff's account even after the termination of the Agreement.

57. It was not disputed that even though the plaintiff's statement of account stood at Kshs 21.9 million as at December 2007, the said balance and reduced to Kshs 17.9 million as at 23rd April 2008.

58. My finding is that owing to the nature of business that the parties herein engaged in and considering that the plaintiff's account continues to accrue benefits/commissions even after the termination of the Agreement it will only be fair and just and the order for accounts of the business between the plaintiff and defendant from the inception to-date be taken before this court can venture into determining other prayers sought by the plaintiff herein and the defendant, in the counterclaim.

59. In this regard, I direct that the audit of the plaintiff's accounts with the defendant be carried out by an independent audit firm to be agreed upon by the parties within 60 days from the date of this judgment failure of which such a firm can be nominated by the Chairman of the Institute of Certified Public Accountants (ICPAC). The parties herein will bear the costs of audit in equal basis.

60. The audit report shall be compiled and filed within 60 days from the date of the appointment of the auditor. The defendant is directed to provide the auditor with all the requisite statements of its dealings with the plaintiff.

61. Mention on 19th November 2020 for further orders.

Dated, signed and delivered via Microsoft Teams at Nairobi this 24th day of September 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mrs Ahomo for Issa for plaintiff

Miss Achieng for Ojiambo for defendant

Court Assistant: Sylvia