



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 279 OF 2004

JAMES NJUGUNA KANGIRI.....PLAINTIFF

-VERSUS-

FLAMINGO BOTTLERS LIMITED.....1ST DEFENDANT

NAIROBI BOTTLERS LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this suit against the Defendant seeking the following reliefs:-

- i. General damages for breach of contract
- ii. Exemplary damages and loss of earnings and profit as will be proved during the hearing and all other reliefs that this court will deem fit per the Plaintiff's plaint
- iii. Cost of the suit

2. In response to the Plaintiff's claim, the Defendant entered appearance and filed the defence dated 25th of October 2004 denying ever signing the agreement. Defendants' contention is that, the 1st defendant's actions are not binding on the 2nd defendant.

3. The Plaintiff availed one witness to adduce evidence while the Defendants did not call any witness. Counsels herein filed written submissions, which they opted not to highlight.

PLAINTIFF'S EVIDENCE

4. Plaintiff testified that on 24th April 1998, he was appointed by the 1st defendant to sell their products and was issued with strategic sales containers. He showed court a copy of the agreement, which he signed together with the 1st defendant's sales manager. He testified that the agreement to sell Coca-Cola products was to be renewed yearly and the signed agreement had termination clause, which provided that, it had to be a written notice.

5. Plaintiff testified that he has not received any termination notice. He said that he was required to deposit kshs 200,000, employ 2 workers and purchase stocks from Flamingo Bottlers (1st defendant) who approached him because of strategic position of his property. He produced the agreement between him and 1st defendant and letter from 1st defendant requiring him to take bank guarantee in court as exhibits. He said that he charged his property Nakuru Municipality/Block 624 to secure kshs.200,000.

6. Plaintiff further testified that he performed well and showed court a letter dated 15th March 2001 indicating that he was being considered to become a key distributor; once appointed key distributor, he was designated a territory and was required to upgrade his stock to minimum of 1000 cases. He said he was further required to provide a warehouse and 3-3 truck carrying 100 cases, employ manager store keepers, one driver and 2 sweepers and upgrade bank guarantee to ksh.1,000,000.

7. As a result of the upgrade, the plaintiff was forced to demolish 8 rooms which were leased to tenants for monthly rent of kshs.12,000 so as to construct a warehouse which he completed in May 2001. He produced a letter marked exhibit 4 in which the defendant congratulated him as key distributor.

8. Plaintiff testified that, he was forced to borrow bank loan of kshs.1,000,000 as part of conditions for appointment as key distributor. He added that the defendant sold to him salvage vehicle registration number KAG 036S which he paid kshs 300,000 and spent kshs 600,000 to put it back on the road. He further testified that he also purchased motor vehicle registration number KAE 268H from the defendant. He produced delivery notes and logbook to confirm purchase of the two vehicles. He was however not able to transfer it to his name as the defendant has not paid duty.
9. Plaintiff testified that as a result of expansion of his business, he was forced to employ 14 workers. He showed court a copy of master roll to confirm that. He said he was paying the manager kshs 7000 and the other workers kshs 4000 each.
10. Plaintiff informed court that on 7th August 2002, he was called for a meeting in Midland Hotel where he was issued a letter dated 7th October 2002 whose effect was to change system of operation by doing away with distributors. On 9th October 2002, he received a warning for going against the new system. He was asked to move out of the territory and new people were appointed on 8th October 2007.
11. Plaintiff testified that the business earned him kshs 80,000 per month. He said the new system lowered profit making him unable to sell stock of 3,000; further, the defendant stopped supplying stock to him. He was forced to lay off excess employees. He said it was difficult to convert the warehouse back to residential house. He added that some employees lodged complaints against him at labour office.
12. In cross examination by Ms. Omwenyo for the defendants, plaintiff said that he signed an agreement with Flamingo Bottlers (1st defendant). He stated that, from the meeting he attended in Midland Hotel, he learnt Nairobi Bottlers owned Flamingo Bottlers but he did not know about the relationship at the time of signing the contract.
13. In further cross examination, the plaintiff stated that clause 4 of the agreement stated that, the operator was to comply with company's standard procedures for S.S.D which would be updated from time to time at the entire discretion of the company; and under clause 5, the company had a right to terminate the agreement giving written notice if the operator continuously fail to meet the standards set out in clause 4 or set by the company from time to time or repeatedly breaches the agreement.
14. Plaintiff confirmed that he received a warning letter from the company on 9th October 2002. He said he was accused of poaching though he tried his best to meet conditions.
15. In further cross-examination, Plaintiff said that he never produced accounts of the business in court. He said a letter dated 15th March 2001 produced as exhibit 4 confirm that he met conditions given by the defendant.
16. In re-examination Plaintiff testified that Flamingo Bottlers (1st defendant) was taken over by Nairobi Bottlers. He said he does not know whether it was wound up or it is still in existence.
17. Plaintiff said he was not served with any notice of termination and that he suffered loss due to termination. Defendant never adduced evidence.

SUBMISSIONS BY PLAINTIFF

18. In his submissions dated 6th of May 2019, the Plaintiff argued that the Defendant never adduced evidence thus leaving Plaintiff's case unchallenged. He cited the case of **Autar Singh Bahra & another Vs Raju Govindji HCC No. 548 of 1998 (unreported)** where the court held that where Defendant fail to adduce evidence, not only does the Plaintiff's case stand unchallenged but also Defendant's claim in his defence and counterclaim are unsubstantiated and the counterclaim must fail. The same position was held in **Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi Civil Case No. 834 of 2012.**
19. On why Plaintiff sued both defendants, Plaintiff submitted that Order 1 Rule 7 of the Civil Procedure Act provide for joining of two or more defendants where the plaintiff is in doubt of who to sue in order for court to determine which defendant and to what extent as between all parties. And Order 9 Rule 9 provide that no suit shall be defeated for misjoinder of parties; and the position was held in the case of **Nairobi HCC No.137 of 2016 Miguna Miguna Vs The Star Publication Ltd and 5 others.**
20. On whether there was frustration of the contract between the parties, the Plaintiff cited **Nakuru Civil Case No.586 of 1195 Rashmikabnt Meghji t/a Rah Wholesalers Vs South Nyanza Sugar Company Ltd** where justice Ouko held as follows

“In terms of Section 5 of the Sale of Goods Act which provide that plaintiff can maintain an action for damages the measure of which is estimated loss measure of which is the estimated loss directly or naturally resulting from ordinary course of events; from seller's breach of contract. It is for plaintiff and not the court to obtain and prove estimates

21. He further stated that at the lapse of the 12 months from the time of the agreement the Defendants did not issue a termination notice and have not to date which was a condition in the agreement and Defendant's intention to upgrade him from SSD to Key distributor is clear evidence that he met all conditions.

DEFENDANT'S SUBMISSIONS

22. In submissions dated 25th of March 2019, the Defendants argued that the suit herein is time barred as it is based on the Strategic Sales Depot Agreement dated 24th of April 1998 while the plaint is dated 1st of October 2004 filed on the 21st of October 2004; that the suit was filed over 6 years after the parties entered into the agreement and therefore the suit is time barred; as Plaintiff failed to seek leave of court to

extend time and even if he sought leave, the court would not have granted as the suit is not based on tort. Defendants cited the case of **Mary Osundwa Vs Nzoia Sugar Company Limited** where the court held that the court lacks jurisdiction to extend time in cases involving contract or any other causes of action other than tort.

23. Defendants further urged court to find that the 2nd defendant was wrongly sued on ground that the plaintiff failed to adduce any evidence to show whether he had any contacts with the 2nd defendant or its officials; and it was upon the plaintiff to show how the 2nd defendant was vicariously liable for actions and omissions of the 1st defendant or what role the 2nd defendant played in the transactions. Defendants argue that the alleged relationship between 1st and 2nd defendants are an imagination of the plaintiff.

24. As to whether the Defendants were in breach of the contract between the Plaintiff and the 1st Defendant, defendants submitted that the Plaintiff was aware that the 1st Defendant was constantly changing the mode of selling and distributing its products and even attended training sessions before the changes were effected. Further, that the Plaintiff did not adduce evidence to show that he took measures to qualify to be appointed as a Key Distributor. They further stated that in their letter dated 17th May 2001, they informed the Plaintiff that his appointment was on temporary basis for 6 months based on performance and they never signed a contract to solidify the appointment from SDD to KD.

25. Defendants submitted that the fact that the 1st Defendant's cancellation of Bank guarantee and failure to sell products to the Plaintiff mean contract was automatically terminated and the 1st Defendant did not need to issue a termination notice and Plaintiff never responded when bank guarantees were cancelled on 6th and 10th of February 2003.

26. The defendants cited the case of **Behange Vs School outfitters (U) LTD Court of Appeal of Uganda at Kampala No. 53 of 1999**, where it was held that Courts should not interfere with the contract of parties. Defendants urged court to dismiss this suit.

ANALYSIS AND DETERMINATION

27. I have considered evidence adduced, pleadings and submissions filed plus authorities cited by parties herein and consider the following as issues for determination:-

- i. Whether the suit is time barred
- ii. Whether the plaintiff sued the right party – whether 2nd defendant was wrongly sued.
- iii. Whether the defendants frustrated the contract and whether plaintiff is entitled to damages.

i. Whether the suit is time barred

It is not disputed that an agreement was entered between plaintiff and 1st defendant on 24 the April 1998. Record show that this suit was filed on 1st October 2004. It is evident that by 9th October 2002; the plaintiff was still distributing defendant's products. The letter dated 9th October 2002 in which the 1st defendant accused the plaintiff of poaching confirm this. An aggrieved party is expected to file a suit after occurrence of a dispute. The alleged frustration is alleged to have occurred 4 years after smooth operationalisation of the contract. It would therefore be incorrect to start counting time for filing suit from the date of the agreement; time start running when the cause of action arise. The suit is not therefore time barred.

ii. Whether the plaintiff sued the right party – whether 2nd defendant was wrongly sued.

As to whether 2nd defendant was wrongly sued, no evidence was adduced to show nexus between the 2nd defendant and 1st defendant. Both are named as Limited Liability Company. Plaintiff alleged that the 2nd defendant is a parent company of the 1st defendant. This he gathered from the meeting he attended in which he was issued a warning letter. This was denied by the 2nd defendant in their defence. Despite the fact that the defendants failed to adduce evidence to substantiate their claim, it was the duty of the plaintiff to prove his case on a balance of probabilities.

In **Kirugi & Another V Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated the obvious that the burden was always on the plaintiff to prove his case on a balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

Plaintiff never produced evidence to show that the 2nd defendant was a parent company of the 1st defendant nor prove of any takeover of the 1st defendant by the 2nd defendant. It was the responsibility of the plaintiff to prove connection between the defendants herein. Agreement entered was between him and 1st defendant.

From the forgoing I find that the plaintiff has not demonstrated justification of joining the 2nd defendant as a party to this suit. The suit against the 2nd defendant cannot therefore stand with the evidence on record.

iii. Whether the defendants frustrated the contract

In respect to frustration of contract. From the 1st defendant's letter dated 15th March 2001, the plaintiff was performing to the expectations of

1st defendant. In the letter, he was being considered to be upgraded to a key distributor. In the letter, the 1st defendant considered plaintiffs past records and performance. In the letter requirements for upgrade were listed as follows:

1. Warehouse to hold 300 cases
2. Minimum stock of 1000
3. Bank guarantee of at least 1,000,000, not less than 500,000
4. 3.3 truck capacity
5. Manpower of one manger,3 store people,1 driver and 2 helpers.

1st defendant upgraded the plaintiff from SSD operator to key distributor through the letter dated 17th may 2001.

Bank facility of kshs 1,000,000 taken by the plaintiff is dated 22nd march 2002.Purpose of the loan is indicated as working capital for his business. There is no doubt that plaintiff made arrangements for upgrade after communication from the 1st defendant.

By letter dated 7th October 2002, the 1st defendant gave different instructions for distribution which the plaintiff was required to comply failure which one warning would be given and thereafter dismissal of distribution from distributorship. The arrangement known as Manual Distribution Centre (MDC) was modelled towards allocation of outlets and not sale to stockists. This was followed by letter dated 9th may 2002 to the plaintiff for allegedly selling to stockists contrary to new instructions.

28. Though the agreement dated 24th April 1998, provided, that the distributor will comply with the company's standard procedures which would be updated from time to time at the discretion of the company, the plaintiff was approved to be a key distributor after being given a list of requirements which I believe he complied before the promotion.

29. The change to sell direct to allocated outlet in my view is substantial change.it would appear that the initial capital put into restructuring of the business would not be utilised. There is no doubt that the new mode of operation substantially affected the plaintiff's business. The changes necessitated both parties agreeing to new terms of operation again. Changes appear to have come from one party to a party who had adjusted to requirements of upgrade to key distributor from their earlier style of operation.

30. Though the 1st defendant in the agreement reserved the right to upgrade, there should have been fair play to avoid frustration of the plaintiff's attempts to comply with the new conditions of operation.

31. The plaintiff prayed for general damages for breach of contract, exemplary damages and loss of earnings. Plaintiff however never produced record of his earning to prove that he was earning kshs 80,000 per month.

32. I also note that the appointment as key distributor as per letter dated 17th may 2001 was on temporary basis for 6 months and contract would be signed based on his performance.

33. Even though there is no new contract signed, there is no doubt that the plaintiff complied with the new conditions and continued operating beyond the 6 months until when the new changes were introduced. This no doubt show the plaintiff satisfied the required conditions. The initial contract provided for updating procedures of operations at the discretion of the 1st defendant. In the absence of new contract being signed after 6 months of upgrade, my interpretation is that the initial contract was still in force.

34. The question that arise is whether the plaintiff is entitled to general damages for changes of operation which lead to inability to go on with the business?

35. I refer to the case of **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR** where the court of appeal held as follows:-

“the appellant conceded that whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive.”

36. Having made adjustments to meet requirements demonstrate plaintiff's commitment to comply with the contract conditions; in doing so he must have had legitimate expectation of returns from the business. Plaintiff testified he restricted his rental houses, which gave him monthly earning of 12,000 to accommodate the business. From evidence analysed above, I find that plaintiff is entitled to general damages. I proceed to award plaintiff general damages of kshs.2,000,000

37. FINAL ORDERS

1. I do enter judgment for plaintiff against the 1st defendant for kshs 2,000,000
2. suit against 2nd defendant is dismissed

3. interest on 1 above to be paid at courts from the date of filing suit.

4. the cost of 2nd defendant to be paid by the plaintiff.

5. Plaintiff's costs to be paid by 1st defendant.

Judgment Dated, signed and delivered at Nakuru this 27th day of June 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Mr. Opar holding brief for Karanja Mbugua Counsel for Appellant

Ms. Alwala Counsel for Respondent